Chapter Three. Legal Doctrine confronting State Practice, 1848–1912

I. Introduction

The first half of the nineteenth century provided a large number of cases of armed reprisals. However, it was not before the mid-nineteenth century that the State practice became a topic of discussion in legal doctrine. The purpose of the present chapter is to understand the role played by the legal doctrine in the maintenance of grey zones in international law regarding armed reprisals.

The time period under scrutiny stretches between 1848 (the year when the first thorough studies about the contemporary State practice of armed reprisals, more precisely pacific blockade, were published) and 1912 (the year when the Institute of International Law decided to postpone the examination of a proposal aiming at an international convention restricting the use of measures short of war).

It is argued in the course of this chapter that lawyers lacked the will and failed in the opportunity to deal with the issue of armed reprisals fully and that they might have made the situation even more burning.

II. Precursors of the Doctrinal Debate on Armed Reprisals: Wurm and Hautefeuille

During the first half of the nineteenth century, legal scholars did not pay much heed to the modern practice of reprisals. Their contribution to the law of reprisals was negligible.[459] The international law treatises of that period usually spoke of reprisals in historical terms. Indeed, only the pre-

459 For example, the German publicist Johann Ludwig Klüber developed the distinction between 'positive' and 'negative' reprisals. The former class referred to the refusal by the aggrieved State to fulfil a legal obligation or the act of withholding something owed to the wrongdoing State. The latter class related to the acts of reprisals involving the taking of something belonging to the target country. See Jean Louis Klüber, *Droit des gens moderne de l'Europe*, 2nd vol. (Stuttgart: J. G. Cotta, 1819), 371f. fn. c). For the sake of simplicity, it can be said that positive reprisals encompassed the positive acts of coercion while the negative kind

nineteenth-century practice (treaties, cases and opinions like those of Grotius, Vattel or Valin) and theory (in a manner reminiscent of Bartolus de Saxoferrato's *Tractatus*) were spelt out.[460] As Neff rightly points out, "[the] various changes in the character of reprisals came about largely as a matter of state practice, with legal doctrine (as so often) lagging behind. Indeed, a number of legal writers largely ignored the changes and treated reprisals entirely in the traditional fashion."[461] During the period 1815–1870, lawyers disdained the study of international law as a fully fledged discipline.[462]

Some legal scholars, however, showed a better understanding of the new evolution of reprisals by the 1840s. For instance, August Wilhelm Heffter, German writer on international law, appears to have been aware of the occurring changes. Indeed, he wrote in the first edition of his book *Das europäische Völkerrecht der Gegenwart* (1844) that the coercive maritime blockade could be deemed a legitimate means of reprisals which entailed the same rights and duties for third States as in neutrality.[463] U.S. jurist and diplomat Henry Wheaton also underlined that reprisals "seem[ed] to ex-

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covered non-forcible reprisals. See Westlake, 'Reprisals and War' (above, n. 256), 132; Arrigo Cavaglieri, 'Règles générales du droit de la paix', *RdC* 26/I (1929), 315–585, at 575. However, this distinction was considered utterly useless for it did not lead to separate regimes of rules. See, e.g., Friedrich Fromhold von Martens, *Traité de droit international*, traduit du russe par Alfred Léo, 3rd vol. (Paris: Librairie Marescq ainé, 1887), 160; Amos S. Hershey, *The Essentials of International Public Law* (New York: The Macmillan Company, 1919), 344 fn. 4.

460 See, e.g., Saalfeld, *Handbuch des positiven Völkerrechts* (above, n. 221), 185–7; Manning, *Commentaries of the law of nations* (above, n. 240), 106ff.; Bello, *Principios de derecho internacional* (above, n. 12), 126–7; Antonio Riquelme, *Elementos de derecho público internacional*: *con esplicacion de todas las reglas que, segun los tratados, estipulaciones, leyes vigentes y costumbres, constituyen el derecho internacional español*, 1st vol. (Madrid: D. Santiago Saunaque, 1849), 258–263; Richard Wildman, *Institutes of International Law*, 1st vol. (London: William Benning & Co., 1849), 186–198. See also Archer Polson, *Principles of the Law of Nations*: *With Practical Notes and Supplementary Essays on the Law of Blockade, and on Contraband of War.* To Which is Added, *Diplomacy*, by Thomas Hartwell Horne, B. D. (Philadelphia: T. & J. W. Johnson & Co., 1860), 36–7; Agustín Aspiazu, *Dogmas del derecho internacional*, Obra impresa bajo la protección del coronel Agustín Morales (Nueva York: Hallet & Breen, 1872), 144–6.

461 Neff, *War and the Law of Nations* (above, n. 2), 227.

462 See Koskenniemi, *The Gentle Civilizer of Nations* (above, n. 80), 28ff.

463 August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* (Berlin: E. H. Schroeder, 1844), 194.

tend to every species of forcible means for procuring redress, short of actual war".[464]

Two publicists, in particular, demonstrated clear-sightedness. Their names were Christian Friedrich Wurm, a German political author, and Laurent-Basile Hautefeuille, a French maritime law expert. While Wurm's contribution to the topic of reprisals has, hitherto, passed largely unnoticed, Hautefeuille is better known in legal history because he is credited with coining the term 'pacific blockade' to describe a coercive blockade or blockade short of war.[465]

In 1848, Wurm published an entry in *Das Staats-Lexikon* —an encyclopedia of public law edited by Karl von Rotteck and Carl Welcker— about self-help in international law. In this contribution, he expressed serious concern about the recent confusion between peace and war. Indeed, real acts of war were committed under the garb of reprisals, and yet the diplomatic relations between both countries were not severed. The too recurrent use of armed force not followed by the admission of a state of war led to blurring the line between peace and war for want of tangible criteria.[466] For Wurm, the reason why, in his time, some countries preferred to exercise 'pretended reprisals' rather than to declare war ensued from the serious inexpediency of war under modern conditions; namely, the enormous scale and costs of modern warfare, the fragility of credit, the need of production sale and, more generally, of trading. On the contrary, reprisals im-

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464 Henry Wheaton, *Elements of international law* (3rd edn., Philadelphia: Lea and Blanchard, 1846), 340.

465 Laurent-Basile Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime*, 3rd vol. (1st edn., Paris: Au comptoir des imprimeurs-unis, 1849), 176. Amongst the authors who regarded Hautefeuille as the father of that expression, see, e.g., Ernest Nys, *La guerre maritime*: *Étude de droit international* (Bruxelles/Leipzig: C. Muquardt, Merzbach et Falk, 1881), 68; Thomas Barclay, 'Les blocus pacifiques', *RDILC* 29 (1897), 474–90, at 477; Westlake, 'Pacific Blockade' (above, n. 438), 19; Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 685; Brownlie, *International Law and the Use of Force by States* (above, n. 45), 223 fn. 5; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 619 fn. 11. However, the present Writer found the first use of the term 'pacific blockade' ("*Friedensblokade*" [sic!] in German) in Wurm, 'Selbsthilfe (völkerrechtliche)' (above, n. 292), 132; that being, one year before the publication of Hautefeuille's third volume containing this phrase.

466 Indeed, Wurm noted that "[e]in Hauptzug dieser neueren internationalen Politik ist die Geläufigkeit eines sehr ausgedehnten Begriffes von Repressalien und die Anwendung von Zwangsmaßregeln, um einer Unterhandlung Gewicht zu geben, welche sich auf streitige Rechte oder Interessen bezieht." (Ibid., 129). Cf. Vattel's comment about 'pretended reprisals' *supra*, Chapter One III.2.(c).

posed a lesser burden on the whole nation and, for passing more easily unnoticed, made the Government's course of action less subject to enquiry. The consequence was that injustices were more likely to be committed by way of reprisals. That is why Wurm refused to regard the use of reprisals as proof of moderation in comparison to war since they were usually employed in cases where the justice and relevance of the demands were more than dubious.[467]

Ten years later, in an article published in the *Deutsche Vierteljahrs-Schrift*, Wurm addressed the issue of armed reprisals again and criticised the lack of scholarly involvement in this topic.[468] He first acknowledged the fact that self-help was, in principle, a lawful remedy in international law because of the absence of a superior authority acting as a judge. Consequently, independent States were entitled to have recourse to such a proceeding in time of peace in order to protect their nationals living abroad. Yet, in his opinion, the resort to acts of war by way of reprisals could not be treated as lawful coercion in peacetime. Not only such acts —like pacific blockade— had adverse effects on third States, but they also did not really prevent the occurrence of war. Turning then his attention to the instances of the past thirty years, he observed that the resort to armed reprisals had just been the practice of strong Powers against weak and small nations in a very questionable and abusive manner. This observation made him wonder whether the institution of reprisals had actually not become an abuse in itself.[469] In such circumstances, he could not therefore concur with the opinion that the state of peace remained unaltered when armed reprisals were exercised. Thus, Wurm advocated the recourse to amicable means of settlement of international disputes like arbitration instead of the use of force.[470]

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467 Ibid., esp. 111 and 128–132.

468 The recent publication of some documents in the *Aves Island* affair —a case in which the United States had contemplated for years whether reprisals should be made against Venezuela— prompted Wurm's new reflection.

469 "Auch solche Mißbräuche heben allerdings den Gebrauch nicht auf. Aber wir geben anheim, ob nicht das Institut der Repressalien durch seine, man darf sagen, ausschließliche Anwendung auf schwächere Staaten gehässig geworden, und fast in den Ruf gekommen, es sey selbst ein Mißbrauch? ferner: ob nicht auf dem Wege der Repressalien fast unbemerkt und ohne die öffentliche Meinung aufzuregen, Forderungen durchgeführt sind, die man nach Inhalt und Form auf dem Wege des Krieges durchzuführen nicht unternommen haben würde?" (Wurm, 'Selbsthülfe der Staaten in Friedenszeiten.' (above, n. 355), 83).

470 Ibid.

As for Hautefeuille, he did not address the issue of armed reprisals as a whole. He only looked into the phenomenon of pacific blockade following the *Conseil d'État*'s sentence of 25 March 1848 in the case of the *Comte de Thomar*, which, in his opinion, was erroneous and hence required a clarification.[471] He thus became the first legal scholar to ever deal at length with this new measure short of war.

For Hautefeuille, the establishment of a blockade clearly implied the existence of a status of war between the parties directly involved because the right of blockade derived from the belligerent right of conquest. It was rightly this taking of control of a portion of the territory or territorial sea of the attacked country that entitled the aggressor to impede ships of third States from navigating from and to the blockaded ports. Any attempt to run a blockade could then be punished by the capture and condemnation of the ship and cargo, whereas normally trade had to remain unhindered in time of peace. So, only war could impose obligations on third States, pursuant to the law of neutrality. It is from this angle that Hautefeuille challenged the legality of pacific blockade, precisely because it might have effects on vessels flying the flag of third States. He concluded then that either a blockade entailed a state of war or it was resorted to as an illegal proceeding in time of peace. Therefore, pacific blockade could not be recog-

471 Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (above, n. 465), 13. On this judgement, see *supra*, at 146 fn. 444. Indeed, the judgement of the *Conseil d'État* has sometimes been regarded as a landmark decision for pacific blockade. Calvo, e.g., called it a major precedent (Calvo, *Le droit international théorique et pratique* (above, n. 224), 538 (§ 1840)). However, other legal scholars after Hautefeuille also challenged the importance placed on this judgement as the judicial recognition of pacific blockade. See, e.g., Pistoye and Duverdy, *Traité des prises maritimes* (above, n. 223), 376–377; Gessner, *Le droit des neutres sur mer* (above, n. 234), 235–6. In fact, the judgement raises more questions than answers and it should be stressed that the *Conseil d'État* did not declare pacific blockade consistent with peace. As a matter of fact, it confirmed several condemnations of neutral ships pronounced by prize commissions during the same blockade of the Río de La Plat. See the judgements of the *Conseil d'État* collected by Pistoye and Duverdy, *Traité des prises maritimes* (above, n. 223), 382–390, and principally the decision in *La Louisia*. In the *Comte de Thomar*, the *Conseil d'État* quashed the decision of the prize commission of Montevideo solely because the Brazilian neutral ship did not receive a special warning. In other words, the question whether the blockade was instituted in wartime or in time of peace had absolutely no relevance on the outcome of the decision. The result of the judgement in the *Comte de Thomar* appears then as "un acte de munificence et de liberalité, bien plus qu'un acte juridique" (Ibid., 1st vol., 391). Cf. Fauchille, *Du blocus maritime* (above, n. 405), 43–4.

nised as a legitimate means of the law of nations, notwithstanding the fact that the great Powers, i.e. France and Great Britain, might well defend the institution of pacific blockade for allowing them to spare their own shipping and for being a powerful tool of coercion at a lower cost than war.[472]

In summary, both Wurm and Hautefeuille warned against the confusion between peace and war. They argued for a strict separation between wartime measures and acts of reprisals consistent with peace. However, instead of facing condemnation, the recent State practice denounced by Wurm and Hautefeuille was about to receive confirmation by the legal doctrine.

III. Building the Legal Theory of Pacific Blockade

1. Rising Interest and Controversy, 1849–1887

Of all the forms of armed reprisals, the most employed by the great Powers and hence the most studied in legal doctrine was the pacific blockade. Indeed, in Hautefeuille's wake, legal scholars started taking a keen interest in this anomalous measure. The name itself, built on an oxymoron, sparked off reactions.[473] Yet, the idea of a blockade bereft of belligerency intrigued them to the point where every publicist had his say on the subject. During about forty years from Hautefeuille's first analysis in 1849 till the Heidelberg session of the Institute of International Law in 1887, the legal scholar community addressed the 'burning issue' of pacific blockade without benchmarks.

The first step for studying the measure thus consisted of gathering the potential cases where a pacific blockade had been applied. In this regard, Hautefeuille identified the blockade of Navarino Bay as the first historical instance of a blockade allegedly established in time of peace. He narrated that, in order to come to the Greek insurgents' aid, Great Britain, France

472 Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (above, n. 465), 176–194.

473 Indeed, the authors almost unanimously deplored the name of the measure. See, e.g., Henry Bargrave Deane, *The Law of Blockade: Its History, Present Condition, and Probable Future. An International Law Essay, 1870* (London: Longmans, Green, Reader, and Dyer; Wildy & sons, 1870), 48f.; Fauchille, *Du blocus maritime* (above, n. 405), 48; Piédelièvre, *Précis de droit international public ou droit des gens* (above, n. 56), 94. Nevertheless, no other denomination succeeded in prevailing. See Falcke, *Le blocus pacifique* (above, n. 40), 9 fn. 1, and 247 fn. 8.

and Russia together closed the entrance of the bay of Navarino where the Ottoman fleet was anchored. A naval battle ensued on 20 October 1827 that saw the near total destruction of the Muslim fleet. Nevertheless, the three allied European Powers vigorously denied being at war with the Sublime Porte.[474]

This incident became the first case of pacific blockade on most authors' list.[475] All the subsequent blockades not preceded by a declaration of war were then added to the enumeration, regardless of the nature of the action. The result was a large variety of cases which revealed the heterogeneous pattern of execution of these so-called pacific blockades.

As a matter of fact, the resort to pacific blockade occurred either in cases of reprisals or intervention.[476] On the one hand, pacific blockade up to 1863 was often carried out to enforce reprisals, e.g. the British blockade of

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474 Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (above, n. 465), 177–178. As evidence of the European Powers' peaceful intentions, see the common instructions sent to the commanding officers in chief in the Levantine Sea, 12 July 1827: Great Britain, F. O., *BFSP 1829–1830* (17th vol.; London: James Ridgway, 1832), 15. Their behaviour, however, led the Turkish Reis Effendi to exclaim: "Leur conduite présente à la fois l'exemple du pour et du contre. C'est absolument comme si, cassant la tête d'un homme, je l'assurerais en même tems [sic!] de mon amitié." (Report of the dragomans of France, Great Britain and Russia, 4 November 1827: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 12th vol., 146).

475 Nevertheless, some authors attempted to present earlier occurrences of pacific blockade. See, e.g., Smith and Sibley, *International law as interpreted during the Russo-Japanese War* (above, n. 240), 356; Nils Söderqvist, *Le blocus maritime: Étude de droit international* (Stockholm: Centraltryckeriet, 1908), 60–4. The former even believed that an extract from Sir William Scott's judgement in the *Staadt Embden* (1796) set the root of pacific blockade (Smith and Sibley, *International law as interpreted during the Russo-Japanese War* (above, n. 240), 203). The passage in question reads: "an auxiliary fleet is not of itself sufficient to make its government a principal in a war," (Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (above, n. 255), 1st vol., 30). But, in truth, this discussion about the birthday of pacific blockade was quite sterile.

476 The suppression of insurrection was regarded sometimes as a subcategory of pacific blockade, too. This is especially the view that Charles Sumner, Senator for Massachusetts, sustained at the time of the debates in the U.S. Senate relating to the ratification of the Seward-Johnson treaty which pursued the settlement of the famous Alabama Claims. He, indeed, argued that President Abraham Lincoln's proclamation of a blockade of the ports of the Confederate States on

the ports of New Granada in 1837 or the French blockade of Mexico in 1838. On the other hand, interventionist reasons also motivated some of those blockades bereft of belligerency. For example, the blockade of Navarino pursued a humanitarian goal, i.e. the prevention of bloodshed.[477] Between 1845 and 1850, France and Great Britain likewise interfered in the Uruguayan Civil War by blockading the entrance to the Río de La Plata in order to re-establish trade relations and ensure the protection of their nationals.[478]

Furthermore, in all these cases, the ships under flags of third States were differently affected by the blockade. They were sometimes driven away, merely sequestrated or even confiscated.[479] However, in other instances like the British blockades against Greece in 1850 and Brazil in 1862–1863 —which were both clear cases of reprisals, the former being a watershed in

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19 April 1861 was merely an act of sovereignty, of internal police. Therefore, Great Britain was not allowed to recognise the Southern Confederacy as a belligerent Power. See Executive Session of the U.S. Senate, 13 April 1869: Sumner, *The works of Charles Sumner* (above, n. 54), 13th vol., 58–64, esp. 63–64. See also Thomas Erskine Holland, *Studies in international law* (Oxford: Clarendon Press, 1898), 132 and 138–140. But for a dissenting opinion, see Oppenheim, *International Law* (above, n. 25), 43 fn. 1.

477 See the preamble of the Treaty signed on 6 July 1827 between them for the Pacification of Greece: Great Britain, F. O., *BFSP 1826–1827* (14th vol.; London: Printed by J. Harrison and son, 1828), 632–3.

478 For an account of this intervention, see Auguste Bourguignat, *Question de La Plata: Les traités Leprédour. Notice au point de vue du droit international* (Paris: Imprimerie centrale de Napoléon Chaix et Cie, 1849); José Luis Bustamante, *Los cinco errores capitales de la intervención en el Plata* (Montevideo: Imprenta uruguayana, 1849); John Le Long, *Intervention de la France dans le Rio-de-La-Plata*: *Motifs et moyens. L'Opposition de l'Angleterre à une intervention armée pourrait-elle aller jusqu'à poser un casus belli?* (Paris: Imprimerie de Madame de Lacombe, 1849); Falcke, *Le blocus pacifique* (above, n. 40), 75–86; Graham-Yooll, *Imperial Skirmishes* (above, n. 47), 75–89.

479 Some authors, mainly French, denounced the confiscation by Great Britain of the vessels of third States for breach of a pacific blockade. On the contrary, they pointed out that France solely confined itself to sequestrating them. See, i.a., Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (above, n. 465), 191f.; Gessner, *Le droit des neutres sur mer* (above, n. 234), 240; Fauchille, *Du blocus maritime* (above, n. 405), 51; Barès, *Le blocus pacifique* (above, n. 81), 143–4; Ducrocq, *Représailles en temps de paix* (above, n. 81), 74; Despagnet, *Cours de droit international public* (above, n. 27), 787. However, this statement seems to rest on no serious foundations. Cf. Falcke, *Le blocus pacifique* (above, n. 40), 225; Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 682.

the practice of pacific blockade—,[480] the blockading Power refrained from interfering with foreign shipping and enforced the blockade exclusively against the ships of the target country.

Therefore, the question of the legality of pacific blockade raised much controversy in legal doctrine.

The vast majority of lawyers denied pacific blockade the character of an institution of international law. They maintained that the measure actually was an act of war, purely and solely inconsistent with a state of peace. In fact, they often put forward the indictment that the past instances did not give rise to a state of war only because the target countries were always too weak to forcefully resist against the stronger reprisal-taking Powers, i.e. almost exclusively France and Great Britain. The truth was that the resort to a belligerent blockade outside wartime was illegal at any rate. Besides, they argued that the practice of pacific blockade rested upon no treaty or rule of domestic law, and was too recent to have already entered customary international law. Finally, last but not least, they strove to demonstrate the illegality of the measure by laying great emphasis, like Hautefeuille, on the interference with the shipping of third States.[481]

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480 Cf. Falcke, *Le blocus pacifique* (above, n. 40), 225; Washburn, 'The Legality of the Pacific Blockade' (above, n. 41), 458; Wolfgang Schumann, *Die Friedensblockade* (Das geltende Seekriegsrecht in Einzeldarstellungen, 9; Frankfurt am Main: Alfred Metzner, 1974), 65.

481 Cf. Pistoye and Duverdy, *Traité des prises maritimes* (above, n. 223), 376–377; Gregorio Perez Gomar, *Curso elemental de Derecho de Gente*: *Precedido de una Introduccion sobre el derecho natural*, 2nd vol. (Montevideo: Imprenta de El Pueblo, 1866), 135–6; Heinrich Bernhard Oppenheim, *System des Völkerrechts* (2nd edn., Stuttgart & Leipzig: A. Kröner, 1866), 255; William de Burgh, *The Elements of Maritime International Law*: *With a Preface on Some Unsettled Questions of Public Law* (London: Longmans, Green, and Co., 1868), 121–122 fn. 2; Theodore Dwight Woolsey, 'The Alabama Question.', *The New Englander* 28 (1869), 575–619, at 587–593; Ignacio de Negrin, *Tratado elemental de derecho internacional marítimo*: *Con varios apéndices que contienen la legislacion interior, los tratados de España y otros documentos nacionales y extranjeros referentes al asunto*, Obra de texto en la Escuela Naval Flotante y Academias del Cuerpo Administrativo de la Armada (Madrid: Miguel Ginesta, 1873), 133 fn. 1; Gabriel Massé, *Le droit commercial dans ses rapports avec le droit des gens et le droit civil*, 1st vol. (3rd edn., Paris: Guillaumin et Cie, 1874), 260; Raffaele Schiattarella, *Il diritto della neutralità nelle guerre marittime* (Sassari: Tipografia Sociale, 1874), 129–33; Guiseppe Carnazza Amari, *Trattato sul diritto internazionale pubblico di pace* (Corso di diritto internazionale, 1; 2nd edn., Milano: V. Maisner e compagnia, 1875), 904–7; Antenor Arias, *Lecciones de Derecho Maritimo*: *Dictadas en la Facultad de ciencias politicas y administrativas de la Universidad Mayor de San Marcos* (Lima: Imprenta del Estado, 1876), 431–3; Gessner, *Le droit des neutres sur mer* (above, n. 234),

Some publicists, on the other hand, resolutely insisted on the recognition of pacific blockade. In their view, the limited scale of the operation made the proceeding more humane than an all-out war. The measure, thus, was commendable for its restraint and because it could prevent war. With this in mind, they considered as a small but necessary drawback the right for the blockading Power to interfere with the ships of third States, insofar as the former abode by the rules governing wartime blockades (namely, i.a., the notification of the blockade to neutrals, the use of a sufficient force for an effective blockade and the special notice given to every approaching ship).[482] That is why the French publicist Eugène Cauchy and the Belgian lawyer Gustave Rolin-Jaequemyns regarded pacific blockade as introducing an intermediary state between war and peace.[483]

234–41; Leopold Neumann, *Grundriss des heutigen europäischen Völkerrechtes* (2nd edn., Wien: Wilhelm Braumüller, 1877), 92; Nys, *La guerre maritime* (above, n. 465), 69; Fauchille, *Du blocus maritime* (above, n. 405), 47–55; Henry Glass, *Marine International Law*: *Compiled from various sources* (Proceedings of the United States Naval Institute, 11, No. 3; Annapolis, Md.: The United States Naval Institute, 1885), 102–4; Carlos Testa, *Le droit public international maritime*: *Principes généraux. – Règles pratiques*, Traduction du portugais annotée et augmentée de documents nouveaux, touchant la contrebande de guerre, la neutralisation des mers et des fleuves et la décision de la conférence africaine (1885) en matière de droit maritime suivie d'une table alphabétique et analytique par Adolphe Boutiron (Bibliothèque internationale & diplomatique, 18; Paris: A. Durand et Pedone-Lauriel, 1886), 228–9; Funck-Brentano and Sorel, *Précis du droit ges gens* (above, n. 36), 408; Karl Gareis, *Institutionen des Völkerrechts* (Gießen: Emil Roth, 1888), 189f.

482 Cf. Eugène Cauchy, *Le droit maritime international considéré dans ses origines et dans ses rapports avec les progrès de la civilisation*, 2nd vol. (Paris: Guillaumin et Cie, 1862), 426–428; Carlos Calvo, *Le droit international théorique et pratique*: *Précédé d'un exposé historique des progrès de la science du droit des gens*, 2nd vol. (2nd edn., Paris: A. Durand et Pedone-Lauriel; Guillaumin et Cie; Amyot, 1872), 603f.; Gustave Rolin-Jaequemyns, '[Book Review: *Le droit des neutres sur mer.* By Ludwig Gessner]', *RDILC* 8 (1876), 165–6, at 166; Arthur Desjardins, *Traité de droit commercial maritime*, 1st vol. (Paris: A. Durand et Pedone-Lauriel, 1878), 30–31.

483 Cauchy, *Le droit maritime international considéré dans ses origines et dans ses rapports avec les progrès de la civilisation* (above, n. 482), 426; Rolin-Jaequemyns, '[Book Review: *Le droit des neutres sur mer.* By Ludwig Gessner]' (above, n. 482), 166. This assertion was strongly criticised by some opponents. See, e.g., Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (above, n. 465), 194; Woolsey, 'The Alabama Question.' (above, n. 481), 593; Carnazza Amari, *Trattato sul diritto internazionale pubblico di pace* (above, n. 481), 905; Fauchille, *Du blocus maritime* (above, n. 405), 48f.

However, several lawyers were willing to consent to the recognition of pacific blockade insomuch as the use of this measure fell within the scope of legitimate reprisals. For example, the German-speaking international law expert August von Bulmerincq condemned the past instances of pacific blockade as being cases of either illegitimate intervention or reprisals disproportionate to the offence or merely motivated by the blockading Power's personal interests. He considered, indeed, that pacific blockade still lacked a legal basis in international law. Nevertheless, he admitted that this measure could have the character of reprisals, provided that there was a just cause. Under such conditions and as long as the rules on wartime blockade were observed, Bulmerincq agreed that the blockading Power could interfere with foreign shipping, on the one hand, by detaining the ships of the target country the time of the blockade and, on the other, by driving away those of third States.[484]

But Bulmerincq's view was not shared by all legal experts who were ready to acknowledge pacific blockade as a special form of reprisals. For instance, Johann Caspar Bluntschli and Friedrich Fromhold (von) Martens defended the opinion that third States should suffer no ill effects at all from a pacific blockade: the blockaded ports should then remain open to them.[485]

In other words, the recognition of pacific blockade in legal doctrine was not altogether excluded insomuch as the measure was given the character of reprisals. Such a classification implied that the proceeding in question could not affect the third States. Indeed, this aspect was the main objection to the legality of pacific blockade. On the contrary, legal scholars did not appear to have assigned much importance to the fact that the blockade being an act of war might give rise to a state of war between the parties directly involved. In other words, it was not so much the act itself that posed a challenge, but the impact that pacific blockade had on the shipping of third States.

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484 Bulmerincq, 'Le blocus pacifique et ses effets sur la propriété privée' (above, n. 422). Cf. Jan Helenus Ferguson, *Manual of International Law*: *for the Use of Navies, Colonies and Consulates*, 2nd vol. (London: W. B. Whittingham & co., 1884), 240–241; Fiore, *Nouveau droit international public suivant les besoins de la civilisation moderne* (above, n. 54), 667–670.

485 Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten*: *als Rechtsbuch dargestellt* (3rd edn., Nördlingen: C. H. Beck, 1878), §§ 506–507; Martens, *Traité de droit international* (above, n. 459), 176. Cf. Morin, *Les lois relatives à la guerre selon le droit des gens moderne, le droit public et le droit criminel des pays civilisés* (above, n. 444), 109–11.

2. Examination by the Institute of International Law

(a) First Contact at The Hague, 1875

During this period of intense controversy, the Institute of International Law —hereafter shortened 'the Institute'— addressed briefly and superficially the issue of pacific blockade.

As preliminary work for the session at The Hague in 1875, the eleven members composing the fifth commission on private property in maritime war were asked to answer a questionnaire. One of the questions submitted to them was whether pacific blockade was a legitimate coercive means recognised in international law that allowed the seizure and confiscation of ships attempting to break the blockade.[486] The rapporteur, Albéric Rolin, noted that the majority of the answers condemned pacific blockade. Indeed, Theodore Dwight Woolsey, American international law expert and President of Yale University, reaffirmed his opinion expressed in 1869 that pacific blockade was an unlawful extension of the belligerent right of blockade. The English scholar John Westlake concurred with this view and considered pacific blockade to be a shameful act committed under the veil of peace against a small country by a great Power that did not want to accept the negative consequences of war. Therefore, he argued that pacific blockade could not affect shipping and that no prize court could legally be established to order the confiscation of any ships, either of the blockaded country or third States. On the other hand, Albéric Rolin believed that pacific blockade could have the same effects as a blockade in wartime because it was, in fact, an authentic act of war. Only Bulmerincq called pacific blockade a means as lawful as any other act of war.[487]

It cannot be said, as some lawyers claimed, that the whole Institute decided against the legality of pacific blockade.[488] As a matter of fact, out of the eleven members of the fifth commission, solely six replied to the ques-

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486 Institut de Droit International, 'Questionnaire adressé à MM. les membres de la commission. [Suite des Travaux préliminaires à la Session de La Haye. V^me^ Commission. – Propriété privée dans la guerre maritime]', *RDILC* 7 (1875), 553–7, at 555.

487 Institut de Droit International, 'Rapport de M. Albéric Rolin sur les observations présentées en réponse au questionnaire', *RDILC* 7 (1875), 603–18, at 611–612.

488 See, e.g., Fauchille, *Du blocus maritime* (above, n. 405), 46; Wharton, *A digest of the international law of the United States,* (above, n. 46), 408.

tionnaire.[489] Besides, the matter remained at the level of preliminary work and the question addressed only the impact of pacific blockade on shipping, namely whether confiscation was allowed. Still, this hints at the high expectations placed on the Institute to give a decision of high authority on such a burning issue.

(b) The Heidelberg Declaration of 1887

i) Triggering Event: The French Blockade of Formosa, 1884

Until the early 1880s, the doctrinal discussion of the legality of pacific blockade stagnated. The vast majority of legal scholars condemned the measure, while some called for its acceptance. The absence of breakthrough in the debate resulted from the fact that all the instances of so-called pacific blockade occurred in the second quarter of the first half of the nineteenth century. That means that during a period of at least thirty years since the *Don Pacifico* affair in 1850 the practice of pacific blockade had been dormant, with the major exception of the British blockade of the bay of Rio de Janeiro in 1862/63.

However, the legal issue acquired new relevance in 1884 with a French blockade of the Chinese island of Formosa (now known as Taiwan).[490] This incident was the triggering event that revived the discussion.

At the root of the incident were France's colonial ambitions in Indochina. It all started when, at the outcome of a *de facto* war, China had been forced to recognise the territorial claims of France over Annam and Tonkin.[491] Yet, French forces on their way to occupy military places in Tonkin were allegedly attacked on 23 June 1884 by regular Chinese soldiers in violation of the peace treaty, resulting in several deaths and injuries.[492] Remonstrances were addressed to the Chinese Government but

489 See Institut de Droit International, 'Rapport de M. Albéric Rolin sur les observations présentées en réponse au questionnaire' (above, n. 487), 605.

490 F. von Martitz, 'Über Friedensblockaden', *ZVölkR 9* (1920), 610–21, at 610.

491 See Preliminary Convention of Peace between France and China, 11 May 1884: Great Britain, F. O., *BFSP 1883–1884* (75th vol.; London: William Ridgway, 1891), 1110–1.

492 General Millot to Vice admiral Peyron, June 1884: France and Louis Renault, *Archives diplomatiques*: *Recueil mensuel international de diplomatie et d'histoire*, 13th vol. (2nd ser.) (Paris: Féchoz, 1885), 168.

remained vain.[493] Thus, France demanded, in the form of an ultimatum, a compensation of 250 million francs and the immediate withdrawal of Chinese troops from Tonkin.[494] In the end, China agreed to comply with the withdrawal but disputed the principle of indemnity because the imputation of responsibility in the attack on 23 June was without proof.[495]

Nevertheless, even before the Chinese reply, the French Government had resolved to adopt preventive measures, although it wished to avoid the blame for breaking the peaceful relations with China.[496] Thus, Counter admiral Courbet received the instruction to take possession of two Chinese ports, to seize Chinese ships trying to run the blockade of the Min River

493 See Viscount de Sémallé to Mr Jules Ferry, 29 and 30 June 1884: Ibid., 169–70.

494 Mr Patenôtre to Mr Jules Ferry, 13 July 1884: Ibid., 180–1. However, Ferry confessed three weeks later that the amount of compensation was exaggerated and, therefore, reduced it to 50 millions francs. See Mr Jules Ferry to Mr Patenôtre, 3 August 1884 : France, Ministère des Affaires étrangères, *Affaires de Chine et du Tonkin*: *1884–1885.* (Documents diplomatiques; Paris: Imprimerie nationale, 1885), 9.

495 Mr Jules Ferry to Mr Li-Fong-Pao, 18 July 1884: France and Renault, *Archives diplomatiques* (above, n. 492), 184–5; Mr Li-Fong-Pao to Mr Jules Ferry, 18 July 1884: Ibid., 185.

496 Mr Jules Ferry to Mr Patenôtre, 7 July 1884: Ibid., 175. Cf. "L'amiral Courbet voulait l'état de guerre déclarée, afin d'exercer tous les droits de belligérants, de visiter les navires neutres, de leur interdire le transport de la contrebande de guerre, et de faire, au besoin, des prises maritimes. Le Gouvernement préférait la continuation de la paix, qui n'était pas officiellement rompue. Du moins tenait-il à ne pas prendre l'initiative de la rupture. Une déclaration de guerre à la Chine aurait alarmé les intérêts étrangers, suscité les réclamations des neutres, indisposé les Puissances maritimes, provoqué des déclarations de neutralité. Sans doute, il était privé des droits de belligérants au regard des neutres; mais, par compensation, tous les ports étrangers lui restaient ouverts sur la route des Indes et de l'extrême Orient; ses bâtiments continuaient à y faire escale et à s'y ravitailler librement : condition précieuse pour ses expéditions incessantes entre la métropole, l'Indo-Chine et la Chine même. L'amiral semblait oublier qu'en cas de guerre, l'escadre ne pourrait plus s'approvisionner par l'intermédiaire des neutres. Du reste, si l'état de paix limitait notre action vis-à-vis des tiers, il ne nous privait, à l'égard de la Chine, d'aucun des droits utiles d'un belligérant. Nous pouvions, par la voie des représailles, tenter toutes les opérations nécessaires pour l'amener à composition, prendre des gages territoriaux, courir sus à sa marine de guerre, bombarder ses ports militaires, déclarer des blocus pacifiques, interdire le transport de la contrebande de guerre et même du riz dans les limites de ces blocus. C'était assez pour parvenir à nos fins. Il était donc préférable de s'abstenir d'une déclaration de guerre." ([Albert Billot], *L'affaire du Tonkin*: *Histoire diplomatique de l'établissement de notre protectorat sur l'Annam et de notre conflit avec la Chine. 1882–1885* (Paris: J. Hetzel, 1888), 248–9).

and to prevent war preparations by force if the ultimatum proved unsuccessful.[497] The occupation of the port of Keelung in northern Formosa responded to strategic considerations: few foreign merchants frequented the port, minimal force was sufficient to occupy the place and control the Formosa Strait, and nearby coal mines would ensure supply for the fleet in the event of the closing of neutral ports if a state of war ensued.[498]

Shortly after the end of the ultimatum's deadline, Keelung was bombarded. French troops then landed but failed to secure control.[499] Still, the French Government hesitated over the course of action to follow, which gave China time to make military preparations for war.[500] It eventually decided to destroy the forts and arsenals of the port of Fuzhou as well as the Chinese vessels anchored there before concentrating the fleet near Keelung and occupying the latter place.[501] These plans were put into execution, but in the face of Chinese resistance, a blockade of the west coast of Formosa had to be declared. According to the notification of the blockade, any ship attempting to break it was liable to be captured and condemned pursuant to the law of nations.[502]

Heretofore, there was officially no state of war between France and China. In fact, the French Government intended to maintain an effective blockade without war, as had been done in the past by Great Britain and France. It argued that to this end, the vessels of third States could be either driven away or captured for breach of the blockade. Nevertheless, it assured Great Britain that it would not assert the belligerent rights of visit and capture of neutral vessels on the high seas.[503]

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497 Vice admiral Peyron to Counter admiral Courbet, 13 July 1884: France and Renault, *Archives diplomatiques* (above, n. 492), 181.

498 [Billot], *L'affaire du Tonkin* (above, n. 496), 216.

499 Ibid., 216–7.

500 "Des représailles, dont la légitimité n'était contestée par personne, finiront, à force d'être différées, par être considérées comme des actes d'agression. La Chine profite de nos délais pour se fortifier et dépense en achats d'armes des sommes considérables. […]. Nos hésitations auront pour résultat final de nous obliger à une guerre en règle qu'un acte de vigueur accompli en temps opportun eût rendue inutile." Mr Patenôtre to Mr Jules Ferry, 12 August 1884: (France, Ministère des Affaires étrangères, *Affaires de Chine et du Tonkin* (above, n. 494), 34).

501 [Billot], *L'affaire du Tonkin* (above, n. 496), 222.

502 Notification of the blockade, *J.O.R.F.*, 23 October 1884, 5577.

503 Mr Waddington to Earl Granville, 5 November 1884: Great Britain, F. O., *BFSP 1884–1885* (above, n. 269), 425.

These explanations did not convince the British Government. Earl Granville, Great Britain's Secretary of State for Foreign Affairs, told the French ambassador that a pacific blockade certainly did not allow the capture and condemnation of ships of third States attempting to get through the blockade. Besides, the British Government supported the view that given the large scale of the operations, a state of war existed between France and China. Consequently and although it refrained from issuing a formal Proclamation of Neutrality, it instructed the governors of the British Eastern colonies to enforce the Foreign Enlistment Act which prohibited the equipping of any foreign vessels employed for military duties.[504]

For France, this decision entailed dire consequences since its warships could not restock with coal in British colonial ports. As a result, the resupplying had to come all the way from Marseille to Saigon for a cost of 700.000 francs per steamship.[505] Finally, left with no alternative, the French Government treated the enforcement of the Foreign Enlistment Act as tantamount to a formal declaration of neutrality. It, therefore, decided to exercise all the rights granted to belligerent nations against neutral vessels.[506]

In terms of reprisals, this case is enlightening. France did not want to confess the existence of a state of war. French Prime Minister Jules Ferry defended the view that the legal situation between France and China actually was a 'state of reprisals' unless the latter wished to declare war.[507] He explained in the *Chambre des députés* that France pursued, through the occupation of Keelung, what he euphemistically called "une politique des gages", i.e. a policy of material guarantees. He stressed then that this occupation was not a conquest but a pledge which a creditor could seize for

504 Cf. Earl Granville to Mr Waddington, 11 and 26 November 1884: Ibid., 426–427 and 429–430; Earl Granville to the Marquis Tséng, 26 November 1884: Ibid., 430–1.

505 Geffcken, 'La France en Chine et le droit international' (above, n. 33), 147.

506 Mr Waddington to Earl Granville, 29 January 1885: Great Britain, F. O., *BFSP 1884–1885* (above, n. 269), 432–3.

507 Mr Jules Ferry to Mr Patenôtre, 18 August 1884: France, Ministère des Affaires étrangères, *Affaires de Chine et du Tonkin* (above, n. 494), 44. Yet, Geffcken pointed out that international law did not know a so-called state of reprisals, but just acts of reprisals (Geffcken, 'La France en Chine et le droit international' (above, n. 33), 145).

payment.[508] Finally, Ferry argued after reciting a list of past instances of pacific blockade that this hostile measure did not require a declaration of war to be legal and produce all its effects.[509] Indeed, the French Prime Minister understood pacific blockade as a fully fledged belligerent blockade not preceded by a declaration of war. And such a way of waging war offered major advantages ("*il y avait de très grands avantages […] à faire la guerre comme nous la faisons, sans recourir à une déclaration préalable.*").[510] The three reasons why the French Government opted to pacific blockade and reprisals in the present case were that (1) negotiations could be resumed at any time; (2) the existing treaties were to remain in force; and (3) quarrels with third States could be avoided.[511]

On this latter point, the protest of Great Britain proved him wrong. It is, in fact, the exercise of belligerent rights within the scope of a pacific blockade that raised serious concerns and pointed to the urgent need for a juridical elucidation of great authority about this measure. It is noteworthy, however, that statesmen did not challenge the fact that there was such a thing as pacific blockade, although they disagreed as to the legal effects attached to its establishment.

ii) The Work of the Institute

Directly in the wake of the pacific blockade of Formosa, the Institute of International Law decided in 1885 to look more closely into the situation of pacific blockade and fill the existing legal vacuum.[512] A commission was thus set up to solve the question of the legitimacy of pacific blockade and,

508 M. le président du conseil, *Chambre des députés*, 26 November 1884: *J.O.R.F.*, 27 November 1884, 2487–8. Albert Billot, French diplomat and lawyer by training, also justified the projected destruction of Fuzhou as a lawful act of reprisals which would not have broken peace. See [Billot], *L'affaire du Tonkin* (above, n. 496), 223–4.

509 M. le président du conseil, *Chambre des députés*, 26 November 1884: *J.O.R.F.*, 27 November 1884, 2487.

510 M. le président du conseil, *Chambre des députés*, 26 November 1884: Ibid.

511 M. le président du conseil, *Chambre des députés*, 26 November 1884: Ibid.

512 In fact, the reading of an essay about the Sino-French conflict by Geffcken triggered the Institute's interest in the matter. See Institut de Droit International, 'Conflit franco-chinois. – Lecture de M. Geffcken.', in Institut de Droit International (ed.), *Session de Bruxelles – September 1885* (Annuaire IDI, vol. 8; Bruxelles/Leipzig: Librairie européenne C. Muquardt, Merzbach & Falk, 1886), 289.

if it be so, laying down the rules that should govern the measure.[513] On 7 September 1887 in Heidelberg, in the presence of the Grand Duke of Baden and under Bulmerincq's chairmanship, the Institute examined this issue in plenary session.

Ferdinand Perels, a German maritime law expert and Commissioner of the Imperial German Admiralty, acted as rapporteur of the Institute's sixth commission. He endeavoured in his report to demonstrate that a blockade outside a state of war and not preceded by a declaration of war could lawfully be instituted by way of reprisals or intervention. For this fervent advocate of pacific blockade, the measure had to be studied *in abstracto*. He, indeed, deemed incorrect to combat the legality of pacific blockade on the basis of the assumption that a blockade could only be an act of war. In his opinion, pacific blockade was a lesser evil than war and, therefore, as lawful as any other coercive acts of force short of war. For that reason, he judged that pacific blockade could affect the navigation of third States. Still, he agreed that the confiscation of ships attempting to run the blockade would exceed the aim of the measure. He thus proposed that the ships flying flags of third States should just be turned away. As for the vessels of the blockaded Power, he supported their mere sequestration and their restitution without compensation after the end of the blockade. Moreover, Perels was of the opinion that the blockade had to be effective, notified and declared. Finally, sufficient time should allow the ships of third States to leave the blockaded ports.[514]

However, Perel's statement was followed by a counter-report submitted by a staunch opponent of pacific blockade: the German lawyer Friedrich Heinrich Geffcken. Working on the hypothesis that pacific blockade could, arguably, be regarded as a special kind of reprisals, he insisted on

513 See Institut de Droit International (ed.), *Session de Bruxelles – September 1885* (Annuaire IDI, vol. 8; Bruxelles/Leipzig: Librairie européenne C. Muquardt, Merzbach & Falk, 1886), 11 and 347; and the copy of the circular of the Bureau of the Institute, May 1887: Institut de Droit International (ed.), *Session de Heidelberg – Septembre 1887* (Annuaire IDI, vol. 9; Bruxelles/Leipzig: C. Muquardt, 1888), 275–6.

514 Ibid., 276–86. The report is also published in *RDILC* 19 (1887), 245–52, and in *Clunet* 14 (1887), 721–9. It should be pointed out that, a few years earlier, Perels used to defend a more stringent view regarding the legal effects of the enforcement of the blockade against third States. Indeed, he maintained that the ships flying the flag of third States could eventually be sequestrated until the end of the blockade. See Ferdinand Perels, *Manuel de droit maritime international*, traduit de l'allemand et augmenté de quelques documents nouveaux par L. Arendt (Paris: Guillaumin et Cie, 1884), 182.

the fact that reprisals were legitimate in international law as isolated acts, but could by no means constitute a state of reprisals allowing all kind of hostilities outside of war. More importantly, they could not affect the third States. For Geffcken, it was on this point that pacific blockade exceeded the scope of mere reprisals since a blockade intrinsically meant the closing of ports to navigation. It thus had adverse effects on third States. So, in Geffcken's view, a pacific blockade could only be an abuse of force by a strong Power taking advantage of its superiority to enforce a belligerent measure against a weaker and smaller country, while simultaneously refusing to assume the responsibilities arising from war. He regarded such a proceeding as obviously contrary to the principle of equality amongst States. For all these reasons, he called the members of the Institute to decide against pacific blockade.[515]

From there, the minutes of the session are quite succinct about the ensuing debate.[516] Geffcken and Neumann reiterated that pacific blockade was a genuine act of war or an illegal practice of reprisals in terms of international law. Yet, Perels contested Geffcken's objections by maintaining that pacific blockade should be regarded as an act of reprisals as valid as embargo or the sequestration of property. Besides, he argued that States were equal to the extent that they all had the right to establish a pacific blockade, although they did not have the same capacity to perform it.[517]

At the heart of the debate was the question of the enforcement of the blockade against the ships of third States. Perels provided at Section 4 of his draft that the ships flying foreign flags could be driven away by the blockader. This opinion had the support of Gustave Koenig, professor of law at Bern, who looked upon pacific blockade as a measure of police whose efficacy depended on a strict closure of the blockaded ports to ships of third States. Others like Emilio Brusa, professor at the University of Turin, considered that only the ships carrying contraband could be impeded entrance into the blockaded ports. The reason he put forward was that

515 Institut de Droit International (ed.), *Session de Heidelberg – Septembre 1887* (above, n. 513), 286–95. Also published in: Friedrich Heinrich Geffcken, 'Le blocus pacifique. Réponse aux conclusions du rapport de M. Perels', *RDILC* 19 (1887), 377–83.

516 See Institut de Droit International (ed.), *Session de Heidelberg – Septembre 1887* (above, n. 513), 295–300.

517 Ibid., 295–296. Cf. Gerry J. Simpson, *Great Powers and Outlaw States*: *Unequal Sovereigns in the International Legal Order* (Cambridge Studies in International and Comparative Law; Cambridge: CUP, 2004), 44–5.

the right to resort to pacific blockade should be reserved to the Concert of the Great European Powers that could establish it by majority vote.[518]

However, it is the principle of the absolute free passage of ships under a foreign flag through the blockade line that prevailed. The unanimous vote of the Institute on this rule confirms that therein lied the key to the recognition of pacific blockade.

Apart from this matter, the thirty and more members present that day fairly quickly agreed on the text of a declaration despite various reformulations of Perels's draft. The result was the recognition of the validity and legality of pacific blockade by the Institute under certain conditions. The declaration reads as follows:

> "Declaration Voted by the Institute on Blockade in the Absence of a State of War
> The establishing of a blockade in the absence of a state of war should not be considered as permissible under the law of nations except under the following conditions:
> 1. Ships under a foreign flag shall enter freely in spite of the blockade.
> 2. Pacific blockade must be officially declared and notified, and maintained by a sufficient force.
> 3. The ships of a blockaded Power which do not respect such a blockade may be sequestrated. When the blockade is over, they shall be restored to their owners together with their cargoes, but without any compensation whatsoever."[519]

It must be noted that the declaration did not explain on what grounds pacific blockade could be resorted to. In other words, it did not say whether pacific blockade was a measure of reprisals or intervention or both. It is clear that during the session as well as in Perels's and Geffcken's reports, pacific blockade was addressed mainly in reference to reprisals. For instance, the Institute's secretary-general, Gustave Rolin-Jaequemyn, put to

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518 This idea was shared by some authors. Cf. Eugène-Marie-Henri Rosse, *Guide international du commandant de bâtiment de guerre*: *Du droit de la force (D'après Calvo, Fauchille, Ortolan, Hautefeuille, etc.)* (Paris: Librairie militaire de L. Baudoin, 1891), 89; Albert Edmond Hogan, *Pacific blockade* (Oxford: Clarendon Press, 1908), 19f. But see Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 686–8.

519 Translation by Scott (ed.), *Resolutions of the Institute of International Law dealing with the Law of Nations* (above, n. 386), 69–70. See the original text in the French language in: Institut de Droit International (ed.), *Session de Heidelberg – Septembre 1887* (above, n. 513), 300–1.

discussion the requirement of a just cause for the legality of pacific blockade. He emphasised that, in the absence of a *justa causa*, this proceeding was nothing less than an act of war in the eyes of the target country. To which Bulmerincq added that as a measure of reprisals, pacific blockade always required a just cause in order not to amount to an arbitrary means. This amendment was turned down by a slight majority.[520]

Nevertheless, the so-called pacific blockade of Greece seems to have served as a model for the declaration. In many respects, that blockade contrasted diametrically with the one of Formosa. In 1886, the great European Powers, except France, resorted to this measure as a form of intervention in order to prevent Greece from waging war on Turkey. Only ships under Greek flag that did not carry foreign cargo were affected. A month after being established, the blockade was already lifted as Greece consented to lay the weapons down.[521] Lawyers applauded the *modus operandi* of this blockade, which manifestly contributed to the recognition of pacific blockade as a legitimate institution of international law.[522]

The conclusion to retain is thus that the Institute's declaration did not forbid resorting to pacific blockade either by way of intervention or of reprisals. It led Paul Heilborn, German international law expert and *Privatdozent* at the University of Berlin, to regard pacific blockade as a hybrid expedient, midway between reprisals and intervention.[523] Thereafter, pacific

520 See Ibid., 297–9.

521 About the whole incident, see Gustave Rolin-Jaequemyns, 'Chronique du droit international (1885–1886) [Troisième article]', *RDILC* 18 (1886), 591–626, esp. at 619–621.

522 See, i.a., Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines* (above, n. 36), 5th vol., 772; Antoine A. Rontiris, 'De l'évolution de l'idée de blocus pacifique', *Clunet* 26 (1899), 225–39, at 236–237. For the opinions of other authors, see Falcke, *Le blocus pacifique* (above, n. 40), 143–144 fn. 8.

523 "Die Friedensblockade […] ist eine einzelne Gewalthandlung; sie gehört begrifflich weder ausschliesslich zu den Repressalien, noch zu den Interventionshandlungen, noch ist sie eine dritte, besondere Art der Selbsthilfe; je nach den Umständen trägt sie den Charakter der Repressalie, der Interventionshandlung, ist sie rechtswidrig. Für die Beurteilung einer Friedensblockade kommt demnach – von der principiellen Frage abgesehen – in Betracht, ob der handelnde Staat interveniert oder zu Repressalien greift, ob ein Interventionsgrund bezw. ein Anlaß zu Repressalien vorliegt." (Paul Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (Berlin: Julius Springer, 1896), 367). Cf. Hiller, 'Die Friedensblockade und ihre Stellung in Völkerrecht' (above, n. 45), 82–4.

blockade sometimes occupied an individual section, even chapter, apart from reprisals in international law manuals.[524]

As a final observation, it should be pointed out that the declaration barely concerned the relation between the blockading Power and the blockaded country. The last provision merely mentioned that the sequestrated ships of the latter State had to be restored at the end of the measure and without any compensation whatsoever. This succinctness regarding the relation between the blockaded and the blockading countries shows that the real concern of the members of the Institute was, in fact, the question of the adverse effects that might flow from a pacific blockade on the shipping of third States. Indeed, the Institute did not meet the accusation that pacific blockade was an oppressive measure used by major Powers against weak and small nations. This indictment was perhaps just a mere objection of principle that did not weight in comparison to the more severe issue of the free passage of ships of third States. It can even be said that by confirming the legitimacy of pacific blockade the Institute implicitly sanctioned the measure as a kind of prerogative of the great Powers.

(c) Reception of the Institute's Declaration

When in 1888 the German East Africa Company received the administration of a coastal territory from the Sultan of Zanzibar, the Arab slave traders who saw their interests compromised rose up in protest. A joint Brito-German blockade was then instituted on 2 December 1888 with the Sultan's consent. It aimed to put a stop to the slave trade in those waters and to quash the uprising by impeding the importation of arms. To this purpose, the blockading Powers reserved the right of visit and search against any ships.[525] One year later, on 1 October 1889, the blockade was

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524 See, e.g., Oppenheim, *International Law* (above, n. 25), 43; Alexandre Mérignhac, *Traité de droit public international*, Tome premier de la 3ième partie (Paris: Librairie générale de droit & de jurisprudence, 1912), 60; Henry Bonfils, *Manuel de droit international public (droit des gens)*: *Destiné aux étudiants des Facultés de Droit et aux aspirants aux fonctions diplomatiques et consulaires*, édition revue et mise au courant par Paul Fauchille (7th edn., Paris: Rousseau et Cie, 1914), 706.

525 See the declaration of the blockade and the notice of it by the German and British Rear-Admirals, 2 December and 29 November 1888 respectively: Great Britain, F. O., *BFSP 1888–1889* (81st vol.; London: Harrison and sons, [s.d.]), 97. On 5 December, Italy joined the blockade. See the extract from the Official Gazette of Italy, 19 December 1888: Ibid., 100. On the next day, Portugal decid-

lifted following the signature of a convention by which the Sultan abolished slavery and allowed Great Britain and Germany to visit and search the vessels of his subjects at any time.[526]

In this case, the Sovereign gave his consent to the blockade. So, the measure was a kind of legitimate intervention.[527] More accurately, scholars leaned towards a categorisation as a measure of police.[528] The blockade was, indeed, 'pacific' because of the absence of an official state of war.[529] Still, for Rolin-Jaequemyns, it could not be regarded as a pacific blockade *stricto sensu* since, he explained, a pacific blockade was an act of war in time of peace that required at least two belligerents, viz. two States or organised

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ed to support this blockade by prohibiting the importation and exportation of arms in the Portuguese East African possessions. See the decree thereupon, 6 December 1888: Great Britain, F. O., *BFSP 1887–1888* (79th vol.; London: Harrison and sons, [s.d.]), 384–6. The French Government also consented to exceptionally grant the right of search on the occasion of this blockade. See The Marquis of Salisbury to Sir E. Malet, 5 November 1888: Ibid., 369.
The chancellor Prince von Bismark did not believe that the joint blockade could successfully abolish the slave trade. However, on his own admission, such a proceeding served German colonial policy by showing to African natives that Great Britain and Germany worked hand in hand in good harmony. See Reichstag, 26 January 1889: Deutsches Reich, *Stenographische Berichte über die Verhandlungen des Reichstags*: *VII. Legislaturperiode. IV. Session 1888/89*, 1st vol. (105th vol.; Berlin: Norddeutsche Buchdruckerei und Verlagsanstalt, 1889), 619 (A).

526 See the Agreement between Great Britain and Zanzibar, 13 September 1889: Great Britain, F. O., *BFSP 1888–1889* (above, n. 525), 1291; and the British notification of the raising of the blockade, 30 September 1889: Ibid., 132.

527 Cf. Bulmerincq, 'Le blocus pacifique et ses effets sur la propriété privée' (above, n. 422), 578.

528 See, e.g., Gustave Rolin-Jaequemyns, 'L'année 1888 au point de vue de la paix et du droit international', *RDILC* 21 (1889), 167–208, at 207–208; Rivier, *Principes du droit des gens* (above, n. 226), 198f. For Thomas E. Holland, this blockade was "a very anomalous [one]" within the category of blockades instituted without war that aimed to suppress rebellion (Holland, *Studies in international law* (above, n. 476), 139).

529 Nevertheless, a prize court was established at Zanzibar. Besides, Germany proclaimed the martial law for Dar es Salaam and other places, prohibited the importation of provisions and admitted the existence of a state of war. See the British Order in Council of 17 December 1888: Great Britain, F. O., *BFSP 1887–1888* (above, n. 525), 1336–7; the German Decree applying prize law to Zanzibar, 15 February 1889: *RGBl.*, 19 February 1889, 5–10; Colonel Euan-Smith to the Marquis of Salisbury, 27 February and 12 March 1889: Great Britain, F. O., *BFSP 1888–1889* (above, n. 525), 116 and 121; The Marquis of Salisbury to Mr Beauclerck, 9 March 1889: Ibid., 119.

forces. In addition, he specified that publicists had increasingly condemned pacific blockade.[530]

This last remark is quite surprising since Rolin-Jaequemyns was present and took an active part at the session of Heidelberg in 1887 where the Institute declared pacific blockade lawful. Of course, the blockade of Zanzibar was a peculiar one and, moreover, did not follow the rules laid down by the Institute. This deviation raises the question of the reception and authority of the Institute's declaration.

In general, legal scholars applauded the declaration, primarily because it offered a solution which spared the shipping of third States.[531] A notable exception is Ernest Nys, professor of international law at Brussels, who sarcastically pointed out that the Institute had preferred to find a compromise on the issue rather than to state the principles firmly, i.e. to condemn pacific blockade as an abuse.[532] Some years later, at the time of the French blockade against Siam in 1893, Thomas Gibson Bowles, MP for King's Lynn, came down against pacific blockade and attacked the Institute for having suggested its possibility. He disdainfully called the Institute's decision on this matter the work of "certain unauthorised persons in an unauthorised conference".[533]

On the other hand, some lawyers also criticised the declaration for not going far enough, for being lacunal or unsatisfactory. For example, Thomas E. Holland looked upon the Institute's declaration as "a well-considered expression of expert European opinion". He, however, argued that

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530 Rolin-Jaequemyns, 'L'année 1888 au point de vue de la paix et du droit international' (above, n. 528), 206f.

531 See, e.g., Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines* (above, n. 36), 5th vol., 772; Calvo, *Le droit international théorique et pratique* (above, n. 224), 557 fn. 1 (§ 1859); Piédelièvre, *Précis de droit international public ou droit des gens* (above, n. 56), 105; Georges Bry, *Précis élémentaire de droit international public: mis au courant des progrès de la science et du droit positif contemporain à l'usage des étudiants des facultés de droit et des aspirants aux fonctions diplomatiques et consulaires* (3rd edn., Paris: L. Larose, 1896), 372.

532 Nys, *Le droit international* (above, n. 33), 93. Cf. Thomas Baty, 'The Institute of International Law on Pacific Blockade', *The Law Magazine and Law Review* 21 (4th ser.) (1895–96), 285–300, at 288; Kleen, *Lois et usages de la neutralité* (above, n. 230), 652 fn. 1.

533 Mr Gibson Bowles, House of Commons, 27 July 1893, Great Britain, Parliament, *The Parliamentary Debates authorised Edition: Fourth Series: Commencing with the Second Session of the Twenty-fifth Parliament of the United Kingdom of Great Britain and Ireland* (15th vol.; London: Eyre and Spottiswoode, 1893), col. 660.

the Institute treated pacific blockade as merely a species of reprisals and failed to sufficiently take into consideration the other natures of the measure. Thus, he supported the view that, in case of intervention or suppression of a rebellion, a pacific blockade ought to be directed against the ships under the flag of third Powers too, unlike the pacific blockades established by way of reprisals.[534] Finally, Léon Poinsard, secretary-general of the United International Bureaux for the Protection of Intellectual Property, criticised that the solution adopted by the Institute —which he did not name — consisting in excluding third States from the operation of pacific blockade deprived of its efficacy a measure that he regarded as an excellent alternative to war.[535]

Yet, apart from these few critical reactions, the rules laid down by the Institute in 1887 had received large approval from almost the entire international legal community and prevailed in diplomacy, according to Thomas Joseph Lawrence, lecturer in international law at Downing College of Cambridge University. Nonetheless, the latter author wished that a Hague convention sanctioned them officially.[536] As a matter of fact, the declaration did not lack authority as the Institute gathered the foremost international lawyers of the time. But for being a regulation enacted by a private institution, it had naturally no binding force upon Governments.[537]

3. Departing State Practice: The Blockades of Siam (1893) and Crete (1897–1898)

The Institute's declaration represents undoubtedly a landmark for the theory of pacific blockade given its positive reception amongst lawyers. However, it lacked binding force. That meant that the Governments did not have to abide by the rules laid down by the Institute. In fact, the instances of so-called pacific blockade after 1887 did not follow at all the Institute's declaration. This departing practice reveals a serious gap between State practice and legal theory.

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534 Holland, *Studies in international law* (above, n. 476), 144–145 and 149–150.

535 Léon Poinsard, *Études de droit international conventionnel*, Première série (Paris: F. Pichon, 1894), 83. See Norman Wise Sibley, 'Pacific Blockade.', *The Westminster review* 147 (1897), 679–85, at 682, who concurred with Poinsard's view.

536 Lawrence, *The principles of international law* (above, n. 6), 342–3.

537 Washburn, 'The Legality of the Pacific Blockade' (above, n. 41), 57.

In addition to the peculiar blockade of Zanzibar, two significant cases of pacific blockade occurred during the period going from 1887 until the beginning of the twentieth century, namely the blockades of Siam in 1893 and Crete in 1897–1898.

The first instance happened in the context of the French colonial enterprise in Southeast Asia and a border dispute with the Kingdom of Siam — currently, Thailand— that caused the killing of a French police inspector and the capture of a French officer. The crisis worsened as two French gunboats, which attempted to reach the port of Bangkok notwithstanding the interdiction of the Siamese Government, were fired at by the defence line. The gunboats responded and eventually succeeded to arrive in Bangkok.[538] The French Government, thus, decided to send an ultimatum written in terms that would justify the making of reprisals in case of failure to comply with the demands.[539] It insisted on the recognition of territorial claims, satisfaction for the offence and compensation for damage.[540] Still, following Siam's insufficient reply,[541] parts of the Siamese coasts were blockaded on 26 July 1893.[542]

The French Minister of Foreign Affairs, Jules Develle, justified the course of action as a lawful pacific blockade.[543] However, three days were given to friendly vessels to leave the blockaded places, and blockade runners were liable to capture and condemnation. That is why the announce-

538 See the French Foreign Minister's account of the events read before the *Chambre des députés* on 18 July 1893: France and Louis Renault, *Archives diplomatiques*: *Recueil mensuel international de diplomatie et d'histoire*, 47th vol. (2nd ser.) (Paris: F.-J. Féchoz, 1893), 73–8.

539 That is why the ensuing blockade was regarded —e.g. by Emanuel von Ullmann, *Völkerrecht* (Das öffentliche Recht der Gegenwart, 3; 2nd edn., Tübingen: J. C. B. Mohr (Paul Siebeck), 1908), 458— as an instance of pacific blockade by way of reprisals.

540 See the French demands in France and Renault, *Archives diplomatiques* (above, n. 538), 79; and the telegraph of Captain Jones to the Earl of Rosebery, 20 July 1893: Great Britain, F. O., *BFSP 1894–1895* (87th vol.; London: Her Majesty's Stationery Office, 1900), 262–3.

541 See the Siamese reply: France and Renault, *Archives diplomatiques* (above, n. 538), 80–1.

542 See the First Notification and Second Declaration of Blockade, 26 and 29 July 1893 respectively: Great Britain, F. O., *BFSP 1894–1895* (above, n. 540), 351–2.

543 "[…] la mesure dont il s'agit constitue, en réalité, un moyen de contrainte auquel un État est fondé à recourir, sans rompre la paix, pour rappeler une autre Puissance à l'observation de ses devoirs internationaux." In support of this statement, Develle cited past examples of pacific blockade and asserted that the British Government did not dispute the rights invoked by France at the time of

ment of the French blockade of Siam raised concerns in Great Britain and led to question the 'pacific' character of the blockade.[544] The British Government then seriously considered to treat the blockade as giving rise to a state of war, and thence to apply the law of neutrality.[545] Nevertheless, the blockade was lifted not long after its establishment as the Siamese Government quickly resolved to accede to the demands of France.[546]

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the blockade of Formosa in 1884, but merely issued a few reservations. See Mr Develle to the Marquess of Dufferin, 3 August 1893: Ibid., 297–8.

544 See, e.g., The Marquess of Dufferin to Mr Develle, 28 July 1893: Ibid., 284. Another example is George Curzon, MP for Southport, who declared the following while addressing the Under-Secretary of State for Foreign Affairs, Sir Edward Grey: "[…] although it is, I believe, a recognised principle of International Law that a pacific blockade does not apply to ships flying the flag of another Power, France is, in spite of that, on the verge of establishing a blockade which would have that effect, and which would not so much injure Siam as British trade and shipping." (House of Commons, 27 July 1893: Great Britain, Parliament, *The Parliamentary Debates authorised Edition* (above, n. 533), col. 660).

545 See The Earl of Rosebery to the Marquess of Dufferin, 28 July 1893: Great Britain, F. O., *BFSP 1894–1895* (above, n. 540), 282. In the House of Commons, the MP for King's Lynn, Thomas Gibson Bowles, reproached the British Government for not protesting strongly enough against the so-called pacific blockade of Siam whereas a British steamer had been seized, according to him. He also took the opportunity to reiterate that pacific blockade was an invention that aimed to legitimate the abuse of force by powerful States against weak and inferior countries without proceeding to all the extremities of war. For him, a blockade could only be an act of war. The pretended pacific blockade could thus not claim a place as an institution of international law. See Mr Gibson Bowles, House of Commons, 2 August 1893: Great Britain, Parliament, *The Parliamentary Debates authorised Edition* (above, n. 533), col. 1147–1150. See also Mr Gibson Bowles, House of Commons, 27 July 1893: Ibid., col. 660, where he peremptorily stated that pacific blockade did not have the support of any international lawyers. Sir William Vernon Harcourt who served then as Chancellor of the Exchequer agreed with Gibson Bowles that a blockade which interfered with the ships under the flags of third Powers was a belligerent blockade. Nevertheless, he stressed that pacific blockade was a lawful species of reprisals insomuch as it did not apply to ships of third countries. See The Chancellor of the Exchequer (Sir W. Harcourt), House of Commons, 2 August 1893: Ibid., col. 1151–1152. In fact, Harcourt's opinion was not insignificant. He was, indeed, considered an authority in international law during his lifetime as he held the chair of Whewell professor of International Law in the University of Cambridge from 1869 until 1887. See Alfred George Gardiner, *The Life of Sir William Harcourt*, 1st vol. (London/Bombay/Sydney: Constable & Company, 1923), 194.

This pretended pacific blockade evokes in many respects the blockade of Formosa. Indeed, the French Government claimed in both cases the existence of a 'state of reprisals' in order to institute these blockades.[547] The claims, however, were rather dubious and could not hide the French colonial ambitions in the background.

As to the blockade of Crete in 1897–1898, the Concert of Europe established it in order to preserve peace. As a matter of fact, in spite of the great Powers' injunction to withdraw troops and naval forces, Greece persisted in trying to annex Crete by providing military support to the islanders' uprising against Ottoman rule.[548] So, the blockade began on 21 March 1897 and aimed to prevent reinforcement. It was directed against all the ships flying the Greek flag. The vessels under other flags could enter the blockaded ports unless they carried supplies for the insurgents or troops. Therefore, the blockading Powers reserved the right of visit.[549] Despite these measures, war officially broke out between Greece and the Sublime Porte.[550] The great Powers, nevertheless, maintained the blockade so that Crete remained outside of the theatre of war.[551] It was only a year after the signature of a peace treaty between the warring nations that the blockade was ultimately lifted.[552]

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546 See Prince Vadhana to Mr Develle, 29 July 1893: Great Britain, F. O., *BFSP 1894–1895* (above, n. 540), 288; and the Notification of Raising of Blockade, 3 August 1893: Ibid., 353. See also the Peace Treaty between France and Siam, 3 October 1893: Ibid., 187–9.

547 See the Second Declaration of Blockade, 29 July 1893: Ibid., 352.

548 See the great Powers' note presented to the Greek Government, 2 March 1897: Great Britain, F. O., *BFSP 1898–1899* (91st vol.; London: His Majesty's Stationery Office, 1902), 175–6; and Mr Métaxas to the Marquess of Salisbury, 10 March 1897: Ibid., 174–5.

549 See the British Notification of the Blockade of the Island of Crete, 19 March 1897: Great Britain, F. O., *BFSP 1896–1897* (89th vol.; London: His Majesty's Stationery Office, 1901), 446.

550 See the Greek Prime Minister's declaration in the Greek Chamber of Deputies, 6 [O.S.]/18 [N.S.] April 1897: Great Britain, F. O., *BFSP 1898–1899* (above, n. 548), 227–8.

551 Cf. The Marquess of Salisbury to Sir N. O'Conor, 20 April 1897: Ibid., 226; The Marquess of Salisbury to Sir Clare Ford, 20 April 1897: Ibid., 228; The First Lord of the Treasury, House of Commons, 26 April 1897: Great Britain, Parliament, *The Parliamentary Debates, authorised Edition. Fourth Series, Commencing with the Third Session of the Twenty-sixth Parliament of the United Kingdom of Great Britain and Ireland* (48th vol.; London: Waterlow & sons, 1897), col. 1076.

552 See Sir P. Currie to the Marquess of Salisbury, 4 December 1897: Great Britain, F. O., *BFSP 1898–1899* (above, n. 548), 465; British Notification raising the Blockade of the Island of Crete, 12 December 1898: Ibid., 113.

This blockade —similar in nature to the blockade of Greece in 1886— was not officially presented as a pacific blockade. George Curzon, the British Under-Secretary of State for Foreign Affairs, called it nothing more than a measure of police that did not amount to a state of war with either Greece or Turkey.[553] Nevertheless, a couple of weeks before the blockade effectively started, the MP for Sunderland asked the Attorney-General Sir Richard Webster whether the blockade would be belligerent or pacific. The latter did not know but emphasised the distinction between the two kinds. On the one hand, pacific blockade could be directed only against the ships of the target country. On the other, a belligerent blockade —which he also named blockade *jure gentium*— applied to all ships indistinctly and implied the existence of a state of war.[554]

Once established, the character of the blockade remained unclear. Nobody seemed willing or able to tell whether the blockade was pacific or belligerent.[555] That explains why, in view of the notification of the blockade, John Sherman, U.S. Secretary of State, "confined [himself] to […] not conceding the right to make such a blockade […], and reserving the consideration of all international rights and of any question which may in any way affect the commerce or interests of the United States."[556]

Thus, it clearly appears that the declaration adopted by the Institute in 1887 failed to dictate the conduct of the blockading Power in both cases (as well as in the blockade of Zanzibar). However, the legality of the said

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553 Mr Curzon, House of Commons, 25 March 1897: Great Britain, Parliament, *The Parliamentary Debates authorised Edition*: *Fourth Series, Commencing with the Third Session of the Twenty-sixth Parliament of the United Kingdom of Great Britain and Ireland* (47th vol.; London: Waterlow & sons, 1897), col. 1311.

554 The Attorney General, House of Commons, 9 April 1897: Great Britain, Parliament, *The Parliamentary Debates, authorised Edition* (above, n. 551), col. 861.

555 For instance, three weeks after the beginning of the blockade, Harcourt —now Leader of the Opposition— asked the British Government who were the neutrals and the belligerents in the issue since the notification of the blockade explicitly used the term "neutral Powers". See Sir W. Harcourt, House of Commons, 12 April 1897: Ibid., col. 984. Arthur Balfour taunted him by responding that he was not as well-versed in international law as Harcout who could surely teach the House about pacific blockade. See The First Lord of the Treasury, House of Commons, 12 April 1897: Ibid., col. 999. Balfour's derision does not say whether the British Government truly believed that the blockade of Crete was 'pacific'.

556 Mr Sherman to Sir Julian Pauncefote, 26 March 1897: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 6, 1897.* (Washington: GPO, 1898), 255.

pacific blockades was seriously challenged. This calling into question may support the view that the Institute succeeded, after all, in making pacific blockade become recognised as a lawful measure of self-help in international law, provided the shipping of third States remained unaffected.

4. A Custom of International Law?

(a) "Mais si la doctrine proteste, la politique agit"[557]

With these words written in 1896, Alphonse Rivier, Swiss lawyer and Nys's predecessor at the chair for public international law in Brussels, wanted to stress that he saw evidence in the repeated State practice that pacific blockade had indisputably gained a place amongst the lawful remedies of international law. He noted that a strong party amongst legal scholars vigorously opposed this measure for being an act of war that really disrupted the state of peace. Nevertheless, he gave to understand that pacific blockade now came under customary law.[558]

This assertion is rather peremptory. In fact, two elements were needed to form an international custom: a *repetitio facti* and the *opinio juris*.[559] Rivier seemed to consider the first component sufficient. So, he confined him-

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557 The whole sentence is: "Mais si la doctrine proteste, la politique agit, et il n'est plus guère possible aujourd'hui de dénier au blocus le caractère d'une institution du droit des gens actuel." (Rivier, *Principes du droit des gens* (above, n. 226), 198).

558 Ibid., 198–199. Yet, he observed that the absence of interference with the shipping of third Powers achieved a compromise in legal doctrine that gave pacific blockade the recognition as a species of reprisals.
Other authors, like Rivier, viewed in the repeated occurrences of pacific blockade the existence of a legal institution. See, e.g., Poinsard, *Études de droit international conventionnel* (above, n. 535), 83; Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (above, n. 523), 36; Söderqvist, *Le blocus maritime* (above, n. 475), 137; Hershey, *The Essentials of International Public Law* (above, n. 459), 345. But cf. Walker, *A Manual of Public International Law* (above, n. 405), 99: "Whether Pacific Blockade in any form has established its title to international recognition as a legal measure of coercion falling short of war is a question of historic fact. At present, *in view of the paucity of instances*, the divergence in the character of the actual operations in those instances and the disputes which arose thereon, we must be content to say that the title is not yet practically established." (emphasis added).

559 E. Chauveau, *Le droit des gens ou Droit international public*: *Introduction (notions générales – historique – méthode)* (Paris: Arthur Rousseau, 1891), no. 47.

self to enumerating the instances of blockade bereft of belligerency. In other words, he did not appear to have looked critically at each case individually.

However, a close examination of the cases of so-called pacific blockade does not show a consistent practice. There was undoubtedly a recurrence of instances of blockade short of war after 1887, but they barely bore resemblance, except for the absence of an overt state of war between the blockading and the blockaded States. Besides, the blockade of Siam was the only example that was called 'pacific' by the blockading Power, namely here the French Government. The other instances were either a measure of police by great Powers or a belligerent blockade. Still, many lawyers classified those cases as instances of pacific blockade, but without referring to the criteria set out in the Institute's declaration. In fact, those so-called pacific blockades were hardly permissible since at least one of the conditions was missing.

Those controversial cases, nevertheless, rekindled the debate about pacific blockade in legal doctrine. As a consequence, the study of this topic enjoyed a revival of interest that is observable in the variety of works —often doctoral theses— dealing fully or partially with the institution of pacific blockade.[560]

(b) Dialogue of the Deaf

Far from all lawyers shared Rivier's view. For example, in 1888, Émile Acollas, a French professor of law who is remembered as one of the founders of the League of Peace and Freedom, viewed pacific blockade as a concealed way of waging war. That is why he deplored that some publi-

560 See, i.a., Barès, *Le blocus pacifique* (above, n. 81); Ducrocq, *Représailles en temps de paix* (above, n. 81); Hogan, *Pacific blockade* (above, n. 518); Söderqvist, *Le blocus maritime* (above, n. 475); Hermann Staudacher, *Die Friedensblockade*: *Ein Beitrag zur Theorie und Praxis der nichtkriegerischen Selbsthilfe* (Staats- und völkerrechtliche Abhandlungen, 7/3; Leipzig: Duncker & Humblot, 1909); Teyssaire, *Le blocus pacifique* (above, n. 81); Falcke, *Le blocus pacifique* (above, n. 40); Hiller, 'Die Friedensblockade und ihre Stellung in Völkerrecht' (above, n. 45); Ho, 'Pacific blockade with special reference to its use as a measure of reprisal' (above, n. 81).

cists gave their approval to the measure merely because the great European Powers had repeatedly resorted to such a blockade.[561]

Despite its short duration and geographical remoteness, the blockade of Siam in 1893 reopened the discussion of the legality of pacific blockade as more voices were heard refusing to consider this measure a legitimate institution of international law. For example, an Italian publicist named Oreste Da Vella called to ban pacific blockade from international law and harshly condemned lawyers who corrupted the role of science by trying to legitimise a revolting practice introduced for mere political purposes. According to him, a blockade could only be an act of war that had to be preceded by a declaration of war and could then apply against neutral shipping. That is why he disagreed with the Institute's view that pacific blockade could be deemed a lawful coercive measure. Furthermore, he believed that non-forcible means like good offices, mediation and arbitration were better suited to prevent war than a pacific blockade. He applauded, therefore, the severe censure of Great Britain on the occasion of the blockade of Siam and hoped that this protest might pave the way to a general declaration by the neutral nations for the abolition of this deceitful practice.[562]

A couple of years after him, another lawyer also challenged the place of pacific blockade in international law. It was the young British lawyer Thomas Baty. Yet, unlike most authors, he attached little importance to the eventual impact of pacific blockade on the shipping of third States.

For Baty, pacific blockade could not be approved as a species of reprisals for being highly excessive and used to enforce dubious claims not always quantifiable in pecuniary terms. He believed that pacific blockade was not a lesser evil than war but actually amounted to war. In fact, he looked upon it as an insolent and one-sided measure because the target country alone felt the harshness of the blockade as long as it did not comply with the too-often frivolous demands of the blockading Power. Beyond that, what convinced Baty that pacific blockade meant war was the unacceptable dilemma that it posed for the target country. Either the blockaded State denounced pacific blockade as war or submitted. The first alternative was no option because, if so, the target country would incur the wrath of the international community for disturbing the peace and because it would suffer the calamities of war since its enemy —who was stronger— would already

561 Émile Acollas, *Le droit de la guerre* (Le droit mis à la portée de tout le monde; Paris: Librairie Ch. Delagrave, 1888), 34f.

562 Oreste Da Vella, 'Il blocco dei porti del Siam e i blocchi pacifici', *Nuova Antologia di Scienze, Lettere ed Arti* 47 (3rd ser.) (1893), 295–308.

be strategically in position to go on the offensive. So, the submission was the only way. However, this did not mean that the assailed State consented not to treat the blockade as war. Therefore, Baty strongly urged to regard such blockades in time of peace as a fully fledged war. He viewed it as necessary, too, on account of the crucial imperative to draw a clear and sharp line between war and peace, at a time when war no longer required a formal proclamation to commence. For Baty, the conclusion was straightforward: pacific blockade could not be considered an institution of international law since it was deprived of intrinsic righteousness.[563]

Nonetheless, it was the blockade of Crete —geographically closer to the main authors on international law— that generated the most reactions in legal doctrine. A large number of lawyers kept defending the institution of pacific blockade. Two authors in particular —Thomas Barclay, British international law expert, and Antoine A. Rontiris, Greek law professor at Athens— both noted that the past instances of pacific blockade were mainly of dubious legality and that the course of action, especially towards the shipping of third States, varied from case to case. Nonetheless, they gave their approval to pacific blockade, particularly in the form adopted by the Institute, since it was a mild alternative to war. Indeed, Rontiris judged that this measure fulfilled the new expectations of civilisation which demanded the settlement of disputes without the recourse to war. That is why, unlike Barclay who was less bold to take a categorical stance, he did not question the place of pacific blockade in international law.[564]

However, according to Lawrence, "[the great Powers'] proceedings have thrown the whole law of Pacific Blockade back into obscurity."[565] Lawrence expressed bewilderment because the blockading Powers did not comply with the condition laid down by the Institute that a pacific blockade could not have an impact on the ships of third States.[566] The two British legal scholars Frederick Edwin Smith (later titled Earl of Birkenhead) and Norman Wise Sibley also reached the conclusion that the block-

563 Baty, 'The Institute of International Law on Pacific Blockade' (above, n. 532). He understood that great Powers obviously preferred resorting to pacific blockade in order to resolve difficulties flowing from war: the question of prestige of waging war against a smaller State, some constitutional restrictions, the uncertainty of the outcome of war, the onus of beginning war, etc.

564 Cf. Barclay, 'Les blocus pacifiques' (above, n. 465); Rontiris, 'De l'évolution de l'idée de blocus pacifique' (above, n. 522).

565 Thomas Joseph Lawrence, *The principles of international law* (3rd edn., Boston: D. C. Heath & Co., 1900), 298 fn. 3.

566 Ibid.

ade of Crete destroyed the consensus by which pacific blockade became acceptable in international law. In fact, they identified that the great Powers were striving to fully assimilate pacific blockade to belligerent blockade with all its attendant consequences. They, thus, predicted future conflicts between blockaders and neutrals.[567]

In a condensed version of his previous article, Baty restated his views in 1898 and severely criticised Barclay's argument that political usages create international practices. He believed that legal scholars had, in fact, a substantial role to play in making an objective and impartial judgement upon those political usages, i.e. acting as a filter rather than merely registering them.[568]

Georgios Streit, another professor of law at Athens, condemned pacific blockade for being a measure utterly incompatible with a state of peace since it affected the independence and equality between States. He argued that pacific blockade went beyond lawful reprisals because it allowed the ships of the blockading Power to infringe on the sovereign territory of the target country. Besides, only strong States made use of this measure against smaller and weaker countries. Therefore, he could not agree with Perels that all States had the right to establish a pacific blockade but not the same capacity to enjoy it. This reflection inspired him with the remark that the resort to pacific blockade actually constituted a privilege of the great Powers. For him, such a situation could not be tolerable in international law.[569]

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567 Smith and Sibley, *International law as interpreted during the Russo-Japanese War* (above, n. 240), 362–3. Cf. Teyssaire, *Le blocus pacifique* (above, n. 81), 82.

568 Thomas Baty, 'Les blocus pacifiques', *RDILC* 30 (1898), 606–9, at 609.

569 See Georges Streit, 'La question crétoise au point de vue du droit international', *RGDIP 7* (1900), 301–69, at 347–356, esp. 350–351. "Mais, si la possibilité de la réalisation d'un droit n'existe en principe que pour une catégorie de personnes – à savoir pour les forts vis-à-vis des faibles, – n'est-on pas conduit à dire que le droit lui-même n'existe que pour cette catégorie et devient dès lors un *privilège*? M. Perels ne saurait certainement admettre que le droit international reconnaît aux États forts des privilèges vis-à-vis des États faibles." (at 351, emphasis in original).

(c) Opinio Juris

As it stood at the turn of the nineteenth century, the debate in legal theory was somehow exhausted. The divergence of opinions crystallised and seemed irreconcilable. Yet, the fact was that a shift in legal doctrine appeared to have taken place in favour of the recognition of pacific blockade since the Heidelberg declaration. There were still some legal scholars who categorically refused to admit that pacific blockade had entered international law. But many of those who entertained such a view were actually concerned by the adverse effects on the navigation of third States.[570] On the other hand, pacific blockade received the support of the majority of lawyers because it was viewed as a special measure of reprisals of lesser evil than war. That is why most of them fell in with the decision of the Institute that pacific blockade had to be directed only against vessels belonging to the target country, although some still held the view that it could interfere with the shipping of third States.[571] As a result, Westlake could say on

570 Cf. Kleen, *Lois et usages de la neutralité* (above, n. 230), 644–655; Gaston Compin, *Essai sur le blocus maritime en temps de guerre*, Thèse pour le doctorat de la Faculté de droit de l'Université de Paris (Paris: Arthur Rousseau, 1899), 2–3; Despagnet, *Cours de droit international public* (above, n. 27), 788–9; Bonfils, *Manuel de droit international public (droit des gens)* (above, n. 524), 708f. See also John Shuckburgh Risley, *The Law of War* (London: A. D. Innes & Co., 1897), 60 and 62, who noted that pacific blockade exceeded mere reprisals pursuing compensation. Nevertheless, he did not seem to challenge the measure beyond that.

571 Cf. José Joaquín Larrain y Zañartu, *Nociones de derecho internacional marítimo segun los mas recientes progresos de la ciencia*: *Adaptacion a las leyes i preceptos de Chile, i como testo de la Escuela Naval i libro de consulta para los oficiales de la Marina de Guerra, del testo de A. Lemoine, capitan de fragata i Licenciado en Derecho en Francia* (Santiago de Chile: Imprensa Nacional, 1892), 119–20; Piédelièvre, *Précis de droit international public ou droit des gens* (above, n. 56), 103; John M. Gover, 'Current notes on international law', *The Law Magazine and Law Review* 22 (4th ser.) (1896–97), 182–94, at 182–8; Letter of 5 March 1897: Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)* (above, n. 26), 11–3; Manuel J. Mozo, *Tratado elemental de derecho de gentes y marítimo internacional*: *con varios apéndices que contienen documentos nacionales y extranjeros referentes al asunto* (Madrid: A. Avrial, 1898), 303–4; Antoine Pillet, *Les Lois actuelles de la Guerre* (Paris: Arthur Rousseau, 1898), 142–3; George Grafton Wilson and George Fox Tucker, *International law* (New York/Boston/Chicago: Silver, Burdett and Company, 1901), § 93; Albert Zorn, *Grundzüge des Völkerrechts* (Webers Illustrierte Katechismen, 79; 2nd edn., Leipzig: J. J. Weber, 1903), 243–4; Moore, *A digest of international law* (above, n. 222), 135; Söderqvist, *Le blocus maritime* (above, n. 475), 132–9; Westlake, 'Pacific Blockade' (above, n. 438), 21–2; Teyssaire, *Le blocus pacifique* (above, n. 81), 93–6; Luigi Olivi, *Manuale di dirit-*

the eve of World War One that "[…] pacific blockade as against the quasi-enemy is too well established as a recognised institution to be longer attacked with serious hope of success."[572]

As a matter of fact, the topic of pacific blockade became a burning issue because the measure raised serious objections. However, the jurists are mainly to blame for this. They literally invented pacific blockade by giving their approval to an illegal proceeding of the great Powers. In very few cases, those blockades bereft of belligerency were called 'pacific' by diplomats and statesmen themselves. Still, it was rather the work of publicists who characterised them so, irrespective of the lack of common features between the cases. Therefore, as the list of pretended cases grew, so the impression that pacific blockade was an admitted practice was reinforced. This vicious circle went on until the legality of pacific blockade became an undeniable state of affairs. In addition, the Institute's declaration represented a significant milestone in this process.

The result was, thus, that pacific blockade entered international law willy-nilly, although the applicable rules, in particular to third States, remained undefined. However, the protests of third States at the time of the blockades of Formosa, Siam and Crete reveal that Great Britain and the United States recognised pacific blockade only under the terms spelt out in the Institute's declaration of 1887, i.e. as long as a pacific blockade did not impact foreign shipping. They are indicative of an *opinio juris*.

At around the same time, pacific blockade was taken into account in diplomatic circles as a legitimate institution of international law. For instance, Article 1 Paras. 2 and 3 of the Constantinople Convention of 1888 provided the free navigation of the Suez maritime canal in time of both war and peace as well as the ban on blockading it in any way. During the discussion, the Italian jurist Augusto Pierantoni pointed out that a pacific

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to internazionale pubblico e privato (Piccola biblioteca scientifica, 8; 2nd edn., Milano: Società editrice libraria, 1911), 488–91.

It must not be lost sight of the fact that pacific blockade was also admitted by some as a form of intervention or a measure of police. Cf., e.g., Wagner, *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts. Eine historisch-kritische und thetische Untersuchung* (above, n. 36), 80–1; Oppenheim, *International Law* (above, n. 25), 43; Ullmann, *Völkerrecht* (above, n. 539), 458; Hershey, *The Essentials of International Public Law* (above, n. 459), 345 fn. 9. For his part, Franz von Liszt, *Das Völkerrecht*: *systematisch dargestellt* (Berlin: O. Haering, 1898), 206, looked upon pacific blockade just as a sort of intervention.

572 Westlake, *International Law* (above, n. 25), 17.

blockade fell within the scope of this stipulation.[573] Another example is the arbitration treaty of 23 January 1905 between Spain and Sweden-Norway —concluded pursuant to Article 19 of the convention (I) for the peaceful settlement of international disputes signed on 29 July 1899 at the First Hague Conference— which explicitly stipulated that the parties ought to submit any pecuniary claim stemming from a pacific blockade to the Permanent Court of Arbitration and ought not oppose the exception of vital interests and independence.[574]

During the work of the fourth commission of the Second Hague Conference in 1907, dealing with maritime warfare, the Dutch delegate, Willem Hendrik de Beaufort, maintained that the commission should limit itself to the study of the rules applicable to blockade in time of war and examine neither the question of the admissibility of pacific blockade nor of its conditions.[575] Then, at the London Naval Conference of 1909 where a Declaration concerning the Laws of Naval War was drafted, pacific blockade was expressly mentioned as being not covered by that declaration.[576]

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573 See Tobias Michel Karel Asser, 'La convention de Constantinople pour le libre usage du canal de Suez', *RDILC* 20 (1888), 529–58, at 536–537.

574 See Art. 3: Ramón de Dalmau y de Olivart, *Tratados y documentos internacionales de España*: *publicados en la Revista de derecho internacional y política exterior bajo la dirección del Marqués de Olivart*, 1st vol. (Madrid: Estab. tipográfico de los hijos de R. Álvarez á cargo de Arturo Menéndez, 1905), 26.

575 See the eleventh meeting of the fourth commission on 2 August 1907: France, Ministère des Affaires étrangères, *Deuxième conférence internationale de la paix. La Haye 15 juin – 18 octobre 1907. Actes et documents.*, 3rd vol. (La Haye: Imprimerie nationale, 1907), 893. For a translation, see James Brown Scott, *The Proceedings of the Hague Peace Conferences*: *Translation of the Official Texts*, prepared in the Division of International Law of the Carnegie Endowment for International Peace, 5 vols. (Publications of the Carnegie Endowment for International Peace: Division of International Law (Washington); New York: OUP, 1920–1921), Conference of 1907, 3rd vol., 884.

576 France, Ministère des Affaires étrangères, *Conférence navale de Londres*: *1908–1909* (Documents diplomatiques; Paris: Imprimerie nationale, 1909), 13. For a translation, see James Brown Scott, *The Declaration of London, February 26, 1909*: *A collection of official papers and documents relating to the international naval conference held in London, December, 1908–February, 1909*, with an introduction by Elihu Root (New York: OUP, 1919), 135. Thereupon, Gibson Bowles said that "while the Declaration narrows, trammels, restricts, and ties up by the minutest regulations that blockade in war which is as lawful as justifiable, it leaves untouched in anything that blockade in peace which is as unlawful as it is unjustifiable." He regarded this fact as a proof of the falseness of the signatory Powers which claimed to be motivated by feelings of humanity, civilisation, justice, etc. See Thomas Gibson Bowles, *Sea law and sea power as they would be affected by*

So, although pacific blockade never was the subject of a binding international agreement, these sporadic references show that the diplomats acknowledged the existence of the measure and took it into consideration in their negotiations. Hence, the place of pacific blockade in international law could hardly be disputed.[577]

IV. The Larger Issue of Armed Reprisals

1. Twilight Zone

(a) Variety of Armed Reprisals

Throughout the nineteenth century, pacific blockade was the main form of armed reprisals and, therefore, the most studied. It was, indeed, as a measure of reprisals that pacific blockade secured recognition in international law. Nevertheless, there were also other acts of force resorted to by way of reprisals.

In the narrow sense, reprisals still meant until the end of that century the seizure and sequestration of property or ships belonging to the target country and found on the high seas or in the ports of the reprisal-taking Power.[578] This concept of seizure and sequestration of property, however, had received a broader meaning which led to include in the category of reprisals the occupation of territory or custom houses of the wrongdoing State. This is what Jules Ferry, French President of the Council, actually called in 1884 a "politique des gages" because the occupation of the island

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recent proposals; with reasons against those proposals (London: John Murray, 1910), 189.

577 Indeed, James Brown Scott, 'The Declaration of London of February 26, 1909', *AJIL* 8 (1914), 274–329, at 286, regarded pacific blockade as "a recent comer in international law, but destined, it would seem, to stay."

578 See, e.g., Rivier, *Principes du droit des gens* (above, n. 226), 194–195. There were examples of such reprisals still until the outbreak of World War One. In 1872, e.g., the German corvette *Vineta* captured two warships in the harbour of Port-au-Prince in response to the Haitian Government's refusal of paying Germany compensation. See Perels, *Manuel de droit maritime international* (above, n. 514), 178–9; Liszt, *Das Völkerrecht* (above, n. 571), 205. Another instance is the capture of two Venezuelan gunboats by the Netherlands in 1908. See Lawrence, *The principles of international law* (above, n. 6), 336f. On this crisis, see further Embert J. Hendrickson, 'Root's Watchful Waiting and the Venezuelan Controversy', *The Americas* 23 (1966), 115–29, at 121–126.

of Formosa —more precisely, the territory around Keelung— was contemplated only as a pledge until satisfaction was given.[579]

This latter form of reprisals was chiefly employed in the last quarter of the nineteenth century and the first decades of the next one.[580] For instance, in 1895 Great Britain occupied the Nicaraguan town of Corinto to seek redress for the incarceration of the British vice-consul.[581] In 1901, France took control of Mytilene and its custom houses by way of reprisals against the Ottoman Empire.[582] In 1914, the United States occupied the Mexican town of Veracruz as well as the custom house.[583] According to a French professor of public international law at Cairo, such a course of ac-

579 M. le président du conseil, *Chambre des députés*, 26 November 1884: *J.O.R.F.*, 27 November 1884, 2487–8.

580 Earlier cases of occupation of territory by way of reprisals can be identified retrospectively like, e.g., the French conquest of Algeria that officially began on the pretext of obtaining satisfaction for an insult to a French diplomat. See Neff, *Justice among Nations* (above, n. 266), 335. Cf. Wurm, 'Selbsthülfe der Staaten in Friedenszeiten.' (above, n. 355), 91.

581 See United States, Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, transmitted to Congress, December 2, 1895*, Part II (Washington: GPO, 1896), 1025–34; and also Hannis Taylor, *A treatise on international public law* (Chicago: Callaghan & Company, 1901), 441–2; Louter, *Le droit international public positif* (above, n. 51), 203; Abbot Lawrence Lowell, 'The Council of the League of Nations and Corfu', *League of Nations* 6 (1923), 169–75, at 170. But Smith and Sibley, *International law as interpreted during the Russo-Japanese War* (above, n. 240), 359f., just referred to a pacific blockade.

582 See Maurice Moncharville, 'Le conflit franco-turc de 1901', *RGDIP* 9 (1902), 677–700. Cf. Raymond Robin, *Des Occupations militaires en dehors des Occupations de Guerre (étude d'histoire diplomatique et de droit international)*, avec une Préface de M. Louis Renault (Paris: Libraire de la société du Recueil Sirey, 1913), 583–4.

583 See Editorial Comment, 'Mediation in Mexico', *AJIL* 8 (1914), 579–85; Walther Schoenborn, *Die Besetzung von Veracruz: (Zur Lehre von den völkerrechtlichen Selbsthilfeakten)*, mit einem Anhang: Urkunden zur Politik des Präsidenten Wilson gegenüber Mexiko (Berlin: W. Kohlhammer, 1914); Charles Cheney Hyde, *International law chiefly as interpreted and applied by the United States*, 2nd vol. (Boston: Little, Brown, and Company, 1922), 177–179. Falcke, *Le blocus pacifique* (above, n. 40), 205–6, told that the cabinet of U.S. President Woodrow Wilson contemplated the establishment of a pacific blockade. However, the plan was dropped because the U.S. Government did not deem effective enough a blockade that would apply only to U.S. and Mexican vessels. Indeed, the United States had held the view since at least the blockade of Venezuela in 1902–1903 that a pacific blockade could not affect the navigation of third States. So, it was decided instead to occupy the town and custom house of Veracruz with the

tion, especially when it targeted custom houses, had the advantage of not impacting third States, unlike pacific blockade.[584]

Finally, the bombardment or destruction of towns or villages was sometimes treated also as an operation of reprisals, although it does not look different from a punitive expedition at all.[585] An example is the shelling of Greytown in 1854 by the U.S.S. *Cyane*.[586]

So, in the broad sense, reprisals had "come to cover, and it is the only term which does cover generically, an indeterminate list of unfriendly acts […] to which resort is had in order to obtain redress from an offending State without going to war with it."[587]

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aim of preventing the importation of arms carried by a German steamship from reaching the Mexican President Huerta. The ship was detained but almost immediately released with apologies owing to the absence of war that made such detention illegal. On this incident, see Thomas Baecker, 'The Arms of the *Ypiranga*. The German Side', *The Americas* 30 (1973), 1–17.

584 Moncharville, 'Le conflit franco-turc de 1901' (above, n. 582), 699f.

585 Neff, *War and the Law of Nations* (above, n. 2), 229. As a matter of fact, the burning of villages was often carried out against primitive tribes or lawless nations. See the references mentioned in Colbert, *Retaliation in international law* (above, n. 6), 80 fn. 62; and Neff, *War and the Law of Nations* (above, n. 2), 229 fn. 49. Such expeditions (punitive or of reprisals) were usually viewed as mere measures of police. Cf. Thomas Joseph Lawrence, *Essays on Some Disputed Questions in Modern International Law* (2nd edn., Cambridge: Deighton, Bell and Co., 1885), 274; Annual message of President Theodore Roosevelt to the Congress, 3 December 1901: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 3, 1901.* (Washington: GPO, 1902), XXXVI. Such was, e.g., the U.S. Government's opinion about Greytown. See President Pierce's annual message, 4 December 1854, quoted in Moore, *A digest of international law* (above, n. 222), 115.

586 See *supra*, at 134.

587 Letter of 26 December 1908: Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)* (above, n. 26), 19. See also Wheaton, *Elements of international law* (above, n. 464), 340; Ferguson, *Manual of International Law* (above, n. 484), 227–229; Nys, *Les origines du droit international* (above, n. 61), 62; Lawrence, *The principles of international law* (above, n. 6), 337.
However, Bluntschli and Clavo tried to draw up a list of lawful acts of reprisals. They only named measures not involving any use of force, i.e. the so-called negative reprisals, like the sequestration of property belonging to the wrongdoing State or its nationals and found in the territory of the reprisal-taking country; the interruption of commercial, postal, telegraphic relations; the termination of treaties; etc. But unlike Calvo, Bluntschli did not consider the enumeration exhaustive. Cf. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten* (above, n. 485), 280; Carlos Calvo, *Dictionnaire de droit international public et privé*,

(b) The Uncertain Dividing Line between Peace and War

The use of belligerent measures by way of reprisals (even in a milder form, like pacific blockade when it did not impede the navigation of third States) raised serious issues of compatibility with a state of peace. In general, reprisals were considered as not giving rise to a state of war and all its attendant consequences.[588] Thus, their employment did not cause the abrogation of the existing treaties or the suspension of the diplomatic relations; the proceeding terminated without a peace treaty; and third States were supposedly not affected by the measures taken. Moreover, the acts of reprisals, unlike war, were limited in scope and localised.[589] These effects flowed directly from a clear-cut distinction between reprisals and war.

However, the resemblance between the acts of armed reprisals and their belligerent equivalents made a distinction resting on objective criteria impossible. The differentiation of armed reprisals from war then relied exclusively on a 'subjective' test which consisted of sounding out the intent of the Powers immediately concerned.[590] So, although the unilateral use of force implied *prima facie* the existence of a state of war between the parties, the absence of *animus belligerendi*, viz. the intention of waging war, meant that the acts fell within the class of reprisals and did not set up a state of war.[591]

The difficulty, nevertheless, lied precisely in finding out the intention of the assailing country in order to distinguish between war *de facto* and bare reprisals. Hence, the continuance of peaceful relations or the outbreak of war depended largely on the attitude of the target country. Indeed, it took

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2nd vol. (Berlin: Puttkammer & Mühlbrecht, 1885), 161–162. In fact, Thomas E. Holland did not recommend drafting a definite list because it would restrict the reprisal-taking country's freedom of action. See Letter of 26 December 1908: Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)* (above, n. 26), 20.

588 See, e.g., Liszt, *Das Völkerrecht* (above, n. 571), 203.

589 Cf. M. le président du conseil, *Chambre des députés*, 26 November 1884: *J.O.R.F.*, 27 November 1884, 2487; Sainte-Croix, *Étude sur l'exception de dol en droit romain/La déclaration de guerre et ses effets immédiats; Étude d'histoire et de législation comparée* (above, n. 44), 228–9; Letter of 26 December 1908: Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)* (above, n. 26), 19; Lawrence, *The principles of international law* (above, n. 6), 337. See further Arnold D. McNair, 'La terminaison et la dissolution des traités', *RdC* 22/II (1928), 463–537, at 512–513.

590 See Lawrence, *The principles of international law* (above, n. 6), 334.

591 Cf. Hall, *A treatise on international law* (above, n. 46), 382–383; 391.

two to make a war, according to Lassa Oppenheim's definition of war as the contention between at least two States through the application of armed force. This meant that the use of unilateral acts of force did not imply a state of war unless the target country fought back or decided to treat them as acts of war.[592] From this standpoint, the onus of beginning war fell on the assailed State. The attacking State had to do little more than to deny any intention of making war. As a result, flagrant acts of extreme violence like the occupation of territory or bombardments were professedly committed by way of reprisals without officially breaking the state of peace.

Such a theory was denounced by Baty as untenable. As already set out in an article of 1895–1896 about pacific blockade,[593] he underlined the distress of the target country that had, in the end, no other option than submitting to an overwhelming force. Indeed, armed reprisals were done almost exclusively by strong Powers against small and weak States. That is why the subjective test presented a serious threat to the target country's independence. Furthermore, it gave the strong Powers "a two-edged weapon" to settle their disputes with weak countries because it imposed upon the latter the alternative between the outbreak of war and the compliance with the demands. It, thus, allowed a powerful State to resort to forcible proceedings by betting on the target country's weakness. In this way, the reprisal-taking Power did not need the ascent of the national parliament and supported neither the onus of declaring war nor the risks associated with war. Therefore, against such "conditional war", Baty advocated for treating any act of violence exerted in time of peace as amounting purely and simply to war.[594]

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592 Oppenheim, *International Law* (above, n. 25), 56–57. See also Articles 704 and 714 of David Dudley Field, *Draft. Outlines of an International Code* (New York: Baker, Voorhis & Company, 1872), 467 and 473. In case law, the U.S. Court of Claims, e.g., stated in 1909 that "[w]hile reprisals are acts of war in fact it is for the state affected by them to determine for itself whether the relation of actual war is intended." (*The Schooner Endeavor*, in Charles C. Nott and Archibald Hopkins, *Cases decided in the Court of Claims of the United States*: *At the Term of 1908–9, With Abstracts of Decisions of the Supreme Court in Appealed Cases, From October, 1908, to May, 1909*, 44th vol. (Washington: GPO, 1910), 243).

593 See Baty, 'The Institute of International Law on Pacific Blockade' (above, n. 532), 294–5.

594 Thomas Baty, 'Conditional War.', *LMR* 24 (1898–1899), 436–40.

Baty was not alone to share this view. Many lawyers regarded this proceeding as a real abuse of force by a major State against an inferior Power. Therefore, they argued that the use of armed reprisals involved the existence of a state of war, regardless of whether the target country attempted to resist or not.[595] War, in this context, was understood as the prosecution of a nation's rights by force.[596]

Against such a controversial background, some authors advocated the adoption of the formality of a declaration of war in order to distinguish armed reprisals from war.[597] The first Article of the III Hague Convention of 1907 provided precisely that the opening of hostilities had to be preceded by a declaration of war or, at least, an ultimatum.[598] Westlake explained the term 'hostilities' in this convention as not covering the acts of armed reprisals. A reprisal-taking State did not have then to fulfil the requirement of a declaration of war. Yet, the difficulty to separate reprisals from war remained. Now, Westlake believed that neither the objective test nor the subjective test was adequate in this respect. On the one hand, the acts of armed reprisals could not be distinguished objectively from those of war.

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595 See, e.g., Funck-Brentano and Sorel, *Précis du droit ges gens* (above, n. 36), 229–30; Acollas, *Le droit de la guerre* (above, n. 561), 30 and 32–33 fn. 1; Articles 512 and 518 Para. 3 of E. Duplessix, *La Loi des Nations*: *Projet d'institution d'une Autorité internationale Législative, Administrative et Judiciaire. Projet de Code de Droit international public*, Ouvrage couronné par le Bureau international de la Paix (Concours 1905–1906 – 1er Prix) (Paris: Libraire de la société du Recueil J.-B. Sirey et du Journal du Palais, 1906), 171–3; Nys, *Le droit international* (above, n. 33), 88–9; Despagnet, *Cours de droit international public* (above, n. 27), 782–3; Article 385 of Epitacio Pessôa, *Projecto de Codigo de Direito Internacional Publico* (Rio de Janeiro: Imprensa Nacional, 1911), 160.

596 See, e.g., Despagnet, *Cours de droit international public* (above, n. 27), 782. In 1846, Sir John Dodson, the British Queen's Advocate, defined war in the same way. See P. R. O., F. O. 83–2227, 25 July 1846, quoted in Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 678.

597 See, e.g., Nicolas Bruyas, *De la déclaration de guerre*: *Sa justification. – Ses formes extérieures* (Lyon: A. Rey, 1899), 104–5; Maurel, *De la Déclaration de Guerre* (above, n. 27), 139.

598 "The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." (James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*: *accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations* (Carnegie Endowment for International Peace: Division of International Law; New York: OUP, 1915), 96). About the III Hague Convention of 1907, see Ellery C. Stowell, 'Convention Relative to the Opening of Hostilities', *AJIL* 2 (1908), 50–62.

On the other hand, the effectiveness of the rule laid down by the Second Hague Peace Conference could not depend on an obscure criterion, because the Government exercising acts of force could deny too easily any *animus belligerendi* in order to evade the new obligation. Hence, Westlake argued that the distinction could only lie in the inequality of strength. So, if the Powers immediately concerned were of equal strength, the prospect of resorting to reprisals without causing the outbreak of war was so unlikely that a declaration of war needed to precede the use of force. Otherwise, i.e. when inequality of strength existed to the assailant's advantage, the acts would merely amount to reprisals and would not fall within the scope of the III Hague Convention.[599] By saying that, Westlake seemed to carelessly confirm the employment of armed reprisals as a privilege of the great Powers.

(c) State of Reprisals

Since, however, the existence of a state of war did not depend on a previous declaration of war,[600] it can actually be said that the line dividing armed reprisals from war was blurred to a large extent on account of the absence of an adequate criterion for distinguishing the two types of activity.

Thomas E. Holland warned against this confusion between war and armed reprisals in the light of the blockade of Venezuela established by Germany, Great Britain and Italy. He indeed regarded armed reprisals as not being inconsistent with a state of peace. So, the steps undertaken by way of reprisals prior to 20 December 1902 had not interrupted the peace.

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599 Westlake, 'Reprisals and War' (above, n. 256).
It must be noted that during the works in commission, the Chinese delegate at the Hague Conference of 1907 called for a definition of the concept of 'war'. As he explained, his country had been by the past victim of military operations that were not named war (Colonel Ting, third meeting of the second commission's second subcommission on 12 July 1907: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), The Conference of 1907, 3rd vol., 169). Ellery C. Stowell, one of the members of the U.S. delegation, wrote thereupon that the Governments present at The Hague deliberately avoided defining 'war' because they found it "convenient for reasons of domestic and foreign policy to resort to measures of war while maintaining that no war exists." (Stowell, 'Convention Relative to the Opening of Hostilities' (above, n. 598), 55).

600 See Article 2 of the III Hague Convention of 1907. Cf. Söderqvist, *Le blocus maritime* (above, n. 475), 135.

However, he was not sure whether the establishment of the blockade on that day gave rise to an actual state of war. He stressed that it was neither preceded by any declaration of war nor followed by the announcement of neutrality by a third State. Besides, the settlement of the whole issue through an exchange of protocols provided for the restitution of the ships captured. Finally, he noted that the allies limited peculiarly and localised their action to a mere blockade *jure gentium*. Altogether, being unable to tell whether there had been a war or not, he preferred to call the state of affairs between the conflicting parties a state of "war *sub modo*".[601]

This ambiguous state of affairs regarding the commencement of war when armed reprisals were exercised had sometimes been called a 'state of reprisals', notably by Jules Ferry, French Prime Minister at the time of the blockade of Formosa in 1884.[602] At the same time, the French Councillor of State Léon Béquet argued that a state of reprisals was a state of uncertainty, a twilight zone, during which acts of violence were committed in peacetime but without knowing whether war might break out. For Béquet, the acts *per se* could not set up a state of war. Whereas reprisals pursued redress, war aimed to cause as much damage as possible to the enemy. Hence, the state of peace legally remained unbroken as long as the target country did not consent to provide satisfaction or none of the parties decided to declare war.[603]

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601 Holland, 'War *Sub Modo*' (above, n. 35). In a study of pacific blockade, Hogan said that "it is sometimes extremely difficult to decide whether a blockade is warlike or pacific, and one of the strongest arguments that can be raised against the practice is that it tends to blur that clear line of demarcation which for the general good of the body of states should be drawn between peace and war. […] although its rules are undoubtedly a compromise between those of war and peace, yet every blockade must of necessity be either peaceful or warlike." (Hogan, *Pacific blockade* (above, n. 518), 27). Cf. Teyssaire, *Le blocus pacifique* (above, n. 81), 81–2.

602 Mr Jules Ferry to Mr Patenôtre, 18 August 1884: France, Ministère des Affaires étrangères, *Affaires de Chine et du Tonkin* (above, n. 494), 44.

603 Léon Béquet, 'L'état de représailles', *Le Temps*, 31 August 1884, 1. Cf. with *The Boedes Lust* (*supra*, fn. 255). Also, Lord Macnaghten in *Janson v. Driefontein Consolidated Mines* (1902): "[…] if and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects." (Pollock & Stone, *The Law Reports or The Incorporated Council of Law Reporting. House of Lords, Judicial Committee of the Privy Council, and Peerage Cases* (above, n. 33), 498).

This idea that the use of armed reprisals opened an intermediate state between war and peace was not new. Already in the early days of the theory of pacific blockade, it was sometimes told that the said measure presented all the features of a *status mixtus*.[604] However, most international lawyers refused to abandon the peace/war dichotomy and to acknowledge the existence of a third, intermediary status. There were only acts of reprisals which fell either within a state of war or a state of peace.[605]

In order to remove the existing ambiguity between reprisals and war, it had been suggested from time to time to make obligatory a 'declaration of reprisals' which would clarify whether the acts resorted to were intended, or not, to be warlike.[606] Nevertheless, the proposal remained at the level of a doctrinal idea.

It should be noted that the uncertainty created a factual situation that benefited the great Powers. Indeed, they could evade war while forcefully coercing weaker target countries. The former, thus, enjoyed a real privilege since reprisals allowed them to elude war while achieving their ends. But the same proceeding applied against a State of equal strength would ineluctably lead to the outbreak of war.

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604 See *supra*, at 162 fn. 483.

605 See, e.g., Geffcken, 'La France en Chine et le droit international' (above, n. 33), 145f.; Rivier, *Principes du droit des gens* (above, n. 226), 197; Kleen, *Lois et usages de la neutralité* (above, n. 230), 652 fn. 1; Ducrocq, *Représailles en temps de paix* (above, n. 81), 46–7; Nys, *Le droit international* (above, n. 33), 89. Sometimes though, voices were heard in favour of the abandonment of the dichotomy peace–war and the recognition of an intermediate state. This is, for example, what Prof. de Montmorency urged in 1925 in reaction to a paper read by McNair before the Grotius Society. See Arnold D. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals', *TGS* 11 (1925), 29–51, at 51.

606 See, e.g., Letter of 26 December 1908: Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)* (above, n. 26), 20. Cf. Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (above, n. 230), 412.

2. The Blockade of Venezuela (1902–1903) as Breaking Point

(a) Background

The confusion between armed reprisals and war reached a critical point with the already mentioned blockade of Venezuela in 1902–1903.[607] This incident led to question not only the institution of pacific blockade but the employment of armed reprisals in general.

For several years, both Germany and Great Britain had had serious causes of complaint against Venezuela on account of ill-treatment of all kinds against their subjects as well as pecuniary claims owed to British and German companies.[608] And yet, the representations and threats of taking action failed to secure apology and redress from the Venezuelan Government of Cipriano Castro.

Already in December 1901, the German Government thought fit to inform the United States that it contemplated establishing a pacific blockade enforceable against any ship, including those of third States which would merely be turned away, "[i]n the same manner European States have proceeded on such occasions, especially England and France."[609] Nevertheless, the idea of a joint action by Great Britain and Germany was soon laid on the table.[610] Around mid-November 1902, both aggrieved countries agreed to issue an ultimatum to Castro and to resort to coercion by seizing the Venezuelan gunboats, in the event of refusal. This joint execution of coercive measures would be carried out until a satisfactory settlement was reached for both of them.[611] Their plan was communicated to the U.S. Secretary of State John Hay who, albeit regretting such a step, answered that the United States would not stand against the use of force by European Powers against Central and South American countries, providing that no

607 On this blockade, see esp. Hood, *Gunboat Diplomacy, 1895–1905* (above, n. 47).

608 See the British memorandum of 20 July 1902 and the German one communicated by Count Metternich on 13 November 1902: Great Britain, F. O., *BFSP 1901–1902* (above, n. 281), 1064–1068 and 1083–1084, respectively.

609 German pro memoria, 20 December 1901: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 3, 1901.* (above, n. 585), 196.

610 See, e.g., The Marquess of Lansdowne to Mr Buchanan, 28 July 1902: Great Britain, F. O., *BFSP 1901–1902* (above, n. 281), 1069.

611 The Marquess of Lansdowne to Mr Buchanan, 11 November 1902: Ibid., 1083.

acquisition of territory was intended.[612] Hay's statement was the implicit reassertion of the Monroe Doctrine.

Despite Germany's insistence to institute a pacific blockade which would have effects against the shipping of third Powers, the British Government categorically refused to concede such an extension of the theory of pacific blockade.[613] So, the ships of third States could be neither sequestrated nor driven away. However, a blockade bereft of enforcement against third States lacked effectiveness. That is why, in order to avoid instituting a blockade *jure gentium*, viz. a belligerent blockade, that inevitably created a state of war, Great Britain suggested resorting to other coercive measures like the seizure of custom houses and the temporary military occupation of Venezuelan ports.[614] On this point, the British memorandum added the following remark:

> "The various measures mentioned are, no doubt, all of them, in essence acts of war; if Venezuela chose so to treat them, she would be justified in taking that course. It is, however, plainly in her interests not to regard them in this light, and they form a convenient *mitior usus* which is suitable to the case of a recalcitrant petty State in controversy with Great Powers of overwhelming strength, who, while desiring to obtain proper redress, are unwilling to dismember or destroy a puny antagonist."[615]

In this passage, the British Government tacitly admitted that the use of armed reprisals was a real privilege of the great Powers. Indeed, since the target country was in a position of manifest weakness in comparison to the reprisal-taking State and, therefore, had no interest to treat these acts as being tantamount to war, the state of peace would not be interrupted —to the advantage of the great Powers. In this context, the latter did not need

612 Sir M. Herbert to the Marquess of Lansdowne, 13 November 1902: Ibid., 1084. Cf. W. L. Penfield, 'The Anglo-German Intervention in Venezuela', *NAR* 177 (1903), 86–96, at 87.

613 See the two documents unearthed by Lothar Kotzsch in the British Record Office (P. R. O., F. O. 80/446/17), transcribed in Kotzsch, 'Die Blockade gegen Venezuela vom Jahre 1902 als Präzedenzfall für das moderne Kriegsrecht' (above, n. 28), 420–5.

614 According to the British note, other measures such as the seizure of merchant ships or property would be unavailing against Venezuela since that country's commerce and shipping was too insignificant (Memorandum for Communication to Count Metternich, 29 November 1902, reproduced in Ibid., 423).

615 Memorandum for Communication to Count Metternich, 29 November 1902, reproduced in Ibid., 423 (emphasis in original).

to have recourse to war in order to achieve their goals. Armed reprisals presented a convenient and expedient way of compelling a weaker nation without proceeding to war. This extract clearly shows, too, the prevailing of the subjective test, i.e. war does not break out as long as either party does not resolve to express an *animus belligerendi*.[616]

Finally, the ultimatum was issued but failed to produce results.[617] Reprisals, thus, began with the seizure of Venezuelan ships of war in the port of La Guaira.[618] Nevertheless, the measures did not succeed to break the obstinacy of Castro who, in retaliation, arrested British and German nationals.[619] The necessity to institute a blockade then imposed itself.[620] However, the situation escalated as a British and German squadron shelled two Venezuelan forts and troops were landed to dismantle the artillery.[621] As a consequence, the Venezuelan Government proposed to settle the dispute through arbitration.[622] Great Britain and Germany agreed in principle but not for all claims.[623] Therefore, the coercive measures were not sus-

616 Yet, Great Britain defended the opinion that pacific blockade had to be considered from an objective or material point of view: if a blockade impacted on the shipping of third Powers, it could only mean a belligerent blockade. The subjective test did not prevail here. It shows that the priority was to spare third States at any cost because they could declare the existence of a state of war between the parties involved in the conflict if their interests were directly affected by the blockade. Cf. Kotzsch, *The concept of war in contemporary history and international law* (above, n. 69), 131–41.

617 See The Marquess of Lansdowne to Mr Haggard, 2 December 1902: Great Britain, F. O., *BFSP 1901–1902* (above, n. 281), 1099–101; Mr Haggard to the Marquess of Lansdowne, 7 December 1902: Ibid., 1108.

618 Mr Haggard to the Marquess of Lansdowne, 7 December 1902: Ibid., 1110. Cf. the German memorandum communicated to the U.S. Government, 18 December 1902: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 7, 1903.* (Washington: GPO, 1904), 422–3.

619 See for more details the correspondence of 10 and 11 December 1902: Great Britain, F. O., *BFSP 1901–1902* (above, n. 281), 1110–2.

620 The Marquess of Lansdowne to Mr Buchanan, 11 December 1902: Ibid., 1112–3.

621 Commodore Montgomerie to Admiralty, 16 December 1902: Ibid., 1119–20.

622 Mr White to the Marquess of Lansdowne, 13 December 1902: Ibid., 1116.

623 See The Marquess of Lansdowne to Sir F. Lascelles, 18 December 1902: Ibid., 1124–5.

pended, and a blockade of the coasts of Venezuela commenced on 20 December 1902 with the participation of Italy.[624]

In the end, Castro yielded to "superior force" and consented to recognise the claims of the assailing Powers.[625] Separate protocols of agreement were signed between the parties on 13 February 1903 and, on the next day, the blockade was raised.[626] Venezuela had consented to immediately pay Germany, Great Britain and Italy a sum of 5.500£ each to satisfy the first-rank claims while the other claims should be referred to a Mixed Commission. It also was decided that any other unsettled questions that might arise would fall under the jurisdiction of the Permanent Court of Arbitration. As for the captured Venezuelan ships, they should be restored without any indemnity whatsoever.[627]

It is unclear whether the whole proceeding gave rise to a state of war or not.

On the one hand, the separate protocols signed with Venezuela carefully avoided speaking of a state of war between the parties. The protocol signed with Great Britain even confirmed the continuation of all the bilateral treaties, "*inasmuch as it may be contended* that the establishment of a blockade of Venezuelan ports by the British naval forces has, *ipso facto*, created a state of war between Great Britain and Venezuela, and that any Treaty existing between the two countries has been thereby abrogated".[628] Besides the absence of a declaration of war, it is worth mentioning that the provision regarding the restitution of all the captured Venezuelan ships also seems to echo one of the conditions laid down by the Institute of International Law in 1887 for a pacific blockade to be lawful.[629] Altogether, the

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624 See the British, German and Italian notifications of the blockade: Ibid., 425–7. Italy had previously expressed the wish to join in the effort. See Sir R. Rodd to the Marquess of Lansdowne, 3 December 1902: Ibid., 1101; The Marquess of Lansdowne to Sir R. Rodd, 5 December 1902: Ibid., 1107–8; The Marquess of Lansdowne to Mr Buchanan, 9 December 1902: Ibid., 1109.

625 See Mr White to the Marquess of Lansdowne, 1 January 1903: Great Britain, F. O., *BFSP 1902–1903* (96th vol.; London: His Majesty's Stationery Office, 1906), 439.

626 The Marquess of Lansdowne to Sir M. Herbert, 14 February 1903: Ibid., 506.

627 See the separate protocols of 13 February 1903: Ibid., 99–101, 803–805 and 1172–1174.

628 Art. 7 of the Protocol between Great Britain and Venezuela, 13 February 1903: Great Britain, F. O., *BFSP 1902–1903* (above, n. 625), 100 (emphasis added).

629 Viz. "The ships of a blockaded Power which do not respect such a blockade may be sequestrated. When the blockade is over, they shall be restored to their owners together with their cargoes, but without any compensation whatsoever."

operation against Venezuela had to all appearances the character of reprisals.[630]

On the other hand, there are various elements which contradict the assumption that the blockade might have been only 'pacific'. As a matter of fact, the U.S. Government strongly protested against any extension of the theory of pacific blockade in a way that might impact on the shipping of third Powers.[631] Great Britain acquiesced with the United States and pressed Germany to come around to this view.[632] Although the blockading

630 Such was the opinion of Jules Basdevant, a young French scholar later destined to become President of the International Court of Justice between 1949 and 1952. He was convinced that the blockade of Venezuela was an act of reprisals, which was called war blockade only to satisfy "des subtilités de juriste." For his part, he supported the view that pacific blockade could apply against the shipping of third States too. See Jules Basdevant, 'L'action coercitive anglo-germano-italienne contre le Vénézuéla (1902–1903)', *RGDIP* 11 (1904), 362–458, at 420–425. See also Walther Schücking, 'Rückblick auf den Streit mit Venezuela', *DJZ* 8 (1903), 157–60, at 158–159. But for a contrary view, see Theodore Salisbury Woolsey, 'The passing of pacific blockade', *YaleRev* 11 (May. 1902, to Feb. 1903), 340–6.

631 Mr Hay to Mr Tower, on the one hand, and to Mr White, on the other, 12 December 1902: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 7, 1903.* (above, n. 618), 420 and 452. Before the Permanent Court of Arbitration, the U.S. counsels acting on behalf of Venezuela at The Hague believed that the proceeding of the great Powers indisputably constituted a state of war. Indeed, they put forward that a pacific blockade could only be directed against the ships of the target country according to "all the authorities upon international law" (Case of Venezuela: United States, Senate, *The Venezuelan arbitration before The Hague Tribunal, 1903: The protocols between Venezuela and Great Britain, Germany, Italy, United States, Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway, signed at Washington, May 7, 1903* (Washington: GPO, 1905), 157). According to W. L. Penfield, solicitor to the Department of State and one of the members of the U.S. delegation before the PCA, the United States helped to adjust the theory of pacific blockade by obtaining from "the three leading maritime Powers of the world" the repudiation of the idea that pacific blockade could extend its effects to vessels flying foreign flags. Under these conditions, Penfield agreed to regard pacific blockade as a legitimate species of reprisals milder than open war. See Penfield, 'The Anglo-German Intervention in Venezuela' (above, n. 612), 86; 89–96.

632 Mr Tower to Mr Hay, 14 December 1902: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 7, 1903.* (above, n. 618), 421.

Powers considered superfluous to declare war, the blockade would, nevertheless, be warlike and affect neutral countries.[633]

In any case, the assailing Powers did not want to wage an all-out war against Venezuela. That is why Germany and Great Britain assured the U.S. Government that they would not act beyond a warlike blockade.[634]

Germany did not want to institute a belligerent blockade because, according to Article 11 Para. 2 of the German Imperial Constitution, the consent of the *Bundesrat* was required. See Mr White to Mr Hay, 17 December 1902: Ibid., 454. However, as the *Reichskanzler* Bernhard von Bülow explained to the Emperor, this step was necessary to give Great Britain the assurance that they were on the same page. See Graf von Bülow to Kaiser Wilhelm II, 12 December 1902: Johannes Lepsius, Albrecht Mendelssohn Bartholdy, and Friedrich Thimme (eds.), *Die Wendung im Deutsch-Englischen Verhältnis*, herausgegeben im Auftrage des Auswärtigen Amtes (Die Grosse Politik der Europäischen Kabinette 1871–1914, 17; Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1924), 258. See also Freiherr von Richthofen to Graf von Metternich, 5 December 1902: Ibid., 257.

633 See Mr Tower to Mr Hay, 18 December 1902: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 7, 1903.* (above, n. 618), 423; The Marquess of Lansdowne to Sir R. Rodd, 26 December 1902: Great Britain, F. O., *BFSP 1901–1902* (above, n. 281), 1133. Cf. Admiralty to Vice-Admiral Sir A. Douglas, 11 December 1902: Ibid., 1113–5.
For the British Government, the establishment of a blockade automatically gave rise to a state of war. This was, indeed, the opinion of Balfour, Prime Minister of the United Kingdom. That is why he sarcastically responded the following to an MP who wondered whether war had broken out with Venezuela: "Does the hon. and learned gentleman suppose that without a state of war you can take the ships of another Power and blockade its ports?" (Mr A. J. Balfour, House of Commons, 17 December 1902: Great Britain, Parliament, *The Parliamentary Debates*: *(authorised edition), fourth series. Third session of the twenty-seventh Parliament of the United Kingdom of Great Britain and Ireland* (116th vol.; London: Wyman and sons, 1902), col. 1490–1491). In the Reichstag, the German Secretary of State for Foreign Affairs Freiherr von Richthofen expressed on 23 January 1903 the same view: "Mit Eröffnung der Blockade war der Kriegszustand zwischen uns und Venezuela geschaffen, […]." (Deutsches Reich, *Stenographische Berichte über die Verhandlungen des Reichstags*: *X. Legislaturperiode. II. Session 1900/1903.*, 8th vol. (186th vol.; Berlin: Norddeutsche Buchdruckerei und Verlagsanstalt, 1903), 7511 (B)).

634 Mr Tower to Mr Hay, 14 December 1902: United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 7, 1903.* (above, n. 618), 421.

(b) The Venezuelan Preferential Claims

All the factors seem to confirm that the use of armed reprisals amounted to a privilege in the hands of the great Powers that could evade the negative consequences associated with war while exercising forcible pressure upon the target country during peacetime. In this regard, the joint blockade of Venezuela in 1902–1903 can also be deemed an example of such a privilege, albeit it had to be called on paper a belligerent blockade in order to meet the objections of third States. In fact, the allied Powers achieved their ends without overtly commencing war.

In the three separate protocols ending the conflict, a clause provided that 30 % of the custom revenues of the two most prosperous Venezuelan ports firmly under governmental control were assigned to the settlement of claims and payable in monthly instalments.[635] The redaction of this stipulation, however, posed a problem because it entitled all the other creditor States of Venezuela —namely Belgium, France, Mexico, the Netherlands, Spain, Sweden-Norway and the United States of America— to also receive a share of the reserved custom incomes.[636] It raised the question of whom amongst all the creditors should receive priority of payment.

Arduous negotiations ensued. The blockading Powers naturally contended that they should be paid first.[637] Nevertheless, prior to the blockade, France and Belgium had already drawn the attention of Great Britain to their right over a portion of Venezuela's custom receipts.[638] In addition, they (as well as Spain and the United States) invoked the most favoured nation clause with Venezuela that should allegedly guarantee them the most beneficial mode of payment for their claims.[639] In fact, the claim of the blockading Powers was coldly met by Herbert Wolcott Bowen, U.S. minister at Caracas, who acted in representation of Venezuela. He demurred that (1) a preferential treatment would be inequitable and illegal towards the other creditor States; (2) it would urge the latter to have re-

635 Article 5 of the separate protocols, 13 February 1903: Great Britain, F. O., *BFSP 1902–1903* (above, n. 625), 99f., 804 and 1173. See also Sir M. Herbert to the Marquess of Lansdowne, 28 January 1903: Ibid., 489–90.

636 Sir M. Herbert to the Marquess of Lansdowne, 25 January 1903: Ibid., 492.

637 Cf. The Marquess of Lansdowne to Sir F. Lascelles, 29 January 1903: Ibid., 496–7.

638 Memorandum of the French ambassador to London, 28 November 1902: Great Britain, F. O., *BFSP 1901–1902* (above, n. 281), 1098; Mr Grénier to the Marquess of Lansdowne, 14 December 1902: Ibid., 1117.

639 Mr Delcassé to Mr Cambon, 18 December 1902: Ibid., 1125–6.

course to force for the collection of their claims, too; and (3) the allied Powers had never asked for preferential treatment since the beginning.[640]

Faced with dogged determination on both sides, the issue was submitted to the Permanent Court of Arbitration at The Hague.[641] The arbitral panel, appointed by the Tsar of Russia, was formed by the Russians Nikolay Valerianovich Muraviev and Friedrich Fromhold Martens as well as the Austrian Heinrich Lammasch.[642]

Before the PCA, Bowen's remarks found an echo in the argumentation presented by the creditor third States. The case of the French delegation led by Louis Renault addressed the subject of the unilateral use of force. The French jurisconsults, indeed, neither criticised the use of force in general nor in the present case. They admitted that a Government could be driven to apply force in order to obtain redress. Still, they challenged the claim that the use of force against the debtor conferred upon the allied Powers a preferential treatment over the other creditor States. The French delegation argued that such treatment would actually be contrary to the principle of equality between States, here the creditors of Venezuela. Moreover, from the perspective of equity, the concession of a preferential treatment would have the following consequence:

> "If, according to the contention of the allied Powers, it be recognized by a judicial decision, whose authority will be unquestionable, that the mere fact by one or more States of exerting a violent coercion against another State, affords to the promoters of the said violence a privileged situation as against the States standing outside the conflict, it may be said that it involves the early end of any regular and patient transaction, as well as of any pacific arrangement for such States whose solvency is doubtful."[643]

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640 Sir M. Herbert to the Marquess of Lansdowne, 29 January 1908: Great Britain, F. O., *BFSP 1902–1903* (above, n. 625), 495–6.

641 Article 1 of the agreement between Great Britain and Venezuela, 7 May 1903: Ibid., 102.

642 See the recitals of the award of the tribunal, 22 February 1904: James Brown Scott (ed.), *The Hague Court Reports*: *Comprising the awards, accompanied by syllabi, the agreements for arbitration, and other documents in each case submitted to the permanent court of arbitration and to commissions of inquiry under the provisions of the conventions of 1899 and 1907 for the pacific settlement of international disputes* (Carnegie Endowment for International Peace: Division of International Law; New York: OUP, 1916), 57.

643 Case of the French Republic: United States, Senate, *The Venezuelan arbitration before The Hague Tribunal, 1903* (above, n. 631), 886.

The French jurisconsults insisted that a judicial decision in favour of the allied Powers would encourage the use of force by creditor States, despite the recent progress related to the pacific settlement of international disputes like the I Hague Convention of 1899. But more than that, it would prompt the creditors to act forcibly fast in order to get served first: "a premium to speed."[644]

For Wayne MacVeagh, counsel of both the United States and Venezuela, the matter had to be approached from an ethical perspective. He then submitted to the PCA the argument that at the present stage of development of international law with the recent achievements of the First Hague Peace Conference, the allied Powers had a moral obligation to first exhaust the amicable means of settlement like mediation and arbitration before resorting to force.[645]

However, the allied Powers hid behind the argument that they exercised their sovereign right of force. They also pointed out that this employment of force concretely helped to obtain the recognition of their claims.[646] Therefore, they regarded the complaints of the creditor third States as a manoeuvre "to reap the benefit from such action without in the least exposing them or incurring any risk consequent upon war operations."[647]

On 22 February 1904, the PCA announced its decision. The arbitrators considered that the question of the character or nature of the military operations undertaken by the allied Powers fell outside their jurisdiction. They also thought that they did not have to examine the argument of the mandatory exhaustion of amicable methods of settlement prior to the use of force. As a matter of fact, the PCA confined itself to interpreting the protocols and, on this basis, ruled in favour of the three blockading Powers.[648]

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644 See the Case of the French Republic: Ibid., 881–887, here quotation at 887.

645 Wayne MacVeagh, 'The Value of the Venezuelan Arbitration', *NAR* 177 (1903), 801–11.

646 *The New York Times* indirectly quoted Augusto Pierantoni, the Italian jurisconsult in this case, as saying that "the objections to the employment of force were purely sentimental, […]. The blockade had excellent results, as it forced Venezuela to recognize her responsibility for damages resulting from the civil war." (from *The New York Times*, 8 November 1903, p. 4, quoted in Becker Lorca, *Mestizo International Law* (above, n. 273), 145). See also the observations of the British counsel, Sir Robert Finlay, during the meeting of 6 November 1903: United States, Senate, *The Venezuelan arbitration before The Hague Tribunal, 1903* (above, n. 631), 1238–9.

647 Counter case on behalf of Italy: Ibid., 1024. See further Ibid., 1022–5.

648 Scott (ed.), *The Hague Court Reports* (above, n. 642), 56–61, esp. 58–59.

Walther Schücking —German professor of international law at Marburg an der Lahn, later called to play a role at the Versailles Peace Conference in 1919 and to become a judge of the PCIJ— had already anticipated this award. He explained that for want of norms in international law which might justify an adverse decision, the PCA could only decide on the basis of the nature of things, which gave the blockading Powers in the present case a decisive advantage.[649] Many years later, this point of view was shared by Hersch Lauterpacht who rightly pointed out that the PCA could not fill the gap *de lege ferenda* since international law allowed the resort to war and reprisals for dispute settlement. Therefore, the PCA could not have decided differently in this case, even if its decision gave the impression that the States which made use of force were rewarded to the detriment of the other creditor States which for their part abstained from such military operations. In his opinion, the very reputation of arbitration had been at stake.[650]

On the other hand, the French legal scholar André Mallarmé believed that this award did not serve the cause of peace and arbitration. In fact, he argued that it rather set a dangerous precedent for minor States because they were particularly likely to be targeted, given their high dependency on monetary assistance and their unreliable public institutions with regard to the protection of aliens.[651]

(c) The Drago-Porter Convention of 1907

i) Previous Efforts of Prevention of Armed Reprisals in International Law

At the time of the arbitral award of the PCA, the use of force was mostly unrestricted in international law. Indeed, it was not conditional on the previous exhaustion of pacific methods of settlement, contrary to what

649 Schücking, 'Rückblick auf den Streit mit Venezuela' (above, n. 630), 159.

650 Lauterpacht, *The Function of Law in the International Community* (above, n. 264), 89–91. Cf. Rudolf Dulon, 'The Venezuelan Arbitration Once More. Facts and Law.', *The American Law Review* 38 (1904), 648–61, at 660–661. Indeed, during the meeting on 6 November 1903, Sir Robert Finlay stated that "nothing more fatal to arbitration could be conceived than any attempt to ignore the legitimate consequences of war." (United States, Senate, *The Venezuelan arbitration before The Hague Tribunal, 1903* (above, n. 631), 1239).

651 André Mallarmé, 'L'arbitrage vénézuélien devant la Cour de La Haye (1903–1904)', *RGDIP* 13 (1906), 423–500, at 496–500.

MacVeagh asserted. The aggrieved State had the sole and entire discretion to judge whether the diplomatic negotiations had failed and then whether it was expedient to make use of force and to what extent.[652]

Nevertheless, more and more authors in the nineteenth century had called for the creation of an international tribunal with mandatory jurisdiction to settle the conflicts between States or supported the idea of arbitration.[653] According to Oppenheim, the science of international law had the task to prevent the resort to reprisals or war by promoting arbitration or even by seeking a way to compel sovereign States to submit their disputes to arbitration.[654] This movement in favour of arbitration often went hand in hand with the project of a code of international law. In many cases, the legal scholars who drafted such a code provided a mandatory procedure of dispute resolution before commencing war or armed reprisals. For example, the American lawyer David Dudley Field imagined that if the negotiations between the parties in conflict failed, ten States making up a Joint High Commission would mediate in the dispute. The next step would be arbitration conducted by a High Tribunal of Arbitration with binding decision. Field included the obligation for all the adherents to his Code to combine forces together against the assailant that did not respect the procedure.[655]

As a matter of fact, between 1815 and 1914, arbitration grew in importance as a mode of settlement of disputes.[656] Many conflicts which might have led to reprisals were settled through some methods of pacific settlement.[657] As the U.S. minister to Spain said to the Spanish minister of State

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652 Cf. Pasquale Fiore, 'L'organisation juridique de la société internationale', *RDILC* 31 (1899), 105–126 & 209–242, at 105–106; George Winfield Scott, 'International Law and the Drago Doctrine', *NAR* 183 (1906), 602–10, at 604.

653 See, e.g., Émile de Laveleye, *Des causes actuelles de guerre en Europe et de l'arbitrage* (Bruxelles: C. Muquardt, 1873); Edgar Rouard de Card, *L'arbitrage international dans le passé, le présent et l'avenir* (Paris: A. Durand et Pedone-Lauriel, 1877); Leonid Kamarowsky, 'De l'idée d'un tribunal international', *RDILC* 15 (1883), 44–51.

654 Lassa Oppenheim, 'The Science of International Law. Its Task and Method', *AJIL* 2 (1908), 313–56, at 322–323.

655 Field, *Draft. Outlines of an International Code* (above, n. 592), 369–373 (Art. 532–537) and 473 (Art. 716). See also Duplessix, *La Loi des Nations* (above, n. 595), 170 (Art. 504–506). Cf. Fiore, 'L'organisation juridique de la société internationale' (above, n. 652), 239–41.

656 Cornelis G. Roelofsen, 'International Arbitration and Courts', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012), 145–69, at 162–166.

657 See Colbert, *Retaliation in international law* (above, n. 6), 69 fn. 30.

Práxedes Mateo-Sagasta following the seizure of American vessels and injuries sustained by American citizens during the hostilities in Cuba in 1869/70, "it was the better practice of modern times, instead of resorting to reprisals, to refer the questions at issue to an international tribunal for final adjustment."[658]

On 29 July 1899, the First Hague Peace Conference adopted a convention that instituted the Permanent Court of Arbitration.[659] Pursuant to Article 19 of this Convention for the Pacific Settlement of International Disputes, many States concluded bilateral treaties with the aim of binding them to refer some of their disputes to mandatory arbitration, unless the vital interests, the national independence or the honour of the contracting parties were affected.[660]

Despite those improvements, the situation of the small countries still remained vulnerable. The great Powers were in no way compelled to prefer arbitration over the use of force. That is why the blockade of Venezuela and the subsequent decision of the PCA shone light on the urgent need to fill the legal lacuna and make the use of force depend on the exhaustion of pacific methods.

ii) The Drago Doctrine as Corollary of the Monroe Doctrine

The blockade of Venezuela caused great consternation amongst the American nations.[661] Indeed, amongst the various classes of claims that the three great European Powers had against Venezuela, there was "the collection of the deferred interest on the foreign public debt, outstanding in the form of

658 John Bassett Moore, *History and digest of the international arbitrations to which the United States has been a party, together with appendices containing the treaties relating to such arbitrations, and historical and legal notes on other international arbitrations ancient and modern, and on the domestic commissions of the United States for the adjustment of international claims*, 2nd vol. (Washington: GPO, 1898), 1039.

659 Articles 20–29: Scott, *The Hague Conventions and Declarations of 1899 and 1907* (above, n. 598), 57–63.

660 See Editorial Comment, 'Treaties of Arbitration since the First Hague Conference', *AJIL* 2 (1908), 823–30.

661 Luis María Drago, 'State Loans in Their Relation to International Policy', *AJIL* 1 (1907), 692–726, at 692. This article was also published in French: Luis María Drago, 'Les emprunts d'Etat et leurs rapports avec la politique internationale', *RGDIP* 14 (1907), 251–87.

bonds issued by the Venezuelan government".[662] This particular demand worried the Argentinian lawyer and, at the time, Minister of Foreign Affairs: Luis María Drago. In a note of 29 December 1902, he laid down the rule that default on public debt could not give rise to an armed intervention against any debtor American State or the military occupation of the latter's territory by European Powers. He grounded this doctrine on the Monroe doctrine and the principles of state sovereignty and equality between States, yet without exonerating Governments from responsibility for "bad faith, disorder, and deliberate and voluntary insolvency."[663]

Drago crafted his doctrine as a corollary of the Monroe doctrine. Indeed, the U.S. President Theodore Roosevelt set forth the Monroe doctrine in his annual message to the United States Congress on 3 December 1901 as allowing no acquisition of territory in the Americas by any non-American Power. With this reservation, European States could, nevertheless, adopt forcible measures against recalcitrant American countries.[664] Now, Roosevelt's definition of the Monroe doctrine had a relatively narrow meaning because it only prohibited the *acquisition* of territory.[665] Hence, the Drago doctrine supplemented the Monroe doctrine as it also aimed to prevent the *control* of territory through an alleged temporary occupation under the pretext of bankruptcy.[666]

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662 Drago, 'State Loans in Their Relation to International Policy' (above, n. 661), 692.

663 See Luis María Drago, *Cobro coercitivo de deudas públicas* (Buenos Aires: Coni Hermanos, 1906), 9–26. The quotation is from the English translation of the letter in United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 7, 1903.* (above, n. 618), 1–5, here at 2.

664 United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 3, 1901.* (above, n. 585), XXXVIf. For a study of the Monroe doctrine from this period, see John Brooks Henderson, *American Diplomatic Questions* (New York/London: The Macmillan Company, 1901), 289–448.

665 According to Redslob, *Histoire des grands principes du droit des gens* (above, n. 53), 466, the Monroe doctrine did not impede the use of reprisals. It was thus an implicit recognition of the lawfulness of reprisals.

666 Basdevant, 'L'action coercitive anglo-germano-italienne contre le Vénézuéla (1902–1903)' (above, n. 630), 450–2; Henri-Alexis Moulin, 'La doctrine de Drago', *RGDIP* 14 (1907), 417–72, at 460–467. A striking example of such control was the "temporary" and "provisional" occupation of Egypt by Great Britain which precisely proceeded from the former country's bankruptcy (A Jeffersonian Democrat, 'The Venezuela Affair and the Monroe Doctrine', *NAR* 176 (1903), 321–35, at 329–330). See further on Egypt's bankruptcy Clinton E.

The events in Venezuela urged Roosevelt to rectify his definition, thus endorsing the Drago doctrine implicitly. He recognised that the enforcement of contractual obligations by a European Power against an American country presented a severe threat to peace as a temporary occupation might turn permanent. He, therefore, said in his annual message to the Congress on 5 December 1905 that it was the duty of the United States to interpose between the parties to a dispute, in order to bring about some arrangement suitable for them and the other creditors. He argued that the case of the Dominican Republic provided good proof of success of this foreign policy. That country went through serious internal disturbances and was burdened with a large external debt. Only the appointment of American officials by the U.S. Government to administer the Dominican custom houses averted a foreign intervention.[667]

iii) From Political Policy to Norm of International Law

The Drago doctrine was initially just the formulation of a policy regarding the international relations in the western hemisphere. It had no ambition to become a universal principle of international law.[668] However, because it condemned the recourse to armed force for the very specific purpose of the recovery of contractual debts, the Drago doctrine pertained to the gen-

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Dawkins, 'The Egyptian Public Debt', *NAR* 173 (1901), 487–507; Heimbeck, *Die Abwicklung von Staatsbankrotten im Völkerrecht* (above, n. 47), 63–142.
But Alejandro Álvarez, 'Latin America and International Law', *AJIL* 3 (1909), 269–353, at 334–5, refuted this opinion that the Drago doctrine was a corollary of the Monroe doctrine.

667 United States, Department of State, *Papers relating to the foreign relations of the United States, with the annual message of the President transmitted to Congress, December 5, 1905*. (Washington: GPO, 1906), XXXIII–XXXVII. However, albeit Roosevelt's custom receivership prevented a European intervention, it entangled the United States from then on in the Dominican affairs. About the U.S. campaign that led to military occupation of that Republic following internal disturbances, see Max Boot, *The Savage Wars of Peace*: *Small Wars and the Rise of American Power* (revised edn., New York: Basic Books, 2014), 167–81.

668 See Drago's speech in Buenos Aires in August 1906 during Elihu Root's visit through Latin America: United States, *Report of the delegates of the United States to the Third International Conference of the American States* (Washington: GPO, 1907), 13.

eral discussion of the use of force in time of peace.[669] As a result, it quickly drew the attention of many legal scholars, some of whom acknowledged its legal dimension.[670] Nevertheless, this doctrine was imperfect and defective for being limited just to the American continent and for not making the recourse to armed force subject to a previous arbitral award.[671] As a consequence, legal scholars amended the Drago doctrine in this direction.

Friedrich Fromhold Martens, one of the three arbitrators in the *Venezuelan Preferential Claims*, conferred legal significance upon the Drago doctrine, which he regarded as being distinct from the controversial and political Monroe doctrine. Indeed, he concurred with the conclusions that Drago reached and used them as a starting point to question the unilateral use of force. His own observations actually led him also to recognise the arbitrariness of reprisals. In his opinion, they were too often abusively resorted to by great Powers only against small countries and for the enforcement of exaggerated claims, although he did not want to shirk the responsibility of the Latin American States. The problem was then how to conciliate the protection of nationals abroad while averting abuses. In this respect, he believed that diplomatic interposition and forcible coercion were inappropriate solutions because, with such methods, the examination of claims by the aggrieved country was generally partial, shallow and self-interested. Therefore, he maintained that the most reliable solution should be the exhaustion of the local remedies and that, in the event of any doubt or objection, the PCA might be seized.[672] Martens's conclusions were largely shared by

669 Prior to the Drago doctrine, the Argentine international law expert Carlos Calvo formulated a doctrine of wider scope, known as the 'Calvo doctrine'. Indeed, Calvo condemned any form of intervention, either diplomatic or armed, for the enforcement of private claims of pecuniary nature or resulting from wrongs following a civil war, insurrection or riot. He argued that this violent practice of the European States based upon mere force reflected a colonial tradition and their contempt for the nations of the New World. Therefore, Calvo advocated the exhaustion of local remedies before any such intervention. See Amos S. Hershey, 'The Calvo and Drago Doctrines', *AJIL* 1 (1907), 26–45; Edwin Montefiore Borchard, *The diplomatic protection of citizens abroad or the law of international claims* (New York: The Banks Law Publishing Co., 1925), 309–10.

670 See, e.g., the written reactions of some members of the Institute of International Law to the Drago doctrine: [Various], 'La doctrine de Monroë. – Une note diplomatique du Gouvernement argentin. – Consultations et avis.', *RDILC* 35 (1903), 597–623.

671 Álvarez, 'Latin America and International Law' (above, n. 666), 334–5.

672 Friedrich Fromhold von Martens, *Par la Justice Vers la Paix*: *Annexe : Doctrine de Drago ou Note diplomatique du Gouvernement Argentin du 29 Décembre 1902* (Paris: Henri Charles-Lavauzelle, [1904]), passim.

Henri-Alexis Moulin, professor of public international law at Dijon, who even suggested that the debtor State could request arbitration and that the creditor State had then to accept before making use of force.[673]

At the Third Pan-American Conference at Rio de Janeiro from 23 July to 26 August 1906, several American nations expressed the wish that the Drago doctrine entered the field of law as a conventional principle consistent with the respect of the sovereignty of the debtor countries.[674] This topic was not only the most absorbing at Rio[675] but the most delicate.[676]

On the one hand, some American republics encouraged the adoption of a rule of law at Rio. On the other hand, a group of States led by the United States defended the point of view that the question should be presented at the next Hague Conference.[677] The U.S. Government actually did not object to a discussion at Rio about the forcible collection of public debts, but only as preparation for the Second Hague Peace Conference which the American nations were to attend for the first time.[678] The instructions sent to the U.S. delegation at Rio were unambiguous on this point. Elihu Root, Hay's successor as Secretary of States, explained that the U.S. Government concurred with the content of the Drago doctrine which forbade the use of force for the collection of public debts. Such a proceeding generally turned into an act of oppression and bullying by strong Powers. Thus, a solution needed to be found in order to reassert the sacrosanct principle of the independent sovereignty of States, especially in situations where the weak

673 Moulin, 'La doctrine de Drago' (above, n. 666), 440–60.

674 See, e.g., the exposition of the Argentine delegation, 21 August 1906: International American Conference, *Third International American Conference. 1906*: *Minutes. Resolutions. Documents.* (Rio de Janeiro: Imprensa Nacional, 1907), 224–6. On that occasion, the Drago doctrine was detached from the Monroe doctrine because of the distrust of many American States regarding the latter policy which was viewed as a threat to their independence, but also because the United States did not want to assume all the consequences which might arise from the incorporation of the Drago doctrine into the Monroe doctrine. See Jules Basdevant, 'La conférence de Rio-de-Janeiro de 1906 et l'union internationale des républiques américaines', *RGDIP* 15 (1908), 209–70, at 262.

675 United States, *Report of the delegates of the United States to the Third International Conference of the American States* (above, n. 668), 12.

676 México, *Boletín Oficial de la Secretaría de Relaciones Exteriores*: *Mayo a octubre de 1906*, 22nd vol. (México: Tipografía de la viuda de Francisco Díaz de León, 1906), 338.

677 See Ibid., 339.

678 See Mr Root to Committee on Programme for the Third International of the American Republics, 22 March 1906: Drago, *Cobro coercitivo de deudas públicas* (above, n. 663), 153–157 and esp. 156–157.

debtor country was *bona fide* and momentarily unable to fulfil its obligations. Yet, Root believed that the sister republics of the American continent were not qualified to create a rule of law of such nature and scope, owing to the fact that most of them were debtor nations of creditor European Powers. The decision could then only be taken at The Hague where debtor and creditor States were to convene.[679]

The United States probably did not want to be held responsible by the European Powers for the adoption at Rio of a norm of international law which would bind all the creditor States —the United States included— and limit their capacity of action. Therefore, it was wiser to submit the issue to the Hague Conference.[680]

In any case, the Third Pan-American Conference came round to the opinion defended by the United States and resolved that any American State could invite the next Hague Conference "to examine the question of the compulsory collection of public debts, and, in general, means tending to diminish between Nations conflicts having an exclusively pecuniary origin."[681] Thus, the scope of this resolution was wider than the original Drago doctrine as it also encompassed conflicts arising from an exclusively pecuniary origin.

iv) Second Hague Peace Conference, 1907

The programme of the Second Hague Peace Conference initially did not include the study of the Drago doctrine.[682] Nonetheless, Root reserved the right to bring to the attention of the gathered Powers further subjects for discussion. One of them was the limitation of force for the collection of

679 Instructions to the delegates of the United States to the Third International Conference of American States, 18 June 1906: United States, *Report of the delegates of the United States to the Third International Conference of the American States* (above, n. 668), 41–2. Cf. Root's speech in Buenos Aires in August 1906: James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*: *A Series of Lectures delivered before the Johns Hopkins University in the Year 1908*, 2 vols. (Baltimore: The Johns Hopkins Press, 1909), 1st vol., 421–422.

680 Cf. Basdevant, 'La conférence de Rio-de-Janeiro de 1906 et l'union internationale des républiques américaines' (above, n. 674), 262 fn. 1.

681 International American Conference, *Third International American Conference. 1906* (above, n. 674), 605.

682 See the circular sent by the Russian Government in March–April 1906 to the invited Governments: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), The Conference of 1907, 1st vol., 1.

ordinary public debts arising out of contracts; a small topic that he considered capable of restricting the *ius ad bellum* and leading to an agreement on compulsory arbitration.[683] Accordingly, the U.S. delegates at The Hague submitted this matter for consideration.[684] The examination of the proposition was entrusted to the first subcommission of the first commission dealing with the pacific settlement of international disputes.[685]

On 16 July 1907, the U.S. delegate Horace Porter provided explanations in support of the proposition. He first denounced the fact that unscrupulous speculators, who concluded contracts with foreign Governments, were generally behind the employment of force for the recovery of pecuniary claims. Porter was convinced that those claims were too often dubious and exaggerated, on the one hand, because of the cursory and biased examination of the claims by the national's foreign office and, on the other, because of the significant reduction of the amount claimed in all cases when the issue was referred to arbitration or a mixed commission. But besides, such claims involved considerable costs for the speculator's State. Porter mentioned the past example of a U.S. contractor demanding an indemnity of about 90.000$ for the cancellation of a contract with a foreign Government. Over sixteen years, the United States pressed the case and, at one point, even sent a fleet of nineteen warships. The result was the spending of more than 2.500.000$ by the U.S. Government. Porter argued, therefore, that the State of the speculator had no obligation at all to take up his case, mainly since the issue entailed no question of prestige and na-

683 Root's note, 6 June 1906: Scott, *The Hague Peace Conferences of 1899 and 1907* (above, n. 679), 1st vol., 104.

684 See the instructions to the U.S. delegates to the Hague Conference, 31 May 1907: Ibid., 2nd vol., 188–189; Horace Porter, second plenary meeting on 19 June 1907: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), The Conference of 1907, 1st vol., 55.

685 First meeting of the first commission on 22 June 1907: Ibid., The Conference of 1907, 2nd vol., 8. The first paragraph of the proposition read as follows: "For the purpose of avoiding between nations armed conflicts of a purely pecuniary origin, arising from contract debts, which are claimed as due to the subjects or citizens of one country by the Government of another country, and in order to guarantee that all contract debts of this nature which it may have been impossible to settle amicably through the diplomatic channel shall be submitted to arbitration, it is agreed that there cannot be recourse to any coercive measure involving the employment of military or naval forces for the recovery of such contract debts, until an offer of arbitration has been made by the creditor and refused or not answered by the debtor, or until arbitration has taken place and the debtor State has failed to comply with the award made." (Annexe 48: Ibid., The Conference of 1907, 2nd vol., 906).

tional honour. He then stressed the adverse effects that coercive collections had on the solvency of the debtor State, which sometimes went through great calamities (insurrections, floods, etc.). Finally, he noted that third States were also affected in their trade since the non-recognition of pacific blockade often led to the establishment of a belligerent blockade. That is why, for all those reasons, mandatory arbitration had to be the solution. Porter insisted on the fact that the gathering of both creditor and debtor nations made it timely to agree on a general treaty on the subject.[686]

However, while the delegations of the great European Powers unreservedly approved the text of the U.S. proposition, many delegations —in particular, Latin American countries, to Porter's surprise— made reservations.[687] The concerns were twofold: the scope was too limited, and the wording made clear that the use of force after arbitration was made lawful.

Regarding the scope, the Dominican Republic regarded the term "contract debts" of the proposition as not only vague —"to the grave and manifest detriment of small States"— but also narrow. That is why it introduced an amendment aiming to extend the proposal to include any pecuniary claims, regardless of whether they resulted from damages, losses, contracts or public loans.[688]

Not going as far as the delegation of the Dominican Republic, Luís M. Drago, present at The Hague, expounded on the central difference between contract debts and public loans. On the one hand, the local remedies had to be exhausted in case of ordinary contract claims (just like for claims arising from torts). On this point, he noted that it was even possible in most South American countries to sue the Government without its con-

686 General Porter, fifth meeting of the first commission's first subcommission on 16 July 1907: Ibid., The Conference of 1907, 2nd vol., 226–232. About Porter's assertion that claims submitted to arbitration or mixed commission were invariably reduced, cf. Philip C. Jessup, 'The United States and Treaties for the Avoidance of War', *IntlConciliation* 12 (1928–1929), 179–207, at 189–191.
It must be noted that Porter, as well as other diplomats, generally spoke of armed 'intervention' as an umbrella term for any use of force, including armed reprisals.

687 Cf. George Winfield Scott, 'Hague Convention Restricting the Use of Force to Recover on Contract Claims', *AJIL* 2 (1908), 78–94, at 87; Karl Strupp, 'L'intervention en matière financière', *RdC* 8 (1925), 5–124, at 99.

688 See Annexes 51 and 57: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), The Conference of 1907, 2nd vol., 908 and 910–912, here quotation at 912. See also the address of Francisco Henriquez i Carvajal, delegate of the Dominican Republic, seventh meeting of the first commission's first subcommission, 23 July 1907: Ibid., The Conference of 1907, 2nd vol., 271–272.

sent. However, if a denial of justice were confirmed through arbitration, nothing would impede the plaintiff State to have recourse to other means of its choice. On the other hand, the situation regarding state loans was radically different and, hence, deserved the adoption of guarantees because the issuance of bonds and the payment of the debt were acts of sovereignty. Besides, there was no contract between the issuing Government and the purchaser, which meant that bonds were easily transferable. Bondholders were better protected anyway than investors in a joint-stock company who could lose everything following a bankruptcy. In fact, it was only a matter of time before the insolvent State could regain solvency and pay off its debts. In the light of these observations, Drago held the view that the employment of force for the collection of state loans should be declared by the Hague Conference utterly forbidden, even after arbitration. Otherwise, it would amount to the recognition of war as a legal remedy.[689]

As a matter of fact, many delegations understood the U.S. proposition as the legitimisation of force after the failure of the procedure of arbitration.[690] The Swedish delegate Knut Hjalmar Hammarskjöld even withdrew his support for the proposition on this ground.[691] The opinion of the Colombian delegate Santiago Pérez Triana was even sharper on this aspect. He endorsed the idea to have recourse to arbitration because this institution was equitable and often reduced the exorbitant claims of creditors. However, he criticised that the proposition omitted or forgot to consider the situation of a debtor State which might be unable to pay its debts owing to circumstances beyond its control like revolutions, bad harvests, natural cataclysms, etc. In such cases, the debtor's failure to conform to the

689 Luis M. Drago, sixth meeting of the first commission's first subcommission on 18 July 1907: Ibid., The Conference of 1907, 2nd vol., 246–251. But see Scott, 'Hague Convention Restricting the Use of Force to Recover on Contract Claims' (above, n. 687), 90–3; Scott, *The Hague Peace Conferences of 1899 and 1907* (above, n. 679), 1st vol., 417–418; Borchard, *The diplomatic protection of citizens abroad or the law of international claims* (above, n. 669), 321–2; Strupp, 'L'intervention en matière financière' (above, n. 687), 106–8.

690 This position was, of course, not shared by all the countries, even amongst Latin American nations. For instance, the delegate of Brazil contended that the proposition did not legitimise the resort to war but merely recognised a factual situation: the regrettable, but unfortunately, unavoidable existence of war as a last resort. See Ruy Barbosa, seventh meeting of the first commission's first subcommission on 23 July 1907: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), The Conference of 1907, 2nd vol., 283–285.

691 Eighth meeting of the first commission's first subcommission on 27 July 1907: Ibid., The Conference of 1907, 2nd vol., 309.

arbitral award would give licence to the creditor State to recover debts by force, thereby implying that the debtor country acted with bad faith. This idea was intolerable for Pérez who suspected that the existence of this gap in the proposition was actually intentional in order to meet "exigencies of international politics in which absolute truth cannot have its place."[692]

Despite all this, the U.S. proposal was adopted by the first subcommission on 27 July 1907 with 36 votes in favour and 8 abstentions.[693] Still, Porter introduced soon thereafter a revised version of the proposition in order to meet the criticisms that too much importance was given to the use of force. Indeed, the first paragraph of the new draft stipulated the renunciation of the recourse to arms altogether. The second paragraph neither allowed the use of force explicitly after the failure of arbitration but specified that the debtor State would lose the benefit of the renunciation if it opposed arbitration.[694]

It is that new wording which prevailed and formed Article 1 of the II Hague Convention respecting the limitation of the employment of force for the recovery of contract debts, signed on 18 October 1907. It reads:

> "The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.
>
> "This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award."[695]

Nevertheless, this Convention failed to pass unanimously. The Bolivian delegate, e.g., justified his country's refusal to assent to the draft by explaining that the Convention under discussion meant the legitimisation of a class of *wars* by a *Peace* Conference.[696] Furthermore, notwithstanding the

692 Sixth meeting of the first commission's first subcommission on 18 July 1907: Ibid., The Conference of 1907, 2nd vol., 259–262, here quotation at 261.

693 Eighth meeting of the first commission's first subcommission on 27 July 1907: Ibid., The Conference of 1907, 2nd vol., 310.

694 Scott, *The Hague Peace Conferences of 1899 and 1907* (above, n. 679), 1st vol., 415.

695 Scott, *The Hague Conventions and Declarations of 1899 and 1907* (above, n. 598), 89.

696 Claudio Pinilla, eighth meeting of the first commission on 9 October 1907: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), The Conference of 1907, 2nd vol., 140 (with Pinilla's emphasis).

adoption of the Convention, many signatory Powers —almost exclusively Latin American States— entered a reservation in the signature. Two main aspects were expressed: (1) the exhaustion of all local remedies before referring the issue to arbitration; (2) the absolute renunciation of the right to resort to arms for the collection of debts, particularly those arising from public loans.[697] In other words, the Latin American States wanted a complete ban on the use of force, whereas the Convention solely provided a limitation. Their disappointment was so high that almost twenty years later, most of them had still not ratified the Convention.[698]

The final result shows that many debtor States frequently targeted by operations of armed reprisals pursuing the collection of debts felt that the Convention was not ambitious enough but, instead, aligned with the interests of the creditor Powers. Indeed, the latter did not wave their right to use force, but only restricted it. It may be argued that for the great Powers, this achievement was actually a masterstroke because they displayed a spirit of conciliation, and yet did not yield their right.

v) Mixed Impact of the Second Hague Conference on Armed Reprisals

Considered as one of Latin America's major contributions to the development of international law,[699] the Drago doctrine and the subsequent II Hague Convention of 1907 (also known as the Drago-Porter Convention) introduced a new stage in the history of reprisals, marked by the progressive prohibition of force in peacetime.[700] Indeed, the Drago-Porter Convention provided an important restriction on the employment of

697 See the reservations in Scott, *The Hague Conventions and Declarations of 1899 and 1907* (above, n. 598), 92–5.

698 See Strupp, 'L'intervention en matière financière' (above, n. 687), 104.

699 Francisco-José Urrutia, 'La codification du droit international en Amérique', *RdC* 22/II (1928), 85–233, at 118; Wolfgang Benedek, 'Drago-Porter Convention (1907)', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for comparative public law and international law, 3rd vol. (Oxford: OUP, 2012–2013; <http://www.mpepil.com>, accessed 18 August 2017), 234–6, here at no. 9.

700 Partsch, 'Repressalie' (above, n. 62), 103; Ruffert, 'Reprisals' (above, n. 10), no. 5. The contemporary legal scholar James Brown Scott even argued that the Convention sounded the death knell of pacific blockade against American nations. See James Brown Scott, 'The Work of the Second Hague Peace Conference', *AJIL* 2 (1908), 1–28, at 14; and also Maxime Chrétien, 'La « guerre totale » du Japon en Chine', *RGDIP* 46 (1939), 229–303, at 276–277.

armed reprisals.[701] The failure by the creditor State to offer arbitration made any recourse to this measure utterly illegal.[702] But when the debtor State rejected the offer of arbitration, prevented the conclusion of an arbitration agreement or failed to comply with the award, this renunciation of force disappeared.

The small States undeniably revealed their growing weight at The Hague by speaking loudly against the Western practice of resorting to measures of self-help.[703] However, a closer look at the Convention shows that there were still many loopholes regarding the use of armed reprisals. As a matter of fact, the Drago-Porter Convention did not cover claims arising from tort or resulting from a contract between two States or two individual persons. Only contract debts owed to nationals of one State by the Government of another State fell under its scope.[704]

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701 Yet, the Drago-Porter Convention did not affect the use of non-forcible reprisals. See Strupp, 'L'intervention en matière financière' (above, n. 687), 110; Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 82; Elagab, *The legality of non-forcible counter-measures in international law* (above, n. 14), 26f.
Neff, *War and the Law of Nations* (above, n. 2), 239 fn. 87, maintains that this Convention restricted only the resort to armed reprisals but not the recourse to war. However, Neff's view stands in contradiction with the spirit of the said Convention. Indeed, the represented States clearly sought to limit the existing *ius ad bellum*, as can been seen in the proceedings of the Second Hague Peace Conference. They actually referred indistinctly to war, recourse to arms, armed intervention. Moreover, the term "armed force" used in the Drago-Porter Convention do not permit to draw a distinction between armed reprisals and actual war.

702 Randall Lesaffer, 'Peace through law. The Hague Peace Conferences and the rise of the *ius contra bellum*', in Maartje Abbenhuis, Christopher Ernest Barber, and Annalise R. Higgins (eds.), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907* (Routledge Studies in Modern History; Abingdon, Oxon/New York: Routledge, 2017), 31–51, at 46.

703 Cf. Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 621 fn. 16; Francis Anthony Boyle, *Foundations of World Order*: *The Legalist Approach to International Relations, 1898–1922* (Durham/London: Duke University Press, 1999), 81; O. Thomas Johnson, Jr. and Jonathan Gimblett, 'From gunboats to BITs. The evolution of modern international investment law', *Yearbook on International Investment Law and Policy* (2010–2011), 649–92, at 657; Lesaffer, 'Peace through law. The Hague Peace Conferences and the rise of the *ius contra bellum*' (above, n. 702), 45.

704 Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 82–3; Elagab, *The legality of non-forcible counter-measures in international law* (above, n. 14), 26.

The Drago-Porter Convention could by no means be regarded as a victory of compulsory arbitration because it did not impose an obligation to submit a dispute about contract debts to arbitration. As the International Court of Justice stressed in 1957 in the *Case of Certain Norwegian Loans*, "[t]he only obligation imposed by the Convention is that an intervening Power must not have recourse to force before it has tried arbitration."[705] This obligation was incumbent on the creditor State.[706] For its part, the debtor country was under no obligation to accept the offer of arbitration, although a sword of Damocles hung over it in the event of rejection or a lack of commitment to the procedure of arbitration.[707] The debtor country could, of course, suggest the settlement of the dispute through arbitration, but this would not bind the creditor State.[708] It can thus be said that the Drago-Porter Convention had the result to pacify the relations between creditor and debtor States, and yet it made the inequality between them more blatant.[709] The problem of armed reprisals as a privilege right of the great Powers had, therefore, not seriously been attacked by the Drago-Porter Convention.

There was, in addition, no agreement on compulsory arbitration at The Hague in 1907.[710] The Swedish delegation, nevertheless, had introduced a proposition to declare arbitration obligatory for some pecuniary claims to

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705 International Court of Justice, *Case of Certain Norwegian Loans (France v. Norway)*, Judgement of 6 July 1957, I.C.J. Reports (1957), 9–28, at 24.

706 Henri-Alexis Moulin, *La doctrine de Drago* (Questions de droit des gens et de politique internationale; Paris: A. Pedone, 1908), 324; Stanislas Dotremont, *L'arbitrage international et le Conseil de la Société des Nations*: *Le Pacte, les progrès tentés et réalisés depuis, les progrès réalisables* (Bruxelles: Maurice Lamertin, 1929), 60.

707 Strupp, 'L'intervention en matière financière' (above, n. 687), 108–9; Dotremont, *L'arbitrage international et le Conseil de la Société des Nations* (above, n. 706), 60.

708 Heimbeck, 'Legal Avoidance as Peace Instrument. Domination and Pacification through Asymmetric Loan Transactions' (above, n. 73), 126. But see Borchard, *The diplomatic protection of citizens abroad or the law of international claims* (above, n. 669), 328.

709 Heimbeck, 'Legal Avoidance as Peace Instrument. Domination and Pacification through Asymmetric Loan Transactions' (above, n. 73), 126.

710 See Scott, *The Hague Peace Conferences of 1899 and 1907* (above, n. 679), 1st vol., 330–385. The U.S. representative at The Hague, Joseph Hodges Choate, made the following response to the delegations, e.g. Germany's, which preferred the conclusion of special treaties of obligatory arbitration rather than a general agreement. His remark does not lack interest: "Now as to the question of the reservation of the right or the purpose to resort to force, which is the only other reason that I can conceive of for declining to join in a general arbitration agree-

which the exceptions of vital interests or independence could not be opposed, such as those arising from "so-called pacific blockade, the arrest of foreigners or the seizure of their property."[711] As Hammarskjöld explained to Porter, the Swedish proposition did not overlap the U.S. proposal on the limitation of the employment of force for the recovery of contract debts because it related only to disputes between States.[712]

In conclusion, the situation regarding armed reprisals had not really been impacted by the Second Hague Peace Conference, except for the cases falling under the scope of the Drago-Porter Convention. That is why there were high hopes to see the legal loophole regarding armed reprisals plugged at the next Hague Conference, which would have taken place in 1915 if World War I had not broken out in the meantime.[713] Indeed, in preparation for this Third Peace Conference, the Institute of International

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ment on the part of those who are ready to accomplish the same thing by individual treaties. The idea of the opposition, as I understand it, is that we should maintain our right to select our own company, and not be compelled to admit all the nations into a general agreement with us. But suppose you do agree with twenty nations and conclude such treaties with that limited number, either separately or jointly, what do you mean to do with regard to the twenty-five other nations whom you will have refused to admit into your charmed circle of arbitral accord? You must reserve, must you not, you must mean to reserve the right to resort to war against the twenty-five non-signatory States, when differences with them cannot be settled by diplomatic means? *Those are the two alternative ways—arbitration or force. And if you will not agree to arbitration, it must be because you reserve the right, if not the intent, to resort to force with them*. But, gentlemen, empires and kingdoms, as well as republics, must sooner or later yield to the imperative dictates of the public opinion of the world. Every power, great or small, must submit to the overwhelming supremacy of the public will, which has already declared and will hereafter declare, more and more urgently, that every unnecessary war is an unpardonable crime, and that every war is unnecessary when a resort to arbitration might have settled the dispute. These are the two alternatives between which the opponents of our project must finally choose." (Mr Choate, fifth meeting of the first commission on 5 October 1907: Scott, *The Proceedings of the Hague Peace Conferences* (above, n. 575), Conference of 1907, 2nd vol., 75 (emphasis added)).

711 See Article 18, esp. Para. 3, of Annexe 22: Ibid., Conference of 1907, 2nd vol., 878; Mr Hammarskjöld, fifth meeting of the first commission's first subcommission on 16 July 1907: Ibid., The Conference of 1907, 2nd vol., 237–239.

712 Eleventh meeting of the committee of examination A of the first commission's first subcommission on 23 August 1907: Ibid., Conference of 1907, 2nd vol., 488.

713 See the text of the Final Act of the Hague Conference of 1907 recommending the assembly of a Third Peace Conference more or less eight years later: Scott, *The Hague Conventions and Declarations of 1899 and 1907* (above, n. 598), 29–30.

Law decided at its sitting of Paris in 1910 to set up a preparatory commission.[714] John Westlake was appointed rapporteur of the special commission dealing with the project of extension of the III Hague Convention of 1907 relative to the Opening of Hostilities to all coercive measures such as pacific blockade, occupation, etc.[715]

The choice of Westlake was not innocent. As a matter of fact, the Whewell professor of international law argued in a paper published the previous year that armed reprisals did not fall under the obligation laid down in Art. 1 of the III Hague Convention of 1907, viz. to issue a declaration of war or an ultimatum before commencing the hostilities.[716] Westlake maintained that there was a distinction between armed reprisals and war resting on the inequality of power between, on the one hand, the strong reprisal-taking State and, on the other, the small target country. Nevertheless, he acknowledged that this situation could lead to abuses. As a remedy, Westlake suggested on the model of Art. 1 of the Drago-Porter Convention that the resort to armed reprisals should be made conditional on an offer of arbitration. This proposal, which he intended to submit to the next Peace Conference, aimed to cover all classes of claims: the recovery of contract debts claimed by Governments on behalf of themselves or nationals, and the enforcement of non-contractual claims.[717]

Westlake's project did not aspire to the prohibition of armed reprisals. He merely sought to confine them within reasonable limits. Still, as much as a regulation on this topic was needed, he knew the temperament of the reprisal-taking Powers and feared their resistance:

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714 Extract from the minutes of the meeting on 1 April 1910: Institut de Droit International (ed.), *Session de Paris – Mars-Avril 1910* (Annuaire IDI, vol. 23; Paris: A. Pedone, 1910), 498. See more generally about the preparation of the Third Hague Conference in Otfried Nippold, 'Die gegenwärtige Stand der Vorarbeiten für die dritte Haager Friedenskonferenz', *ZVölkR* 7 (1913), 286–307.

715 See Louis Renault and Édouard Rolin, 'Rapport fait à l'Institut de Droit International au nom de la Commission spéciale constituée en vue de la prochaine conférence de la paix', in Institut de Droit International (ed.), *Session de Christiana – Août 1912* (Annuaire IDI, vol. 25; Paris: A. Pedone, 1912), 23–40, at 29, 31 and 36.

716 See *supra*, at 195–196.

717 Westlake, 'Reprisals and War' (above, n. 256), 134–7. See Lawrence's positive reception of this proposal: Lawrence, *The principles of international law* (above, n. 6), 344. Cf. with Strupp's draft convention improving the Drago-Porter Convention: Strupp, 'L'intervention en matière financière' (above, n. 687), 111–20.

"We may be sure that all Governments, including our own, will strive to retain as much as possible of their powers of action. They desire to exercise those powers for the good of their respective nations, and there is little use in appealing to altruistic sentiment in those nations. If there is to be much improvement in international law, and especially in so much of that law as tends to restrict the powers of Governments, each nation must be convinced that, even for its own good, it is better to rely on well-considered general law than on particular measures taken to meet particular occasions."[718]

Unfortunately, Westlake's project did not materialise. By 1912, the IIL had to postpone the consideration of the subject owing to the absence of report.[719] The following year, Westlake died on 14 April. Finally, the First World War broke out in summer 1914, putting an end to the hope of seeing a general agreement on armed reprisals.

V. Interim Conclusion

At a time when international law grew in importance as a discipline, the contemporary practice of armed reprisals raised the question of compatibility regarding the use of force in peacetime. Thus, the attention of legal scholars was drawn to this matter, concerning in particular the unprecedented custom of resorting to a blockade in time of peace.

However, between 1848 and 1912, lawyers failed to significantly contribute to the clarification of the law of armed reprisals because of their unease about this measure. This was a period of tension. Legal doctrine had to position itself in relation to State practice: either it remained a passive observer consigning the State practice or it decided to play an active role and condemn the abuses.

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718 Letter to *The Times* of 19 December 1908: John Westlake, *The Collected Papers of John Westlake on Public International Law* (Cambridge: CUP, 1914), 571. That is why Lawrence, who shared the view of a limitation of armed reprisals rather than their ban, suggested the creation of "a strong public opinion against their use on slight provocation, or for a manifestly unjust cause." (Lawrence, *The principles of international law* (above, n. 6), 344).

719 Morning meeting of the Institute's sitting at Christiania (Oslo), 27 August 1912: Institut de Droit International (ed.), *Session de Christiana – Août 1912* (Annuaire IDI, vol. 25; Paris: A. Pedone, 1912), 580f.

The first and main battleground was the question of pacific blockade which divided the legal community. At the session of Heidelberg in 1887, the Institute of International Law reached a consensus on the issue by which pacific blockades were recognised as a legitimate measure bereft of belligerency. This solution reveals the permissiveness towards the bullying practice of the great Powers as well as the timid attempt to limit the adverse effects of pacific blockades on the shipping of third States.

But the legal community was quickly overwhelmed by the State practice trying to extend the theory of pacific blockade. At the same time, the blockade of Venezuela of 1902/03 exposed the blurring of the thin line between war and peace and brought out the serious lacuna in international law regarding the use of force in peacetime, as the Permanent Court of Arbitration had to admit that the blockading Powers deserved a preferential treatment over the other creditor States as a result of their armed operation. The legal scholars' response was confused. The initiative had then to come from the Latin American countries with the Drago doctrine, which eventually gave birth to a Hague Convention of 1907 restricting partially armed reprisals.

Lawyers clearly missed the opportunity during the period 1848–1912 to firmly condemn the State practice of armed reprisals by adequately assessing and addressing the issue.