Part IV.
The Promises and Limitations of 'Peace Through Law': MATs and the International Adjudication of 'Mega-Politics'

Chapter 9: An Example of International Legal Mobilisation: The German-Belgian Mixed Arbitral Tribunal and the Case of the Belgian Deportees

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1. Introduction: 'Un grand procès international'

Paris, Hôtel Matignon, Monday, 7 January 1924, shortly after 09:30 am. The dining hall of the grand 18th-century townhouse, once a scene for aristocratic distractions, had been set up for a new type of spectacle. Attendees were met by a decidedly classic decor of massive chandeliers, gilded woodpanelling, and chubby cupids. Screens emblazoned with the double-headed eagle of the now-defunct Austro-Hungarian Empire, whose embassy had occupied the premises before the Great War, added a slightly unreal touch to the scene.[1] The new type of performance set to begin against this backdrop was that of a new type of justice – international justice. The public had come to witness what the Belgian newspaper *Le Soir* advertised as '*un grand procès international*', a major international trial.[2] This trial took place before the German-Belgian Mixed Arbitral Tribunal, one of 17 MATs domiciled at the Hôtel Matignon, which at that time was effectively an international judicial hub – its current use as the official residence of the French Prime Minister only dates back to 1935.[3] It was the first time that the Tribunal had reconvened since January

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1 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 8 January 1924).

2 'Un grand procès international: Les déportés belges contre le Reich' *Le Soir* (Brussels, 9 January 1924).

3 After sequestrating the Hôtel Matignon in 1919 as private enemy property, alleging that it had been ceded in 1889 by its previous owners to Emperor Franz Joseph in person, the French Government eventually agreed to consider it as Austrian and Hungarian government property and to buy it from these countries for 13.5 million francs in 1922. In the meantime, it had already installed the Paris-based MATs there in 1921. Christian Albenque, 'Un hôtel particulier parisien' in Christian Albenque, David Bellamy et al (eds), *L'Hôtel de Matignon: Du XVIII^e siècle*

1923, when French and Belgian troops had occupied the Ruhr, causing Germany to suspend its participation.[4] The proceedings would last for four days, attracting reporters from major European newspapers and even a photographer from the Meurisse press agency. The pictures he took to immortalise the event and its protagonists were widely reprinted at that time, especially in France and Belgium.[5]

The Tribunal in session on 7 January 1924. At the main table, from left to right: Alfred Lenhard, Richard Hoene, Paul Moriaud, Albéric Rolin, Henri Gevers, Georges Sartini van den Kerckhove. In the foreground: Walther Uppenkamp (left) and Jean Stevens (right). Press photograph by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

à nos jours (La Documentation Française 2018) 49–50. When the French Prime Minister contacted the MATs' 'College of Presidents' in 1925 with the request to consider vacating the premises, they refused, noting that their lease was only due to end in 1930. French National Archives (ANF) AJ/22/170. The MATs only left the Hôtel Matignon in November 1934. To mark the building's new role, the French Government symbolically held a council of ministers there on 28 May 1935. David Bellamy, 'Le siège du chef du Gouvernement' in Christian Albenque, David Bellamy et al (eds), *L'Hôtel de Matignon: Du XVIII^e siècle à nos jours* (La Documentation Française 2018) 60.

4 Otto Göppert, 'Zur Geschichte der auf Grund des Vertrags von Versailles eingesetzten Gemischten Schiedsgerichte' (unpublished typoscript, Berlin, March 1931, on file with the author) 94, 97.

5 Press clippings conserved by the deportees' lawyer, Jacques Pirenne, include articles from Belgian, French, Swiss, German, Dutch, British, Italian, Spanish, and Danish newspapers. National Archives of Belgium (AGR), BE-A0510/I 530/5595.

One of the photographs taken for Meurisse shows the Tribunal in session. In the middle of the picture, taking notes, one can clearly distinguish its President, the Swiss law professor Paul Moriaud (1864–1924), whom both Belgium and Germany appreciated for his impartiality and deep knowledge of both the Germanic and the Francophone legal cultures.[6] On Moriaud's left, looking at the public, one can see the Belgian member of the MAT, Albéric Rolin (1843–1937). As a renowned professor and author of books on both private international law and the laws of war, a longtime Secretary-General of the *Institut de droit international* (1906–23) and the Hague Academy of International Law (1914–37), Rolin was undoubtedly the Tribunal's most prestigious member.[7] To Moriaud's right, also taking notes, rises the tall figure of Richard Hoene, the German Judge. As opposed to his two colleagues, Hoene had the profile of a senior career magistrate, having been a member of the Frankfurt Court of Appeals and presided over a Chamber at the Berlin Court of Appeals.[8] During the Ruhr crisis, based on the practice of the Franco-German MAT, the Belgian Government had tried to replace him with a neutral judge appointed by the Council of the League of Nations. However, President Moriaud had been able to derail this project owing to his own resistance and Hoene's discrete cooperation in some of the MAT's work.[9] Sitting closer to the public and facing his Belgian counterpart Jean Stevens, a Brussels lawyer, the German Secretary, Walther Uppenkamp (1893–1980), has raised his head. Despite allegedly subject to less favourable treatment than Stevens by the MAT staff,[10] he would soon rise to state agent at several MATs before being appointed to the position of German Judge at the Mixed Courts of Egypt in 1926.[11] On the two far ends of the large table used by the Tribunal are the state agents. Belgium has sent two of them. Next to the moustachioed Henri Gevers, a Deputy Prosecutor before the Brussels Criminal Court,[12] Georges Sartini van den Kerckhove (1871–1940), an Advocate-General before the Belgian Court of Cassation who was also

6 See Plas (ch 7) and Péricard (ch 8).
7 Charles de Visscher, 'Nécrologie: Le Baron Albéric Rolin' (1937) 18 Revue de droit international et de législation comparée 5–9.
8 'Répertoire alphabétique des Tribunaux Arbitraux Mixtes et de leurs Membres', undated (late 1930s?) ANF, AJ/22/NC/33/2.
9 Göppert (n 4) 95. See also: Péricard (ch 8).
10 ibid.
11 'Répertoire alphabétique…' (n 8); Cilli Kasper-Holtkotte, *Deutschland in Ägypten: Orientalistische Netzwerke, Judenverfolgung und das Leben der Frankfurter Jüdin Mimi Borchardt* (De Gruyter Oldenbourg 2017) 190.
12 ibid.

his country's Agent-General before the MATs, has taken a seat. While at times critical of the MATs' performance,[13] Sartini van den Kerckhove would soon become one of their main promoters, actively encouraging his government to make them permanent.[14] On the opposite side of the room, partly hidden behind members of the public, one makes out the German State Agent Alfred Lenhard (1875–1929). A senior magistrate like Hoene, who had been President of the Court of Appeals in the Lower Saxon town of Celle and a member of the Frankfurt Court of Appeals[15], Lenhard knew that he, and his country, would have to answer some difficult questions over the coming days.

The authors of these questions faced the Tribunal from the other side of the room. Jules Loriaux, a slightly stout man of 38 years, who had to lean on a cane to support himself, was one of them. His presence in front of the Tribunal and Germany's representatives was already a statement in itself. Born on 5 May 1885 in Jumet near the Belgian city of Charleroi, Loriaux had worked as a glassmaker in his hometown. On 24 November 1916, the German occupation authorities in Belgium deported Loriaux, a married man and father to three sons, the youngest of whom was still an infant, to a camp near the fortress of Boyen near Lötzen in East Prussia (nowadays Giżycko in Poland). Here, he was asked to sign a work contract with a German employer. When he refused, his captors exposed him to a programme that was supposed to break his will. It consisted of hard outdoor physical exercise, followed by exposure to ice-cold temperatures for several hours, followed by food deprivation. After enduring this treatment each day for more than a month, Loriaux contracted pneumonia and was hospitalised. After more than a month, he was deemed unfit for work and given a release form allowing him to be sent back to Belgium. However, while Loriaux was transiting through the camp of Preußisch Holland (today Pasłęk), local authorities confiscated his release form and sent him off to another East Prussian camp in Elbing (today Elbląg). Here, he was once again asked to sign a work contract. When he refused, a soldier bashed his head with a club. He was then locked in an underground cell, where he was subjected to starvation and regular beatings, causing him to develop epilepsy after three days. Following one of his fits, he was first transferred to the camp's infirmary before being sent back to Preußisch Holland,

13 Georges Sartini van den Kerckhove, *Les Tribunaux arbitraux mixtes: Extraits du discours de rentrée prononcé à la Cour d'appel de Bruxelles*, *le 2 octobre 1922* (Larcier 1922) 27–28.

14 See Erpelding and Zollmann (Epilogue).

15 'Nécrologie' (1929) 8 Recueil TAM 3.

where he was hospitalised for a cardiac disorder. After his release from the hospital on 7 July 1917, he was transferred to the camp of Guben in Lower Lusatia, where he was finally sent back home on 16 July 1917. Although reunited with his family, Loriaux had, according to his medical certificate, returned from Germany 'a wreck' ('*une épave*'). Once a robust young man of 70 kg, he had shrunk to 35 kg and was unable to walk again for months. Even after regaining some strength, he remained marked for life, displaying various neurological and heart ailments that left him permanently disabled at an estimated 75 % of his pre-detention capacity.[16] Loriaux was the main claimant against the Reich in the case now examined by the German-Belgian Mixed Arbitral Tribunal.

Although he was the only former deportee in the room, Jules Loriaux was not alone. Nine other Belgian forced labourers or their families were also suing the Reich. Jean Poelemans, from Sint-Amandsberg near Ghent, had not been deported to Germany but to occupied France, where he had suffered severe rheumatisms, resulting in total permanent disability.[17] A fellow Gantois, Hortense Gillis's husband Gustave, had also been deported near the frontlines in France, where he had died from pneumonia.[18] Four claimants hailed from the Walloon town of Lessines, from which the first convoy of Belgian deportees had left. Joséphine Musette had lost her husband Émile, who, like the three other claimants from Lessines, had been part of that convoy.[19] After being deported and suffering the same kind of abuse as Loriaux, Émile Musette had contracted tubercular bronchitis and died in captivity.[20] Alphonse Dubois had fallen ill with pleurisy and remained an invalid at 50 % of his pre-detention capacity.[21] Désiré Marbaix had developed a bone infection and was now a total invalid.[22] Auguste Foucart had lost a leg as a result of tuberculosis.[23] Joseph Van Boekstael, from Jumet, had his left foot amputated following exposure.[24] Joseph Bar-

16 Some of the factual information (with a few slight spelling mistakes) can be found in the MAT's published decision: *Loriaux c État allemand* (3 June 1924) 4 Recueil TAM 674. Loriaux's lawyer's file on his client is preserved at the National Archives of Belgium: AGR, BE-A0510/I 530/5605.

17 AGR, BE-A0510/I 530/5605.

18 ibid.

19 'Introduction' (undated opening arguments, presented on 7 January 1922) AGR, BE-A0510/I 530/5607, 17c.

20 ibid.

21 ibid.

22 ibid.

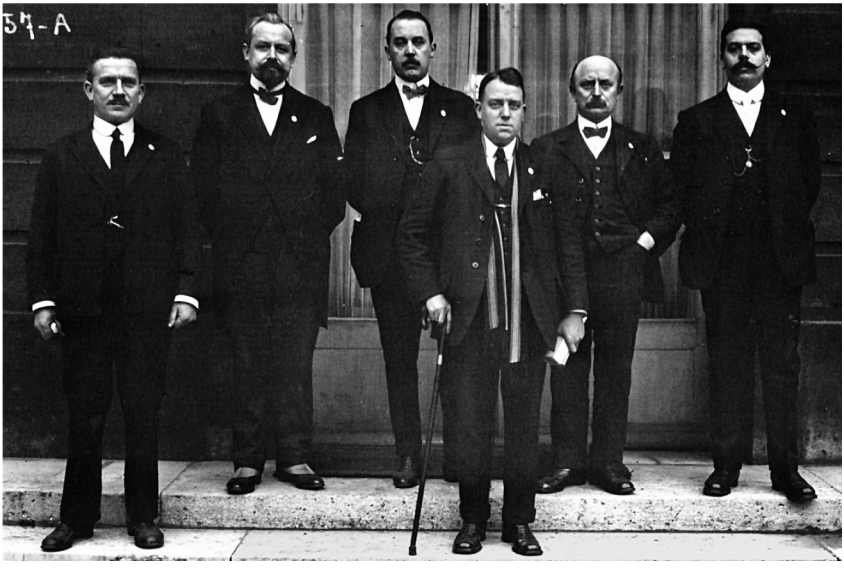
23 ibid.

24 ibid.

daux, from Erquelinnes, had suffered liver damage and remained an invalid at 30 % of his pre-detention capacity.[25] Finally, Marie Dossche, from Ghent, demanded compensation for the death of her husband Charles, who was shot by a German guard while trying to escape from captivity.[26]

All ten claimants were members of the *Fédération nationale des déportés de Belgique*, the National Federation of Belgian Deportees (FND). Founded in April 1919 as an alliance of various local deportees' committees, the Federation had two main aims. The first was to commemorate the deportations. The second was to obtain reparations from those responsible for them. At first, it tried to do so by vowing to help set up a list of German officials to be extradited to Belgium pursuant to arts 228–30 Versailles Peace Treaty (VPT).[27] However, this avenue had proved a dead-end: although Belgium had produced a list of 900 Germans accused of various violations of the laws of war,[28] in 1920 Germany obtained the right to organise its trials before its supreme court, the *Reichsgericht* in Leipzig. These trials were largely a sham, particularly with regard to the deportations, as Germany's highest court systematically found that those responsible for this policy had not violated any provisions of the Hague Regulations.[29] Soon afterwards, the FND set its eyes on the German-Belgian Mixed Arbitral Tribunal.

25 ibid.
26 ibid.
27 Arnaud Charon, 'Les déportés belges au sortir de la Grande Guerre: Un combat de longue haleine' (2018) 272 Guerres mondiales et conflits contemporains 107, 112–16; Arnaud Charon, 'The Claims of the Belgian Deported Workers at the Paris Mixed Arbitral Tribunal in 1924' in Ornella Rovetta and Pieter Lagrou (eds), *Defeating Impunity: Attempts at International Justice in Europe Since 1914* (Berghan, 2022) 49–50.
28 ibid, 50.
29 On this issue, see: Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburger Edition 2003) 388–95.



The main plaintiff, Jules Loriaux (foreground, leaning on a walking stick) and his entourage from the National Federation of Belgian Deportees. From left to right: Oscar Doornaert (President of the Flemish Committee), Eugène-Paul Lévêque (Secretary-General), Wicaert (Secretary of the Flemish Federation), Brigode (Treasurer), Demaret (President of the Walloon Committee). Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

Sometime in the spring of 1921, its Secretary-General, Eugène-Paul Lévêque, had contacted a young Brussels lawyer, Jacques Pirenne (1891–1972), with the idea of suing the Reich for compensation before the German-Belgian MAT. Together with his father, the historian and public intellectual Henri Pirenne (1862–1935), Jacques Pirenne had participated in the work of the Belgian Government's official commission of enquiry on the violations of international law committed by the German occupier, acting as its permanent secretary on questions of legislation enacted by the latter. After a series of consultations, Pirenne had agreed to take on the case.[30] By doing so, he had taken upon himself the responsibility for an early example of mass claims litigation: when adopting its decision to

30 Jacques Pirenne, *Mémoires et notes politiques* (André Gérard 1975) 105–107; 'Inventaire de la Commission d'enquête sur la violation des règles du droit des gens, des lois et des coutumes de la guerre', AGR, BE-A0510/I 298.

bring the matter before the MAT on 2 October 1921,[31] the FND had urged every single of its 48 000 members to give Pirenne an individual mandate using a standardised form, and nearly all of them had accepted to follow suit.[32]

Of these tens of thousands of individual cases, Pirenne selected those of the ten abovementioned deportees or their widows to the MAT as 'test cases' ('*cas types*') that could then be used to settle all the others.[33] In these cases, he requested the MAT to award the following types of compensation: 1. A lump sum for the loss and the wear and tear of clothes (300 francs); 2. a sum for living expenses borne by the deportee's family (150 francs per month of deportation); 3. a sum corresponding to the salary owed for each day of deportation (10 francs per day); 4. a sum corresponding to damages owed for each day of partial or total disability, whether temporary or permanent (eg 25 francs per day of total disability for a specialised worker, 15 for an unqualified worker); 5. a pension for each deportee suffering from permanent disability, or for the surviving spouse or other beneficiaries (calculated along the same lines as the damages for bodily harm).[34] Based on these principles, the damages claimed by Loriaux alone amounted to 101,705 francs.[35] With these figures in mind, the financial and political importance of the Belgian deportees' case before the German-Belgian Mixed Arbitral Tribunal could hardly be overstated. In February 1924, not even a month after the tense hearings at the Hôtel Matignon, officials at the German Ministry of Foreign Affairs estimated the costs of losing this case at roughly 5 billion francs[36] – ie almost eight times the compounded sums that Belgium had demanded for its civilian casualties (500 million francs) and the unpaid salaries due to its deportees (144 million francs) before the Reparations Commission established pursuant to the Treaty of Versailles.[37]

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31 'Tribunal arbitral mixte germano-belge' *L'indépendance belge* (Brussels, 29 October 1921) 2.

32 Pirenne, *Mémoires…* (n 30) 106–107.

33 Jacques Pirenne, 'Le procès des déportés belges contre le Reich allemand' (1924) 51 Revue de droit international et de législation comparée 102.

34 See, eg, the pre-printed petition for Joséphine Musette: 'Requête à Messieurs les Président et Membres du Tribunal arbitral mixte germano-belge' (undated, late 1921) AGR, BE-A0510/I 530/5609.

35 *Loriaux c État allemand* (n 16) 676.

36 Minutes of a meeting held at the *Auswärtiges Amt* (1 February 1924) Political Archive of the German Ministry of Foreign Affairs (PAAA), RZ 403/53269.

37 Charon, 'The Claims…' (n 27) 47.

To be sure, for Germany, the case was extremely sensitive. In the summer of 1923, when the MAT was paralysed as a result of the Ruhr crisis, it had even informally conveyed to President Moriaud that it would be willing to settle to avoid any public hearings because of the negative impact they might have on Belgian-German relations.[38] That said, the Belgian Government, whose relationship with the deportees would always remain uneasy,[39] would also have preferred a quiet settlement. This was at least what one could infer from its Minister of Economic Affairs' opposition to the lawsuit[40] and the encouraging words of its Agent-General before the MATs, describing Germany's settlement proposal as 'quite interesting' ('*assez intéressante*').[41] Jacques Pirenne's priority was exactly the opposite. He wanted to gain as much public attention and sympathy for the deportees and their quest for reparations before the MAT as possible, taking active steps to promote their atypical lawsuit with the press. Already in July 1922, he had secured the *pro bono* participation of a lawyer whose mere presence was certain to draw the attention of both the media and the public: Paul Hymans (1865–1945).[42] Before becoming Pirenne's *maître de stage* at the Brussels bar,[43] Hymans had been Belgium's Minister of Foreign Affairs during the Versailles Peace Conference and the first President of the Assembly of the League of Nations. In a similar vein, only a few days before the hearings in the deportees' case were due to take place, Pirenne gave an interview to the liberal Brussels daily *La Dernière Heure*. After seemingly protesting the reporter's intrusion into his office, he provided him with a detailed description of the upcoming proceedings, which he ended up advertising as 'the most poignant trial of our time' ('*le plus poignant procès de notre temps*').[44]

The press coverage seemed to prove Pirenne right. With the possible exception of the land reform disputes opposing large estate holders to

38 Sartini van den Kerckhove to Pirenne (30 July 1923) AGR, BE-A0510/I 530/5592.

39 On this issue, see: Stéphanie Claisse, 'Le déporté de la Grande Guerre : Un "héros" controversé : Le cas de quelques communes du Sud Luxembourg belge' (2000) 7 Cahiers d'histoire du temps présent 127; Charon, 'Les déportés belges…' (n 27).

40 Pirenne, *Mémoires…* (n 30) 107.

41 Sartini van den Kerckhove to Pirenne (n 38).

42 Pirenne, *Mémoires…* (n 30) 108.

43 Georges-Henri Dumont, 'Pirenne, Jacques' in *Nouvelle biographie nationale* (vol 4, Académie Royale des sciences, des lettres et des beaux-arts 1997) 307.

44 'Le procès des déportés belges à Paris : Comment il se présente : Une visite à M[e] Jacques Pirenne' *La Dernière Heure* (Brussels, 6 January 1924).

former Little Entente states,[45] few cases before the MATs seem to have attracted as much attention as that of the Belgian deportees. If anything in the interwar period came close to the idea of a 'major international trial' in the sense that it was followed not only by a small number of upper-class specialised jurists but elicited interest from a much broader and socially diverse public, this was certainly it. Triggered by an association of tens of thousands of working-class individuals, it was also a prime example of 'legal mobilisation', ie the invocation of legal norms 'as a form of political activity by which the citizenry uses public authority on its own behalf'.[46] Legal mobilisation often occurs after changes in the normative environment have taken place,[47] including by encouraging social actors to claim rights that have not been formally recognised or enforced by the authorities.[48] In the deportees' case, these changes had been brought about by the Versailles Treaty. One might even assert that the deportees' lawsuit was consistent with the wishes of one of the treaty's main drafters, Woodrow Wilson, who had shocked the members of the *Institut de droit international* in May 1919 by telling them that he wanted post-World War I international law to be handled less by socially privileged lawyers, and more by ordinary folk.[49] However, as this chapter will show, the case of the Belgian deportees makes clear that the limitations inherent to legal mobilisation also apply – and perhaps even more strongly – in international law. After presenting the reader with the factual and legal background of the case, this chapter will take a close look at the parties' arguments during both the written and oral phases of the proceedings, relying on previously uncommented archival material.[50] It will then analyse the MAT's decision, questioning its frequent characterisation as a major German victory, before concluding on the long-term legacy of the case.

45 See Papadaki (ch 10) and Stanivuković and Djajić (ch 13).

46 Frances Zemans, 'Legal Mobilization: The Neglected Role of Law in the Political System' (1983) 77 American Political Science Review 690.

47 ibid, 697.

48 Michael McCann, 'Law and Social Movements', in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (John Wiley & Sons 2004) 506, 508.

49 Michel Erpelding, 'Versailles and the Broadening of "Peace Through Law"', in Michel Erpelding, Burkard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Disute Settlement After World War I* (Nomos 2019) 11–26.

50 Although Arnaud Charon's article provides an excellent overview of the deportees' case, it does not include a detailed examination of the legal arguments at hand. Charon, 'The Claims…' (n 27).

2. The Facts and Background of the Case: the Belgian Deportations, 1916–18

Between 1916 and 1918, facing acute labour shortages as a result of military conscription, Germany deported about half a million civilians from occupied territories and subjected them to forced labour. While most of these deportations took place in Poland and Russia, those imposed on the occupied parts of France and Belgium received more international attention.[51] In Belgium, the deportations followed an unsuccessful campaign launched in 1914 to recruit voluntary contractual workers for the German industry. They took two main forms. Between October 1916 and February 1917, about 61 000 Belgians residing in the 'Government-General', the central part of occupied Belgium, were deported to Germany. Here, they were interned in camps and subjected to various pressures to sign work contracts with local industries relevant to the war effort. About 13 500 deportees gave in, leaving the camps as 'free civilian workers'. The remaining three-fourths were subjected to forced labour within the camps. Partly to coerce the deportees into signing work contracts, the working and living conditions were deliberately left in a catastrophic state, resulting in a death rate of about 2 %.[52] The second type of Belgian deportations took place in the 'Operations and Staging Area' ('*Operations- und Etappengebiet*'), the parts of Belgium and Northern France that were closer to the frontlines and had therefore been placed under the direct administration of the High Command of the German Army ('*Oberkommando des Heeres*', OHL). In this Area, between October 1916 and the end of the war, some 62 000 civilians, the majority of whom were Belgians, were pressed into 'Civilian Workers' Batallions' ('*Zivil-Arbeiter-Bataillone*', ZAB) and made to work on military fortifications. With a mortality rate of up to 5 %, working and living conditions were even worse than in the German camps.[53]

The legal basis of the German deportation policy resided in a series of executive orders presented as a response to the 'aversion to work' of occupied populations. The German military Governor-General in Belgium, Moritz von Bissing (1844–1917), issued the first of these orders on 22 August 1915. It made it a criminal offence for jobless people to refuse work

51 Mark Spoerer, 'Zwangsarbeitsregimes im Vergleich: Deutschland und Japan im Ersten und Zweiten Weltkrieg', in Klaus Tenfelde and Hans-Jürgen Seidel (eds), *Zwangsarbeit im Europa des 20. Jahrhunderts: Vergleichende Aspekte und gesellschaftliche Auseinandersetzung* (Klartext 2007) 195–99.

52 Jens Thiel, '*Menschenbassin Belgien*': *Anwerbung, Deportation und Zwangsarbeit im Ersten Weltkrieg* (Klartext 2007) 140–56.

53 ibid, 125–32.

the authorities offered to them.[54] Less than a year later, Article 2 of the order was amended by a provision stating that, in lieu of facing criminal prosecution before Belgian courts, individuals guilty of 'aversion to work' could now be 'deported to the [assigned] place of work' by the competent military and civilian authorities.[55] Although this provision would provide the legal basis for the deportations from the Government-General, von Bissing did not resort to it before late October 1916.[56] By then, under the influence of Erich Ludendorff (1865–1937), the Great General Staff of the Germans had already adopted an even more straightforward version of the order.[57] Amounting to a radicalised version of the 1876 German Criminal Code's provisions on 'aversion to work',[58] it had immediately been implemented in the Operations- and Staging Area.[59] This move, designed to increase pressure on Berlin and Brussels, had the desired result,[60] as German authorities would from now on consider themselves justified to automatically deport any jobless person who refused to 'voluntarily' agree to the contracts 'offered' to them, whether in Germany or for the army in the field.[61] In their radical negation of individual freedom, these executive

54 Verordnung gegen die Arbeitsscheu (22th August 1915) 108 Gesetz- und Verordnungsblatt für die okkupierten Gebiete Belgiens. Cited in: Johannes Bell (ed), *Völkerrecht im Weltkrieg: Dritte Reihe im Werk des Untersuchungsausschusses* (vol 1, Deutsche Verlagsgesellschaft für Politik und Geschichte, 1927) 235.

55 '*An Stelle der Strafverfolgung kann von den Gouverneuren und gleichberechtigten Befehlshabern, sowie von den Kreischefs die zwangsweise Abschiebung zur Arbeitsstelle angeordnet werden*'. Verordnung gegen die Arbeitsscheu (20 May 1916) 213 Gesetz- und Verordnungsblatt für die okkupierten Gebiete Belgiens. Cited in: ibid, 236.

56 Thiel (n 52) 136–40.

57 Persons that are able to work may be forced to do so – even outside their place of residence – in cases where, as a result of gambling, drunkenness, idleness, lack of work or laziness, they require the assistance of third parties for their own subsistence or that of the people in their care.' ('*Arbeitsfähige Personen können zwangsweise zur Arbeit – auch ausserhalb ihres Wohnsitzes – angehalten werden, sofern sie infolge von Spiel, Trunk, Müssiggang, Arbeitslosigkeit oder Arbeitsscheu für ihren Unterhalt oder zum Unterhalt derjenigen, zu deren Ernährung sie verpflichtet sind, fremde Hilfe erhalten oder beanspruchen*'). Verordnung betreffend die Einschränkung der öffentlichen Unterstützungslasten und die Beseitigung allgemeiner Notstände (3 October 1916) Hauptstaatsarchiv Stuttgart J 151 Nr 14, Bild 1.

58 Although §§ 361–62 of the 1876 German Penal Code also made 'aversion to work' a criminal offence punishable either by imprisonment or forced labour, they only targeted jobless individuals that required or had applied for public assistance.

59 Thiel (n 52) 123–24.

60 ibid.

61 Hankel (n 29) 381–82.

orders were not unlike the general obligations to work imposed by certain colonial rulers over their local subjects.[62]

The German authorities were fully aware that this practice was highly problematic from the perspective of international law. Granted, at that time, no conventional rule expressly forbade the deportation of civilians from occupied territories to forced labour. Article 52 of the 1899 and 1907 Hague Regulations concerning the Laws and Customs of War on Land, broadly accepted as representing customary international law, actually allowed requisitions in services from civilians under certain conditions:

> Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the commander in the locality occupied. The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.[63]

However, based on the general context in which it was adopted, this rule could hardly be interpreted as justifying German deportation policies. During the 19th century, most European states had broken with the *Ancien Régime* practice of *corvée* labour and subjected their power to requisition the goods and services of their populations to strict regulations, including in times of war.[64] And while Germany had recently broken with this tradition by introducing a 'patriotic auxiliary service' ('*vaterländischer Hilfsdienst*') in 1916, which allowed it to requisition all male Germans aged 17–60 years for the war effort,[65] it had remained isolated in doing so, with neither France nor Britain resorting to similar measures during the conflict.[66] In any case, even if one held the minority view that states might

62 On this issue, see: Michel Erpelding, *Le droit international antiesclavagiste des 'nations civilisées' (1815–1945)* (Institut Universitaire Varenne 2017) 269–72.

63 Art 52 1907 Hague Regulations merely includes the additional requirement that 'the payment of the amount due shall be made as soon as possible'.

64 Alain Laquièze, 'Réquisition' in Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique* (PUF 2003) 1339–41.

65 Gesetz über den vaterländischen Hilfsdienst (5 December 1916) *RGBl*, 1916, no 276, 1333.

66 Hartwig Bülck, *Die Zwangsarbeit im Friedensvölkerrecht: Untersuchung über die Möglichkeiten und Grenzen allgemeiner Menschenrechte* (Vandenhoeck & Ruprecht 1953) 78–79.

requisition a virtually unlimited range of services from their nationals, it was clear that this proposition could not apply to civilians in occupied territories. Based on the consideration that occupiers were no longer invested with full sovereignty over occupied territories but merely entrusted with their temporary administration, they could not impose the same kind of obligations on the local population as on their nationals.[67] Using a radicalised version of German legislation to deport civilians from their hometowns and subject them to forced labour seemed hardly compatible with this principle.

The German leadership was aware of these issues and the likely illegality of the deportations. Between March and October 1916, von Bissing had opposed the planned measure, which he deemed not only contrary to international law but a potential threat to Germany's status as a member of the community of 'civilised nations'.[68] The German Ministry of War itself recognised the illegality of the deportations, adding, however, that considerations of international legality had to give in to the 'absolute necessity to allocate every worker under Germany's control to the most productive function from the point of view of the war economy.'[69] This latter view was shared by the High Command and Germany's industrial elites,[70] who saw Belgium as a 'human reservoir' ('*Menschenbassin*') that needed to be tapped.[71] Nevertheless, the German authorities were convinced that they had 'to find a legal basis for forced labour that would not be in total contradiction with the Hague Convention',[72] as indicated by the minutes

67 The Hague Regulations included, *inter alia*, the obligation to apply local laws (Art 43), including 'as far as possible', local tax laws (Art 48) and the prohibition to force inhabitants to pledge allegiance to the occupying power (Art 45).

68 Bissing would finally agree to the deportations on 6 October 1916. One should note, however, that he had always been in favour of indirect coercition (eg economic pressure) that would have forced Belgian labourers to sign work contracts with German industrialists. For a detailed discussion of von Bissing's role, see: Thiel (n 52) 64–88, 136–40; Isabel Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War* (Cornell University Press 2014) 128–38. See also: John Fried, 'Transfer of civilian manpower from occupied territory' (1946) 40 AJIL 308; Lothar Elsner 'Belgische Zwangsarbeiter in Deutschland während des ersten Weltkrieges' (1976) 24 Zeitschrift für Geschichtswissenschaft 1259–60.

69 '*Etwaige völkerrechtliche Bedenken dürfen uns nicht hindern, sie müssen der unentrinnbaren Notwendigkeit weichen, jede in deutscher Gewalt befindliche Arbeitskraft der kriegswirtschaftlich produktivsten Verwendung zuzuführen*'. Elsner (n 68) 1260.

70 Hull (n 68) 130–31.

71 Thiel (n 52) 109.

72 '[…] ob sich eine juristische Begründung für Zwangsarbeit finden ließe, die der Haager Konvention nicht allzu offensichtlich widerspräche'. Elsner (n 68) 1260.

of a meeting held on 28 September 1916 between representatives of the OHL, the Ministries of War, of the Interior, and of Foreign Affairs, as well as the Governments-General of Belgium and Warsaw.[73] While radicals like Ludendorff and the industrialist Walther Rathenau (1867–1922) would have contented themselves with a mere reliance on the state of necessity, most German officials thought that more sophisticated and widely-accepted arguments were required.[74] They eventually agreed to rely on a justification reluctantly put forward by the lawyer and diplomat Johannes Kriege (1859–1937), who had been part of Germany's delegation at the 1907 Hague Peace Conference and had headed the Legal Department of its Ministry of Foreign Affairs since 1911. In a memorandum addressed to that Ministry, Kriege had suggested that Germany invoke the power of the occupant to uphold public order set out in Article 43 Hague Regulations.[75] The provision went as follows:

> The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

According to Germany, the naval blockade established by Britain had resulted in an industrial crisis which had rendered many Belgian workers jobless. Since these workers were said to engage in activities that threatened public order and safety out of 'idleness', the occupation authorities felt compelled to react to that threat by deporting them to forced labour.[76] Of course, the German authorities failed to mention that they had actively contributed to mass unemployment in Belgium by asphyxiating and dismantling Belgian industries in favour of their German competitors.[77] Nor did they address the fact that, contrary to von Bissing's suggestions, they had not used deportation as an individual sanction against workers convicted for having troubled public order but had organised systematic

73 Hankel (n 29) 381.
74 Hull (n 68) 41–50.
75 Hankel (n 29) 382. The contents of the memorandum were subject to prior negotiations between Kriege and his assistants, Paul Eckardt and Friedrich von Keller (1873–1960), on the one hand, and represenatives of the OHL, on the other hand. Hull (n 68) 133.
76 Jules Basdevant, *Les Déportations du Nord de la France et de la Belgique en vue du travail forcé et le droit international* (Paris, Sirey, 1917) 58.
77 Thiel (n 52) 40–46; Elsner (n 68) 1258–59.

mass deportations of individuals more or less arbitrarily described as 'jobless workers'.[78]

Despite these precautions, Germany's attempt to reinterpret the Hague Regulations failed miserably. The deportations sparked an international protest wave that extended well beyond the Allied Powers. Amongst the neutral countries, the United States, Spain, Switzerland, and the Netherlands condemned them, as did the Holy See, whereas spontaneous demonstrations took place in Italy, France, Ireland, and the United States.[79] Even in Germany, the social-democratic members of the Reichstag reacted with indignation.[80] Generally speaking, those opposing the deportations had many legal arguments on their side.

Some observers noted that deporting workers to another country to allow the local workers to be sent to the front was hardly compatible with Article 52 Hague Regulations and their requirement that civilians not be involved in military operations against their country.[81] Others replied to Germany's invocation of Article 43 Hague Regulations by stressing that the occupier's power to uphold public order was linked to its obligation to respect local laws, 'unless absolutely prevented' and that no motive whatsoever was strong enough to justify ignoring the fundamental principle of free labour.[82] More generally, other commentators objected that Article 46 Hague Regulations, according to which '[f]amily honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected', could not be set aside by invoking a state of necessity.[83] For the Dutch Government, the deportations were a violation of the 'Martens Clause' set out in the preambles of the 1899 and 1907 Regulations and which stated:

78 For instance, Passelecq notes that in Nivelles, at least half of the deportees were not jobless workers, but farmers, small business owners, or even qualified workers with a valid employment in Belgium. Fernand Passelecq, *Les déportations belges à la lumière des documents allemands* (Beger-Levrault 1917) 44.

79 Hull (n 68) 137.

80 Fried (n 68) 310.

81 James W Garner, 'Contributions, Requisitions, And Compulsory Service in Occupied Territory' (1917) 11 AJIL 105–106.

82 Basdevant (n 76) 60.

83 ibid. At the 1899 Hague Conference, Germany had suggested a reference to the state of necessity that would have limited the impact of this provision. Faced with the general hostily of the other participants, it had retracted its proposal. Hull (n 68) 73.

> that in cases not included in the Regulations …, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[84]

This clause was generally understood at the time as referring to customary laws of war,[85] which, at least since the Congress of Vienna, included the occupier's obligation not to treat occupied territories as part of its territory.[86] Another provision cited in this regard was Article 23 of the 1863 Lieber Code,[87] which stated that:

> Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.[88]

The parallel established in this provision between deportations and slavery in the context of the US Civil War was still considered relevant in the context of the Belgian deportations. In a memorandum addressed to Allied and neutral governments, Belgium itself described the deportations as a 'white slave trade' ('*traite des blancs*') contrary to the 'laws of humanity'.[89] A joint statement by France, Great Britain, Italy and Russia was even more explicit, solemnly declaring that Germany had violated international rules on the repression of slavery:

> The Germans, after promising to respect the freedom of labour, have used the joblessness provoked by themselves as a pretense to provoke, organize and establish slavery, which they had solemnly vowed to abolish in Africa as part of the 1890 Brussels Convention.[90]

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84 ibid, 137.

85 Jochen von Bernstorff, 'Martens Clause', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP 2009).

86 Fried (n 68) 310–11.

87 Jules Van den Heuvel, 'La déportation des Belges en Allemagne' (1917) 24 Revue générale de droit international public 273, 296.

88 US War Department, 'General Orders No 100: Instructions for the Government of Armies of the United States in the Field' (24 April 1863).

89 'Note du gouvernement belge aux puissances alliées et neutres protestant contre le travail forcé et la déportation auxquels l'autorité allemande soumet la population belge' (10 November 1916) 24 RGDIP (documents) 49–51.

90 '*Les Allemands, après avoir promis de respecter la liberté de travail, ont, prétextant le chômage qu'ils avaient eux-mêmes provoqué, organisé et établi l'esclavage qu'ils s'étaient*

The barrage of international criticism finally led Germany to give in. In February 1917, it halted the deportations of Belgians and Poles to the Reich. This was a major, yet limited, concession, as the occupier would maintain conscriptions into the ZAB and deportations of Russian workers until the end of the war.[91] The international outcry against Germany's policies would eventually find its way into the 1919 Versailles Peace Treaty. However, it would do so in a way that did not necessarily provide effective relief to the victims of the deportations.

3. The Written Phase: Reparation of Wartime Injuries as an Individual Right?

The Versailles Treaty expressly provided for the compensation of damages suffered by victims of Germany's deportation policy in its Part VIII regarding reparations. Following Article 231 VPT, which held Germany '[responsible] for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies', Article 232 para. 2 VPT specified that '[t]he Allied and Associated Governments … require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers'. Specifying the categories of damage covered by this provision, Annex I to Part VIII VPT expressly mentioned two items covering the plight of the deportees and their relatives:

> 2. Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, *deportation*, internment or evacuation, of exposure at sea *or of being forced to labour*), wherever arising, and to the surviving dependents of such victims. …
> 8. Damage caused to civilians *by being forced by Germany or her allies to labour without just remuneration*.[92]

Based on these provisions alone, one might have expected full reparation payments for the victims, both direct and indirect, of the deportations. However, the reparations scheme under Part VIII VPT had established

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engagés solennellement par la convention de Bruxelles de 1890 à abolir en Afrique'. 'Protestation des États alliés contre la déportation en masse des civils belges en Allemagne' (6 December 1916) 24 RGDIP (documents) 52–53.

91 Spoerer (n 51) 195–98.

92 Emphasis added.

two major principles with regard to the compensation of private individuals that would somewhat dampen such expectations. The first was of a substantive nature insofar as it limited the global extent of Germany's obligation to compensate for the damages resulting from the war it had started. Under Article 232 para. 1 VPT, the authors of the Versailles Treaty recognised that full compensation was simply impossible:

> The Allied and Associated Governments recognise that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all such loss and damage.

To define the amount of reparations and to resolve the issues of allocation that would inevitably arise from a situation in which a limited amount of resources had to be distributed to various categories of actors, Part VIII VPT relied on a second principle, which established a procedural requirement. Pursuant to Article 233 and Annexes II-VII Part VIII VPT, the amount of damages due under Article 232 VPT was to be established by an Inter-Allied Commission known as the Reparation Commission.[93] Exclusively composed of government delegates from the victorious powers (including Belgium), it was described in para. 12 Annex II Part VIII VPT as having 'wide latitude as to its control and handling of the whole reparation problem as dealt with in this Part of the present Treaty' and as 'the exclusive agency of [said victorious powers] respectively for receiving, selling, holding, and distributing the reparation payments to be made by Germany under this Part of the present Treaty.' Whereas the German Government had the right to be heard by the Reparation Commission, individuals were not mentioned as being part of that process. These provisions seemed to indicate that it was for the Belgian State authorities alone to negotiate a sum on behalf of the deportees and distribute it amongst them. Before long, this solution would prove deeply disappointing to many deportees.

This was not due to a lack of responsiveness on behalf of the Belgian State but rather to its selectiveness in identifying the recipients of and calculating the sums allotted under the reparations.[94] On 10 June 1919, (ie even prior to the signature of the Versailles Peace Treaty on 28 June

93 On the Reparation Commission, see: Jean-Louis Halpérin, 'Reparation Commission (Versailles Treaty)', in Hélène Ruiz Fabri (ed) *Max Planck Encyclopedia of International Procedural Law* (OUP 2021).

94 For a more detailed description of the domestic compensation process offered to Belgian deportees, see: Charon, 'The Claims…' (n 27) 44–47.

1919) the Belgian Parliament had unanimously passed a law that allowed civilians who had suffered bodily damage as a result of the war to file for compensation – including pensions in case of disability – with the Belgian State. In addition, it specifically allowed deportees subjected to forced labour for more than three months without fair pay to request a lump sum of 150 francs before dedicated domestic administrative courts.[95] As noted by Arnaud Charon, this law left many civilian war victims unhappy, especially since pensions were considered too low. Moreover, the deportees perceived the lump-sum system as unjust, as it left forced labourers deported for less than three months without any compensation and did not award higher damages to long-term deportees.[96] Eventually, the law was revised on 25 July 1921, allocating 50 francs per month of deportation for deportees, but only for those either subjected to unpaid forced labour or who had never given in to coercion by signing a work contract.[97]

This was still a far stretch from what deportees considered their due and were now claiming in front of the German-Belgian MAT as just compensation for themselves and their families. Apart from variable damages and pensions for bodily harm, Loriaux and his fellow deportees were asking Germany to award them compensation for material losses, namely 150 francs per month in living expenses and a 300 francs lump sum for worn and torn clothes – something which the Belgian legislation had not even contemplated. Moreover, the 10 francs per day in unpaid salaries they were claiming were not only a major improvement on the 50 francs per month allocated by the Belgian State.[98] They were also vastly superior to the 144 million francs that the Belgian Government had demanded on their behalf before the Reparation Commission. This sum had been calculated based on an estimated salary of 6 francs per day for a maximum of 150 days, multiplied by 160 000 deportees.[99] However, in order for these claims to succeed, Pirenne knew that he would have to overcome one major obstacle: he would have to persuade the MAT that it actually had jurisdiction over them.

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95 Belgium, 'Loi sur les réparations à accorder aux victimes civiles de la guerre' (10 June 1919) Moniteur Belge, 22 June 1919, 2785.

96 Charon, 'The Claims…' (n 27) 46.

97 Belgium, 'Loi portant révision de la loi du 10 juin 1919 sur les réparations à accorder aux victimes civiles de la guerre' (25 July 1921) Moniteur Belge, 28 August 1921, 6954.

98 'Réparation des pertes matérielles subies par les déportés' (undated memorandum, probably mid-1921) AGR, BE-A0510/I 530/5591, III.

99 Charon, 'The Claims…' (n 27) 47.

It was clear from the start that this was going to be an uphill battle. Before agreeing to let Pirenne take on the case, the National Federation of Deportees had contacted Eugène Hanssens (1865–1922), a liberal politician and lawyer before the Belgian Court of Cassation, asking him whether Belgian deportees should sue Germany before the MAT. The reply had been categorical. The deportees had been told that 'in most cases, these suits [stood] no chance at success'.[100] The author of the letter agreed that under the 'general principles of law', the Belgian deportees would have had the right to full compensation for the damage that Germany had caused them and that Belgian domestic legislation had failed to provide them with such compensation. However, positive law – in this case, the Versailles Peace Treaty – had clearly left it to the Reparation Commission to define the amounts due as compensation for wartime acts against civilians explicitly mentioned in Annex I Part VIII, including deportations and forced labour.[101] Accordingly, suing for additional compensation 'would amount to ask Germany to pay twice'.[102] The only damage that could possibly come under the jurisdiction of the MAT was that resulting from the loss of parcels and other goods belonging to the deportees, but only if one could prove that this loss could be assimilated to a form of confiscation, which seemed doubtful.[103] Visibly irked by the FND's decision to contact Hanssen directly,[104] Pirenne soon realised that the legal opinion had, in fact, been drafted by another ambitious young lawyer: Henri Rolin (1891–1973).[105] Pirenne's senior by only one month, Henri Rolin had worked as a secretary for Paul Hymans during the Paris Peace Conference. Later a prominent international lawyer in his own right, Henri Rolin was no other than the son of Albéric Rolin, the Belgian member of the MAT that

100 French original: '*dans la plupart des cas, pareille demande n'aurait aucune chance à aboutir*'. Hanssens to Lévêque (4 August 1921) AGR, BE-A0510/I 530/5591.

101 French original: '*ce serait demander que l'Allemagne paie deux fois que de lui réclamer une indemnité supplémentaire*'. ibid.

102 ibid.

103 ibid.

104 In his memoirs, Pirenne depicts this consultation as his own initiative. Pirenne, *Mémoires…* (n 30) 107. However, Pirenne's own archives show that Lévêque had contacted Hanssens directly, and that Pirenne had resented this move, stating that 'a consultation on this issue could only be useful following a conversation on the precise point of law with the consulted lawyer' ('*une consultation sur la question ne pourrait être utile qu'après une conversation en droit sur le point précis, avec l'avocat consulté*'). Pirenne to Lévêque (8 August 1921) AGR, BE-A0510/I 530/5591.

105 Pirenne, *Mémoires…* (n 30) 107.

Pirenne wanted the deportees to seize.[106] Following this discovery, either the FND or Pirenne himself contacted Henri Rolin, who confirmed that he had indeed co-authored the opinion with Hanssens. He also reaffirmed his view that it was '[i]mpossible to claim one further cent from Germany [in compensation for forced labour]' and that even compensation for lost parcels was unlikely.[107] In order to persuade the FND to ignore this view and press ahead with the suit before the MAT, Pirenne had come up with an alternative, rather intricate and sometimes contradictory, reasoning. This argument would considerably evolve during the written procedure, which, pursuant to the German-Belgian MAT's Rules of Procedure (RoP), not only comprised the four classic stages of a claim ('*requête*'), response ('*réponse*'), reply ('*réplique*'), rejoinder ('*duplique*'),[108] but also allowed the parties to reformulate their submissions ('*conclusions*') until the end of the oral hearing ('*jusqu'à la clôture des débats*', '*bis zum Schlusse der Verhandlung*').[109]

Pirenne's basic assertion, which can already be found in a letter addressed to Lévêque in August 1921[110] and constituted the main argument used in the original claims submitted to the MAT before the end of that year,[111] was that Articles 231–32 VPT did simply not impact the deportees' right to individual compensation. According to Pirenne, what these provisions actually aimed to compensate was not the personal damage the German State had inflicted upon private individuals but the additional costs it had caused to the Belgian State, notably in the form of a diminished workforce, as well as disability and survivors' pensions.[112] In the initial claim, submitted before 31 December 1921, Pirenne argued that the deportees could sue the German State before the MAT based on Article 297 (e) VPT.[113] This provision went as follows:

106 Jean Salmon, 'In memoriam Henri Rolin (1891–1973)' (1973) 9(2) Revue belge de droit international x-xxvi.

107 French original: '*impossible d'encore réclamer à l'Allemagne un [centime] à ce sujet*'. Rolin to unknown recipient (undated, probably summer 1921), AGR, BE-A0510/I 530/5591.

108 RoP Belgian-German MAT, Arts 20–34. Reprinted in: *Reichsgesetzblatt*, 1921, 108.

109 ibid, Art 25.

110 Pirenne to Lévêque (8 August 1921) AGR, BE-A0510/I 530/5591.

111 'Requête à Messieurs les Président et Membres du Tribunal arbitral mixte germano-belge' (undated, late 1921) AGR, BE-A0510/I 530/5609.

112 Pirenne to Lévêque (n 110).

113 'Requête à Messieurs… (n 111).

> The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI …

Germany's response, written by its Agent-General, Hermann Johannes, and State Agent Lenhard, was sent to the MAT on 24 July 1922.[114] Replying to the deportees' factual descriptions of their exploitation and mistreatment, it made generic statements about how Germany had always well treated, fed, and paid 'Belgian civilian workers' ('*ouvriers civils belges*').[115] Addressing the legal aspects of the claim, it flatly rejected the MAT's jurisdiction under Article 297 (e) VPT using two arguments. First, it stressed that the MAT did not have territorial jurisdiction under that provision since the latter only covered 'damage or injury inflicted … in German territory as it existed on August 1, 1914'.[116] Secondly, and perhaps more crucially, it asserted that deporting a civilian was 'a measure exclusively aimed at the latter's person' ('*une mesure exclusivement dirigée contre la personne de celui-ci*'), not at their 'property, rights and interests'.[117] Echoing the point already made by Henri Rolin, it argued that injuries to the health and life of civilians, as well as the repercussions of such injuries on the surviving dependents of such victims, were already 'covered by the 132 billion Goldmark that Germany had been forced to pay under the reparations'.[118] It stressed that this sum, and notably the '640 million francs' claimed by the Belgian Government on account of the deportations, covered all damages suffered by the Belgian deportees, even if they had not been declared individually to the Reparation Commission.[119]

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114 'Réponse du défendeur' (24 July 1922) AGR, BE-A0510/I 530/5609.
115 ibid, 2–6.
116 ibid, 6–8.
117 ibid, 8.
118 French original: '*couverts par la somme de 132 milliards marks d'or, dont le paiement a été imposé à l'Allemagne au titre des réparations*'. ibid, 9.
119 ibid, 10.

The deportees' reply, which reached the German State Agents on 9 December 1922,[120] detailed the argument that Pirenne had already outlined to Lévêque in the summer of 1921 but had not fleshed out in the initial claim. The factual part of the reply essentially provided a detailed and statistically backed-up account of the mistreatment, starvation and health issues suffered by the Belgian deportees, as well as information regarding the non-payment of their salaries, thereby severely undermining Germany's idealised account.[121] In the legal part of the reply, Pirenne provided a bold but also somewhat lengthy and meandering explanation as to why the deportees had a right to sue Germany before the MAT.[122]

The first part of Pirenne's legal arguments regarded Article 297 (e) VPT. With reference to the provision's territorial scope, he noted that the provision only mentioned 'injury inflicted … in German territory' but did not in any way require the measures that had caused that injury to have been adopted in Germany. Moreover, Pirenne specified that, for the purposes of Article 297 (e) VPT, the term 'German territory' had to be interpreted as covering not only Germany itself but also the Operations and Staging Area, which had been under the direct control of the German High Command. He based this argument on the consideration that, under international law, the German military in that area had benefitted from the extraterritorial application of German law and that this also applied to the Belgian forced labourers drafted into the ZABs, which had been placed under German military control.[123] While contradicting the letter of Article 297 (e) VPT – and the widely accepted principle, reaffirmed by the 1899 and 1907 Hague Regulations, that occupying a territory militarily does not automatically result in its annexation[124] –, Pirenne's argument seemed to imply a teleological reading of the Versailles Treaty maximising the compensation owed to individuals, not unlike that given today by certain arbitral tribunals regarding the application of investment treaties to illegally annexed territories.[125] That said, Pirenne's main argument with

120 Schuster (German State Agent before the German-Belgian MAT) to the Reich Ministry of Justice (12 December 1922) German Federal Archive ('BA') (Lichterfelde), R/3001/7476.

121 'En fait' (undated reply, late 1922) AGR, BE-A0510/I 530/5609.

122 'En droit' (undated reply, late 1922) AGR, BE-A0510/I 530/5609.

123 ibid, 5.

124 See, eg, Article 43 Hague Regulations, which renders the occupying power's authority conditional upon its 'unless absolutely prevented, the laws in force in the country'.

125 On this issue, see, eg: Sebastian Wuschka, 'Investment Tribunals Adjudicating Claims Relating to Occupied Territories – Curse or Blessing?', in Antoine Duval

regard to Article 297 (e) VPT concerned the legal characterisation of the deportations.

Pirenne did not deny that the deportations had constituted injuries to the life and health of civilians as described under Annex I Part VIII VPT. What he denied was that they could be *exclusively*, or even predominantly, characterised as such. For Pirenne, the essence of the deportations lay elsewhere. Their purpose was 'to force [the Belgian workers] to execute the work contracts that they had refused to sign'.[126] Citing a literature overview by the centre-left French economist Charles Gide (1847–1932), Pirenne noted that work contracts were analysed either as sales contracts, rental lease agreements, or partnership agreements revolving around Karl Marx's (1818–83) concept of 'labour power' ('*force de travail*'), which was a form of property. The main purpose of the Belgian deportations had been to confiscate this type of property from Belgian workers, even though the measures used to implement this confiscation had also impacted the bodies of these workers. The deportations could therefore be characterised as 'exceptional war measures' targeting the 'property, rights or interests' of individuals under Article 297 (e) VPT.[127] From a theoretical perspective, and perhaps even more so than his considerations about the definition of 'German territory', Pirenne's characterisation of labour power as 'property' was somewhat problematic. For one, as opposed to liberal jurists and economists, the workers' movement – including Karl Marx himself – had always emphasised that it was impossible to separate a worker's labour power from the worker as a person. As a matter of fact, Article 427 VPT had recently affirmed the idea that 'labour should not be regarded merely as a commodity or article of commerce' as the first guiding principle of the newly-founded International Labour Organisation.[128] Moreover, in the

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and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Routledge 2020) 235–57; Kit De Vriese, 'The Application of Investment Treaties in Occupied or Annexed Territories and "Frozen" Conflicts: *Tabula Rasa* or *Occupata*?', in Tobias Ackermann and Sebastian Wuschka (eds), *Investment in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and "Frozen" Conflicts* (Brill/Nijhoff 2020) 319–58.

126 French original: '*contraindre [les ouvriers belges] à exécuter les contrats qu'ils se refusaient à signer*'. 'En droit' (n 122) 1.

127 ibid, 1–5.

128 Stein Evju, 'Labour is not a commodity: reappraising the origins of the maxim' (2013) 4 European Labour Law Journal 222; Maria Vittoria Ballestrero, 'Le "energie da lavoro" tra soggetto e oggetto' (2010) WP CSDLE "Massimo D'Antona". IT – 99/2010.

colonial context, European lawyers often found it useful to describe forced labour as resulting 'merely' in the confiscation of the labour power of local individuals because it allowed them to distinguish this 'civilising' practice from the 'barbarous' institution of slavery, which they described as confiscation of the whole individual.[129] That said, within the limited context of the procedure before the MAT, Pirenne's characterisation of the deportees' labour power as a form of property distinct from their bodies could also be seen as a form of empowerment. Regardless of its wider theoretical implications, it allowed working-class people to claim the kind of procedural avenues and substantive protection a conventional reading of Article 297 (e) VPT would ordinarily have reserved for members of the bourgeoisie.

However, Pirenne also envisaged the possibility that the MAT might not follow his reading of labour power as a form of property under Article 297 (e) VPT. Noting that Germany had denied in its response any general characterisation of the deportees as forced labourers, including by asserting that they had benefitted from the salary grid applied to free workers, he concluded that this implied the existence of labour contracts. Accordingly, he asserted that the MAT, in any case, had jurisdiction under Article 304 (b) VPT, which had included within its remit

> all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and German nationals.[130]

Having thus characterised the deportations as measures impacting private rights, Pirenne concluded that their legal nature depended on the perspective one adopted. From the perspective of the relations between Belgium and Germany, they could be characterised as a violation of Article 52 of the 1899 and 1907 Hague Regulations.[131] As such, they 'undoubtedly [pertained] to public law, endowing the Belgian Government with a right against the German Government'.[132] Conversely, 'from the perspective of each individual deported worker … they [appeared] as pertaining exclusively to private law, more precisely, to the German Civil Code.[133] In

129 Erpelding, *Le droit…* (n 62) 309–313.
130 'En droit' (n 122) 7–8.
131 ibid, 8–9.
132 French original: '*elles relèvent sans contredit du droit public et comme telles créent au profit du gouvernement belge un droit contre le gouvernement allemand*'. ibid., 9.
133 French original: '*du point de vue de chaque ouvrier déporté … ells apparaissent comme relevant exclusivement du droit privé*'. ibid.

Pirenne's reading, the Versailles Treaty took into account both aspects, which it had 'distributed' between the Reparation Commission (which dealt with the public law aspect) and the MAT (which dealt with private rights).[134] This contradicted the conventional view that the drafters of the Versailles Treaty had barred the deportees from claiming damages beyond those earmarked for them by the Reparations Commission. In support of his argument, he cited Article 1 of Belgium's 1919 law on the compensation of civilian war victims, which had provided that the establishment of domestic procedures in this regard did not impact 'the right of the nation and private individuals to seek reparation of acts contrary to the law of nations committed by enemy powers, their agents or nationals'.[135]

Dated 10 April 1923, Germany's rejoinder, signed by Government Agent Thiene, included three legal arguments.[136] The two first regarded Article 297 (e) VPT. Regarding the territorial scope of this provision, Germany vehemently denied that it could have applied to the Rear and Staging Area in occupied Belgium and France since 19th-century state practice, the Hague Conventions, and even the Versailles Treaty itself made clear that 'the *occupatio bellica* of foreign territories in no way changes the territorial sovereignty of the occupied country'.[137] With regard to deportations to Germany itself, the rejoinder essentially asserted that, by focusing on the issue of labour power, Pirenne had artificially reframed the issue at hand. For Germany, even if one accepted that labour power could be characterised as property under Article 297 (e) VPT, the mobilisation of this power was merely the consequence of the deportees' forcible transfer to Germany, which was clearly a measure targeting the individual as such. Moreover, Germany categorically denied that a person's labour power could be considered property under the Versailles Treaty. It first noted that this was contrary to all legal logic and everyday language and that the 'measures of supervision, of compulsory administration, and of sequestration' mentioned by para. 3 Annex to Article 297 (e) VPT could hardly apply to labour power. Dealing a heavy blow to what had been Pirenne's main argument, the rejoinder concluded by citing the German-Belgian MAT's recent decision in *Richelle c État allemand*. In that decision,

134 ibid, 10–14.

135 French original:'*[le] droit de la nation et des particuliers de poursuivre la réparation des actes contraires au droit des gens, commis par les puissances enemies, leurs agents ou ressortissants*'. 'Loi sur les réparations…' (n 95).

136 'Duplique' (10 April 1923) AGR, BE-A0510/I 530/5609.

137 French original: '*l'*occupatio bellica *de territoires étrangers ne modifie en rien la souveraineté territoriale du pays occupé*'. ibid, 9–11.

Moriaud's Tribunal had expressly rejected the notion that the assimilation of labour to property made by certain economists could apply to the legal context as well.[138] The third and last part of the German rejoinder reaffirmed the absorption of private rights by the provisions of Part VIII VPT on reparations. According to Germany, the fact that these provisions were of a public nature did not preclude them from dealing with private rights. Defending a traditional view of international law, Germany noted that only states were subjects of international law and endowed with the power to conclude treaties. Therefore, any treaty-based right to compensation was, at least in principle, reserved to states alone. Private persons could benefit from such a right only on an indirect and exceptional basis, ie if states expressly concluded an express provision to that end. This had also been the system adopted by the drafters of the Versailles Treaty. By mentioning both the damages suffered by the Allied and Associated Governments and their nationals in Part VIII VPT, they had implied that the reparations process established therein covered both public and private rights. Conversely, the right to sue for damages awarded to certain private persons pursuant to Part X VPT had to be considered exceptional and subjected to a restrictive interpretation. Therefore, only damages that had not already been mentioned as subject to reparations under Part VIII VPT could be brought before the MAT – which was not the case for the injuries suffered by the deportees or their relatives.[139]

The arguments exchanged during the written stage of the proceedings made it clear that the deportees' case pitted two very different visions of the Versailles Treaty against each other. On the one hand, the Belgian deportees, represented by Jacques Pirenne, were defending an unconventional interpretation of the treaty centred on the protection of the individual. Based on little more than principles of civil law and considerations of social justice, they were implying that the peace treaty placed the protection of all private rights on a par with those of the signatory states. On the other hand, Germany merely had to rely on established state practice and conventional doctrine to assert that the signatories of the Versailles Treaty could make, and had indeed made, the final determination that some of their nationals would never be able to claim full compensation for their wartime injuries. Based on his previous correspondence with Henri Rolin – whose father was, after all, sitting in the deportees' case – and, more recently, the MAT's rather conservative decision in *Richelle c État allemand*,

138 ibid, 7–8. *Milaire c État allemand* (13 January 1923) 2 Recueil TAM 715.
139 ibid, 11–18.

Pirenne probably knew that his chances of securing a fully-fledged victory for the deportees were limited. It might therefore seem somewhat surprising that he never seems to have replied to the settlement offer made by Germany in July 1923 through the Belgian Agent-General.[140] However, accepting such an offer would have deprived Pirenne and the deportees of something that both of them were expecting impatiently:[141] the publicity of a day in court.

4. The Hearing: Addressing the 'Conscience of Europe'

The publicity of their hearings was one of the most salient features of the MATs, distinguishing them from both 19th- and 20th-century mixed claims commissions and present-day investor-state arbitral tribunals.[142] The deportees' case showed that, much more than the physical attendance of the broader public, which remained limited,[143] the main potential consequence of publicity was media coverage. A classic '[magnifier of] the public power of legal mobilisation pressure tactics',[144] this factor did not appeal equally to both parties. The German Government clearly perceived it as a major liability, fearing that a public discussion of the deportations might exacerbate tensions between Germany and Belgium.[145] Conversely, for Pirenne and the deportees, pleading their case to a large audience had at least two major advantages. First, the hearing and associated media coverage provided the deportees with a platform from which they could attract public attention and sympathy for their plight, something which they felt they had not been given enough. Second, showing the MAT that the deportees enjoyed wide-ranging public support well beyond Belgium might embolden it to embrace at least some of Pirenne's unconventional arguments. The four day-hearing, held from Monday, 7 to Thursday, 10 January 1924, reflected these opposing considerations.

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140 Sartini van den Kerckhove to Pirenne (n 38).

141 Pirenne to Belgian FM Jaspar (17 October 1923) AGR, BE-A0510/I 530/5593.

142 See the Introduction of this volume.

143 According to the Belgian daily *Le Soir*, during the first session of the hearing, the public was limited to 'three ladies' and 'seven gentlemen'. However, the same newspaper later reported increasing attendance numbers, both among Parisians lawyers and jurists and members of the public. 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 8, 9, and 10 January 1924).

144 McCann (n 48) 514.

145 Sartini van den Kerckhove to Pirenne (n 38).

Representing the deportees: Jacques Pirenne (seated) and Paul Hymans (standing). In the background: their client Jules Loriaux (first row, first from the right). Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

The first two days of the hearing were entirely taken up by Pirenne, who spoke for a total of nine hours and 45 minutes.[146] While remaining very factual and generally refraining from hyperbolic statements, he nevertheless adopted a markedly more solemn tone than in his written arguments. In his opening statement, he stressed that the deportees' suit was not about 'reigniting barely extinguished hatreds' ('*réveiller des haines mal calmées*'), but essentially about law ('*c'est essentiellement un procès de droit*'). Its aim was to:

> provoke a decision which might subsequently become a part of the law of nations … in the interest of all peoples and, more particularly, of the working class of all lands … [to protect civilian populations] against the servitude inaugurated by Germany in 1916.[147]

146 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 8 and 9 January 1924).

147 French original : '*afin de provoquer par une sentence qui puisse à l'avenir être incorporée au droit des gens … dans l'intérêt de tous les peuples et particulièrement de la classe ouvrière de tous les pays … [pour protéger les populations civiles] contre la*

By referring to the centrality of the law of nations and the necessity to develop it further in the interest of civilians and workers, Pirenne had reframed the deportees' suit in much broader terms, resonating with the Allies' assertions that WWI had been a war 'for law'[148] and that the institutions created by the Versailles Peace Treaty sought to establish 'peace through law'.[149] Building on this idea, he stressed that the MAT was 'ideally suited' ('*tout désigné*') to set such a precedent, as it represented 'the conscience of all Europe' ('*la conscience de l'Europe entière*').[150] Moving on to the facts at hand, Pirenne provided the Tribunal with a detailed restatement of German deportation policies, partially relying on classified documents one of his acquaintances, the historian Armand Wullus (1893–1969), had stolen from an archive in Potsdam.[151] Amongst his findings, Pirenne highlighted the responsibility of German jurists, including university professors, in encouraging the Reich authorities to simply not consider themselves bound any longer by the laws of war,[152] as well as Governor von Bissing's acknowledgement that the deportation policies violated the Hague Regulations.[153] In order to dispel any doubts about the harshness of the deportations, he provided the Tribunal with a detailed description of their concrete implementation, as well as the inhumane living and working conditions of the deportees, often citing first-person witness accounts.[154]

In the legal part of his statement, Pirenne presented the Tribunal with partly modified and refined arguments. He was able to do so because of the German-Belgian MAT's liberal Rules of Procedure, which, as already mentioned, allowed the parties to submit their final submissions ('*conclusions*') until the end of the oral hearing.[155] This allowed him to take into account the Tribunal's *Richelle* decision, which had discredited his earlier characterisation of the deportations as exceptional war measures against Allied private property. Accordingly, in his 'oral submissions' ('*conclusions*

servitude inaugurée par l'Allemagne en 1916'. 'Exorde' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 1.

148 On this subject, see: Hull (n 68).

149 See: Michel Erpelding, 'Versailles…' (n 49) 11–28.

150 'Exorde' (n 147), 2.

151 Pirenne, *Mémoires…* (n 30) 108–109.

152 'Introduction' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 10–12.

153 ibid, 17–17a.

154 ibid, 18–80.

155 Art 25 RoP Belgian-German MAT.

d'audience'),[156] Pirenne all but renounced the use of Article 297 (e) VPT, invoking it only to secure compensation for worn and torn clothes and lost parcels.[157] Instead, he now relied on one main argument: the contractual nature of the relationship between the Belgian deportees and the German Reich. In support of this characterisation, he pointed out that Germany had not only paid, housed, and fed the deportees in return for their work (albeit insufficiently) but had always categorised them as 'free civilian workers' ('*freie Zivilarbeiter*'). For Pirenne, such a relationship could only be considered as a work contract, both *de facto* and *de jure*, 'whether or not that contract had been confirmed in writing' ('*que ce contrat ait été ou non confirmé par écrit*').[158] In his oral statement, using a principle from civil law, he added that the deportees' lack of consent could in no way allow Germany to deny the legal effects of these contracts, as only the party subjected to the violence could have done so.[159] In any case, the deportations could not be described as requisitions, since the latter could only have taken place 'within the bounds of Article 52 of the [1907] Hague Convention' ('*dans les limites de l'article 52 de la Convention de La Haye [de 1907]*'), which the deportations had violated.[160] Were the Tribunal to refuse Pirenne's characterisation, it could only end up with an even further-reaching and potentially dangerous conclusion:

> it would be obliged to consider that by hiring Belgian workers, the German State had created for them … a legal status characterized by a violently imposed deprivation of all rights and individual freedoms to the benefit of a master …, [i.e. a status which] could only be characterized as slavery.[161]

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156 The term was used by the Tribunal itself: *Loriaux c État allemand* (n 16) 676. Although RoP do not specify when exactly the *conclusions d'audience* were to be delivered, press reports suggest that they were read out loud by Pirenne at the very end of his statement, on Tuesday afternoon. 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 9 January 1924).

157 'Conclusions' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 5–6.

158 ibid, 1–2.

159 'En droit' (n 122) 33.

160 'Conclusions' (n 157) 2.

161 French original: '*il serait obligé de considérer que l'emploi des ouvriers belges par l'État allemand, a créé pour ceux-ci … un état juridique comportant privation de tous droits et de toute liberté individuelle, au profit d'un maître imposé par la violence…, [c'est-à-dire un état qui] ne pourrait être qualifié que du nom d'esclavage*'. ibid.

Conversely, were the Tribunal to follow Pirenne's characterisation and decide that the deportees had benefitted from work contracts, it would also have to declare itself competent under Article 304 (b) VPT and provide the deportees with full compensation for their personal injuries.[162] In this context, he noted that the German-Belgian MAT, in its recent decision in *Milaire c État allemand*, had used this provision to award damages for work injuries to a Belgian who had signed a work contract with the German Military Railways Directorate.[163] Asserting that Milaire had only signed this contract to avoid deportation, he concluded that, from a legal perspective, there was no difference between the situation of Milaire and that of the deportees – although the former was 'a weak man' ('*un homme faible*') whereas the latter were 'heroes' ('*des héros*').[164] Since work contracts were inherently of a private nature, claims resulting from them could not have been addressed by the Reparation Commission, whose competence was limited to the public aspect of the deportations. Pirenne acknowledged that the deportations had indeed given rise to forced labour, but only 'beyond the private relationship between the parties themselves' ('*en dehors des rapports privés entre les parties elles-mêmes*').[165] Thereby, he essentially broke down the deportations into two phases: whereas the initial mobilisation of the deportees had been the result of Germany abusing its powers as a state and was, therefore, a matter of international law, the actual implementation of the forced labour was a contractual matter under domestic private law.[166] For Pirenne, it was 'legally impossible' ('*juridiquement impossible*') for either Belgium or Germany to renounce private contractual claims on behalf of their nationals.[167] Accordingly, the Reparation Commission could only have made determinations regarding the collective damage suffered by the Belgian State both as a result of having to take care of the deportees and of the consequences of the deportations on Belgium as a society and a nation.[168]

Pirenne's argument regarding slavery might seem surprising at first sight, given the Allies' previous condemnation of Germany's forced labour policies as a violation of its international antislavery obligations. Nevertheless, it fell squarely within the overall logic of his statement. For Pirenne,

162 ibid, 2–4.
163 *Milaire c État allemand* (n 138).
164 'En droit' (n 122) 34(1).
165 'Conclusions' (n 157) 3.
166 ibid, 3. See also: En droit' (n 122) 49–50.
167 'En droit' (n 122) 16.
168 ibid, 2–4.

recognising the existence of labour contracts between the deportees and the German State was likely to be more beneficial to workers and civilians than recognising that Germany had engaged in acts of slavery. As he concluded in his oral remarks, requiring Germany to pay the Belgian deportees the salaries they were due based on German labour legislation might have a dissuasive effect on future aggressors:

> Will new wars perhaps afflict the world? Could such a thing happen again? In this case, the lives of hundreds of thousands of human beings will depend on the decision that the Tribunal will have taken. According to the respondent, our claim must be rejected, since the Belgian State was paid a lump-sum indemnity. This means that, according to the respondent, in times of war, the inhabitants of occupied territories will not enjoy any rights any longer. They will remain at the mercy of the occupier, who may carry them away into slavery. They will be human material whose use will either result in an indemnity paid to the state should the occupier lose or will be considered legitimate should he emerge victorious.[169]

169 *'Peut-être de nouvelles guerres désoleront-elles le monde? Pareille chose pourra-t-elle se reproduire? De la décision qu'aura prise le Tribunal dépendra – dans ce cas – le sort de centaines de milliers d'hommes. Pour le défendeur, il faut nous débouter parce qu'une indemnité forfaitaire a été payée à l'État Belge, c'est-à-dire pour lui donc – en cas de guerre les populations des territoires occupés n'ont plus aucun droit – sont livrées à la merci de l'occupant qui peut les entraîner en esclavage – elles sont du matériel humain dont l'emploi donnera lieu au paiement d'une indemnité à l'État au cas où l'occupant est vaincu et qui sera légitime s'il est vainqueur*'. 'En droit' (n 122) 46.

Defending the Reich: Max Illch, counsel for Germany. Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

Compared to Pirenne's detailed and solemn account on behalf of the deportees, Germany's reply was a much more compact affair. As in other cases that were considered to be of exceptional importance, the Reich had not left its defence exclusively to the German State Agents but had appointed a lawyer.[170] Counsel for Germany was Max Illch (1872–1958), registered at the Berlin bar, who, according to the Brussels newspaper *La Dernière Heure*, had lived in France for 14 years and spoke a French 'of great purity and without any accent' ('*avec une grande pureté et sans aucun accent*').[171] Illch, whom Nazi Germany would later bar from exercising certain of his legal activities due to his Jewish ancestry, ultimately causing him to emigrate in 1936,[172] proved to be a sensible choice. Speaking for only two hours and 15 minutes,[173] he avoided any discussion of the facts

170 Göppert (n 4) 14.

171 'L'Allemagne plaide en droit contre les déportés belges' *La Dernière Heure* (Brussels, 10 January 1924).

172 He first emigrated to Italy, later to the United States. 'Illch, Max' in Simone Ladwig-Winters and Rechtsanwaltskammer Berlin (eds), *Anwalt ohne Recht: Das Schicksal jüdischer Rechtsanwälte in Berlin nach 1933* (3rd edn, Bebra 2022) 262.

173 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 10 January 1924).

presented by Pirenne, choosing instead to highlight the contradictions within his opponent's legal arguments. Rebutting Pirenne's most salient accusation, Illch started by presenting Germany as firmly committed to implementing the Treaty of Versailles. He stressed that the Reich was in no way suggesting a new incentive for wartime slavery in occupied territories. Quite to the contrary: it was actually recognising the right of all deportees – including those not represented before the MAT – to reparations pursuant to the peace treaty.[174] Seeking to cast doubt on Pirenne's understanding of that treaty and the consistency of his legal strategy, Illch then pointed out that the deportees' lawyer had already had to abandon his initial main argument based on Article 297 (e) VPT, which the German-Belgian MAT had clearly rejected in *Richelle c État allemand*.[175] With regard to the claimants' new main argument based on Article 304 (b) VPT, he noted that there was a profound contradiction in providing a detailed factual description of the deportations as resulting from coercion while simultaneously alleging their contractual nature. In his view, the Tribunal could not ignore these factual allegations when assessing the legal nature of the deportations.[176] Moving on to Pirenne's central thesis, according to which Belgium could not have deprived its nationals of their right to additional remedies for private injuries, Illch noted that this was precisely what established state practice allowed governments to do:

> Whatever the theory one adopts regarding the nature of the state, everybody agrees that states, even without any mandate from their nationals, rule over them and may determine over their rights pursuant to established treaties and domestic laws. There is no question that the Treaty of Versailles is for all of its signatories also an act of domestic legislation binding upon their nationals. In this regard, states are all-powerful. Besides, gentlemen, where could one find a better example [of such a treaty] than in the Treaty of Versailles itself? Over and over again, it subjects the rights of nationals on both sides to measures that impact them deeply, or even give them up altogether … Gentlemen, there is no question that the Treaty of Versailles's signatory states

174 'Plaidoirie de M[e] Hilsch [sic], de Berlin' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607.
175 ibid, 3–4.
176 ibid, 5–7.

> could do whatever they wanted with [their] nationals and the rights of [their nationals].'[177]

After this transparent allusion to Germany's many grievances about the Versailles Treaty's impact on its nationals, Illch presented the Tribunal with his own analysis of the reparations regimes established by that treaty. From his perspective, as opposed to the measures that fell within the jurisdiction of the MAT, those attributed to the Reparation Commission pursuant to Article 232 VPT and Annex I Chapter VIII VPT all had one feature in common: they consisted of 'particularly flagrant violations of the law of nations' ('*des infractions particulièrement flagrantes au droit des gens*'). The Allied and Associated Powers, who had drafted the Versailles Treaty, had included the deportations under these provisions.[178] This was a remarkable statement, as counsel for Germany seemed to acknowledge that the deportations had been illegal under international law – an acknowledgement which he later repeated.[179] It also stood in sharp contrast to the unanimous decision made in February 1923 at a meeting involving State Agent Lenhard and representatives of various ministries not to discuss the legality of the deportations in front of the MAT because of its 'questionable' ('*zweifelhaft*') nature.[180] However, the criterion put forward by Illch also allowed him to discard as irrelevant whether such egregious violations of international law had been formally based on unilateral normative acts governed by public law or on contracts governed by private law. From his perspective, Pirenne's distinction between the private law and the public law aspects of the deportations was utterly pointless. Conversely, stating that Article 232 VPT only covered reparations for flagrant

177 '*Quelle que soit la théorie à laquelle on se rattache pour dire ce qu'est l'État, tout le monde est d'accord pour reconnaître que l'État sans avoir de mandat de ses ressortissants, en est le maître en tant qu'il dispose d'eux et de leurs droits d'après les conventions et lois intérieures en vigueur, et il est hors de doute que le Traité de Versailles est en même temps pour chacun des États signataires un acte de législation intérieure et que cette législation intérieure lie les ressortissants; que l'État à cet égard est tout puissant. Et d'ailleurs, Messieurs, où pourrais-je trouver un meilleur exemple que dans le Traité de Versailles lui-même? Maintes et maintes fois dans ce Traité, les droits des ressortissants de part et d'autre sont l'objet de mesures qui les aliènent profondément … Messieurs, il me semble sans conteste que les États signataires du Traité de Versailles pouvaient faire de [leurs] ressortissants et de leurs droits ce qu'ils voulaient.*' ibid, 8.

178 ibid, 12–13.

179 ibid, 14.

180 Minutes of a meeting at the German Ministry of Foreign Affairs (24 February 1923) BA (Lictherfelde), R/3001/7476.

violations of international law also allowed to account for the existence of two different sets of procedural avenues. For Illch, it made sense that the Allies would have left the reparations under Article 232 VPT to a Reparation Commission, not including Germany, thus allowing them to unilaterally determine the amount that the Reich would have to pay for its violations. On the other hand, all belligerents had adopted exceptional war measures not amounting to egregious violations of international law. It was for claims arising from such measures alone that the Allies and Germany had created the MATs, ie judicial bodies in which Germany could participate on an equal footing.[181] To illustrate his claim, Illch turned to the MAT's decision in *Milaire c État allemand*. Far from backing up Pirenne's argument regarding the Tribunal's jurisdiction over all employment relationships between Belgians and the German occupier pursuant to Article 304 (b) VPT, it had actually noted that:

> all parties agree that Milaire was not subjected to forced labour under [para. 2 Annex I Chapter VIII VPT], but had willingly committed himself to be hired by the German railways administration in occupied Germany.[182]

Having thus undermined Pirenne's second main legal argument, Illch was able to rest his case. Concluding his speech, he stressed that, just like Pirenne, he hoped for a general appeasement between the former enemies. However, unlike Pirenne, he did not believe that making Germany pay twice based on the deportees' claims would contribute to this appeasement.[183]

Speaking after Illch, the deportees' second counsel, Paul Hymans, essentially provided a summarised version of Pirenne's arguments,[184] drawing an equally repetitive reply from Illch.[185] However, the point of his participation was likely to raise public awareness about the deportees' case. In this regard, it was a success. Not only did the attendance at the hearing

181 'Plaidoirie de M[e] Hilsch [sic], de Berlin' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 13.

182 *Milaire c État allemand* (n 138) 717.

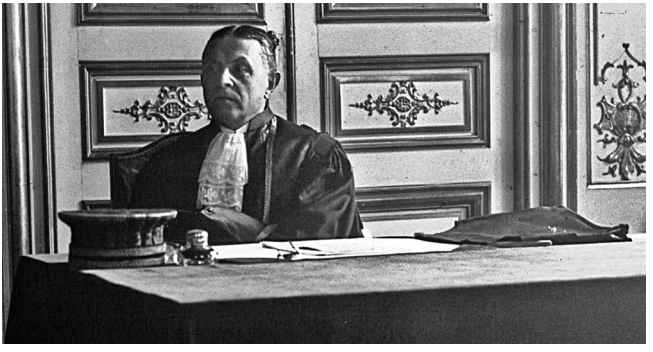
183 'Plaidoirie…' (n 181) 19–20.

184 Unfortunately, there does not seem to be any archival record of Hymans's speech. However, the reporters present at the hearing have left us with numerous accounts and citations.

185 'Réponse de l'avocat allemand, M[e] Hilsch [sic] à M[e] Hymans (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607.

soar on the afternoon of 9 January 1924.[186] Building on the facts and legal arguments assembled by Pirenne, he provided the press with lively descriptions of the deportations and rhetorical flourishes, including a vibrant appeal to the Tribunal to embrace a more human-centred vision of international law:

> The law of nations – which yesterday was still called the law of war – is currently being rewritten. May you contribute to this endeavour, Gentlemen of the Court, taking your inspiration from the sacred rights of man.[187]



'My mission here is strictly defined': German State Agent Alfred Lenhard. Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

Held on Thursday, 10 January 1924, the last session of the hearing was dedicated to a public exchange of arguments between the Belgian and German State Agents. It would end with a minor incident. The first to speak was the Belgian State Agent Gevers. After repeating the arguments already put forward by Pirenne and Hymans, he concluded by declaring that the most important part of the hearing was yet to come, as the German State Agent Lenhard would undoubtedly provide the Tribunal with a formal declaration about his country's opinion on the deportations.[188]

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186 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 10 January 1924).

187 '*On est en train de refaire le droit des gens, ce qu'on appelait hier le droit de la guerre. Apportez-y, Messieurs de la Cour, votre collaboration, vous inspirant des droits sacrés de l'homme.*' 'Les déportés belges contre l'Allemagne' *La Libre Belgique* (Brussels, 10 January 1924).

188 There does not seem to be any archival record of the statements made by the Belgian State Agents. However, the reporters present at the scene provided a

Considering the formal decision taken by the German Government in 1923 to avoid a discussion of the legality of the deportations,[189] Gevers's appeal put Lenhard in a very difficult position. Replying to his Belgian colleague, he declared that his role was purely legal and that he could neither intervene in nor make declarations on political matters. He then moved on to repeating the legal arguments already presented by Illch.[190] After Lenhard had finished his statement, the Belgian Agent-General Sartini van den Kerckhove, adopting a solemn and emotional tone, noted that his counterpart had not made a single gesture or issued a single word of regret to the deportees and accused him of heartlessness.[191] To this, Lenhard replied that 'all victims of the war deserve the compassion of civilised people' ('*la commisération des gens civilisés est acquise à toutes les victimes de la guerre*'), but that in his opinion, it would have been an insult to express his compassion to the deportees while simultaneously denying them the right to the direct remedy they were claiming.[192] Following this statement, the Tribunal's President, Paul Moriaud, took the floor. According to the reporter from *La Libre Belgique*, the following exchange ensued:

> [Moriaud:] May I ask you a few simple questions, Mr State Agent? Do you think that the law of nations – which is not a law based on conventions alone, is it? – may be breached without impunity by any country when it is in that country's interest? Isn't the violation of the law of nations a legal question? Don't you think that the international law questions that are part of the ten cases before us today are legal questions that deserve to be discussed before you?
>
> …
>
> [Lenhard:] Mr President, I apologize for not giving you the answer that you expect. As I already mentioned, my mission here is strictly defined.

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relatively consistent account thereof. See: 'Le duel belgo-allemand' *La Dernière Heure* (Brussels, 11 January 1924); 'Les déportés belges contre l'Allemagne' *La Libre Belgique* (Brussels, 11 January 1924); 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 11 January 1924); 'Taktlosigkeiten gegen Deutschland' *Deutsche Allgemeine Zeitung* (Berlin, 11 January 1924).

189 Minutes of a meeting… (n 180).

190 'Le duel belgo-allemand' *La Dernière Heure* (Brussels, 11 January 1924).

191 ibid.

192 'Réponse de l'agent du gouvernement allemand' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607.

> …
> [Moriaud:] Do the ten test cases before us not pertain to international law?
> …
> [Lenhard:] It is not for us, but for the Tribunal, to say whether these cases pertain to international law. For us, they pertain to the Treaty of Versailles.
> …
> [Moriaud:] Recently, a Bulgarian-Belgian Tribunal[193] had to deal with a case quite similar to the ones before us today. The case was about measures taken against a Belgian national. It was a very painful case on which the Tribunal had to decline jurisdiction. Well, the Bulgarian Agent, Mr Theodoroff, did not in any way hesitate to express his pain at having won this case – and I commend him for that. He spoke like a decent man.[194]

Having uttered these words, Moriaud declared the proceedings closed.[195] Predictably, they led to opposing reactions in Belgium and in Germany. Whereas *Le Soir* welcomed the exchange as 'a moving incident' ('*un émouvant incident*'),[196] the *Deutsche Allgemeine Zeitung* lambasted Moriaud for what it saw as 'acts of tactlessness' ('*Taktlosigkeiten*') and 'improprieties'

193 Moriaud also presided the Bulgarian-Belgian MAT. See Péricard (ch 8).

194 '*[Moriaud :] Vous me permettrez de vous poser ces simples questions : Est-ce que vous estimez que le droit des gens – qui n'est pas un simple droit conventionnel, n'est-ce pas? – peut être violé impunément par un pays quand il y a intérêt? Est-ce que la violation du droit des gens n'est pas une question juridique? Est-ce que les questions du droit des gens qui se trouvent incluses dans les dix articles dont nous nous occupons ne vous paraissent pas des points de droit qui méritaient d'être posés devant vous? … [Lenhard :] Monsieur le président, je m'excuse mille fois si je ne vous donne pas la réponse que vous désirez. La mission pour laquelle je suis venu ici est strictement délimitée, comme je l'ai déjà dit. … [Moriaud :] Les dix cas-types présentés au tribunal ne relèvent-ils pas du droit des gens? … [Lenhard :] Si cela relève du droit des gens, ce n'est pas à nous de le dire, c'est au tribunal. Pour nous, il s'agit du traité de Versailles. … [Moriaud :] Dans une affaire qui s'est déroulée devant un tribunal bulgaro-belge, il s'est passé quelque chose qui se rapproche beaucoup du procès actuel. Il s'agissait de mesures prises contre un Belge; il s'agissait d'un cas très douloureux dans lequel le tribunal s'est déclaré incompétent. Eh bien, l'agent bulgare, M. Théodoroff, a exprimé sans hésitation – fait dont je lui rends hommage – la douleur qu'il avait été vainqueur dans le procès. Il parlait comme un honnête homme.*' 'Les déportés belges contre l'Allemagne' *La Libre Belgique* (Brussels, 11 January 1924).

195 ibid.

196 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 12 January 1924).

('*Entgleisungen*').[197] As for the deportees, they felt vindicated by the President's declaration. Back in his home town of Jumet, the main plaintiff, Jules Loriaux, welcomed it as a 'moral condemnation' issued by a neutral judge against the 'crime of the deportations' committed by Germany.[198]

5. The Verdict: a German Victory?

The German-Belgian Mixed Arbitral Tribunal handed down its verdict in *Loriaux c État allemand* and the nine other test cases on 3 June 1924.[199] Both parties had had good reasons to remain cautious about the result. Perhaps still under the impression of the President's damning remarks to State Agent Lenhard, officials at the German Ministry of Foreign Affairs had not excluded a mostly negative outcome for the Reich. For this eventuality, they had already been envisaging a broad press campaign denouncing the 'absurdity' ('*Widersinnigkeit*') of burdening Germany with another 5 billion francs in reparations only four years after the entry into force of the Versailles Treaty.[200] As for Pirenne, his initial display of optimism – he had told a reporter a few days after the hearing that his impression was favourable and that he hoped for a positive outcome as soon as February[201] – very likely concealed more guarded feelings. The deportees' lawyer had known from the beginning that the odds were not necessarily in his favour. Moriaud's mention of the Bulgarian-Belgian MAT having to decline jurisdiction in a similarly 'painful' case, combined with the German-Belgian MAT's rather discouraging own case law in *Richelle* and *Milaire*, would only have deepened this impression. But there had also been encouraging news. A few days after the end of the hearing, Jean-Maurice Marx, a member of the Belgian delegation at the Reparation Commission, had informed Paul Hymans that Germany's argument about it having to 'pay twice' should the deportees win before the MAT was

197 'Taktlosigkeiten gegen Deutschland' *Deutsche Allgemeine Zeitung* (Berlin, 11 January 1924).

198 'Le retour des délégués des déportés' *La Dernière Heure* (Brussels, 12 January 1924).

199 Only the Loriaux decision was published in the MATs' official collection: *Loriaux c État allemand* (n 16). Of the remaining nine decisions, seven (Poelemans, Musette, Dubois, Marbaix, Van Boekstael, Bardaux) have been preserved in Pirenne's personal archives: AGR, BE-A0510/I 530/5594.

200 Minutes of a meeting (n 36).

201 'Après le procès des déportés' *La Dernière Heure* (Brussels, 13 January 1924).

baseless. The Commission had recently determined that in cases of overlap between one of its own decisions and that of a MAT, the latter would take precedence.[202] Whatever his personal intuition about the outcome of the case, Pirenne had not mentioned this new development in the article sent in March 1924 to the prestigious *Revue de droit international et de législation comparée* and published later that year, which was basically a summarised restatement of the arguments already presented to the MAT.[203]

Pirenne had been right to refrain from making any sanguine statements about the deportees' prospects for compensation. The decision in *Loriaux c État allemand* and the other test cases turned out to be quite similar to the precedent mentioned by Moriaud, with the German-Belgian MAT declining jurisdiction on all but one of the claims put forward by the deportees. Most of the decision addressed the deportees' claim regarding unpaid salaries, which it examined both with regard to Article 297 (e) and 304 (b) VPT. Regarding the former, the Tribunal started by noting that 'not a single domestic legal system in the world' ('*le droit positif d'aucun pays*') considered 'the labour capacity of a worker' ('*la capacité de travail de l'ouvrier*') as property and that,

> based on the unquestionable intention of the authors and signatories of the Peace Treaty, as well as on the unanimous case law of the MATs, "property, rights or interests" are patrimonial assets, i.e. things which are distinct from a person and on which that person owns rights …[204]

Mentioning its own decisions in *Richelle*[205] and *Caro*,[206] but also the Franco-German MAT's decision in *Coquard*[207] and the Anglo-German MAT's decision in *Brueninger*,[208] it declared that 'the deportations were nothing else but measures against persons' ('*la déportation n'est pas autre chose qu'une mesure contre la personne*').[209] It concluded by adding that regarding deportations as exceptional war measures under Article 297 (e) VPT was

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202 Marx to Hymans (14 January 1924) AGR, BE-A0510/I 530/5593.

203 Pirenne, 'Le procès…' (n 33) 102.

204 '… *selon l'indubitable intention des auteurs et des signataires du Traité de paix, de même que selon la jurisprudence unanime des TAM, les "biens, droits et intérêts" sont des éléments du patrimoine et supposent des choses distinctes de la personne et sur lesquelles celle-ci a des droits*'. *Loriaux c État allemand* (n 16) 678–79.

205 *Richelle c État allemand* (20 October 1922) 2 Recueil TAM 403.

206 *Pierre Caro c État allemand* (4 April 1922) 2 Recueil TAM 14.

207 *Coquard Pierre c État allemand* (12 July 1922) 2 Recueil TAM 297.

208 *FW Brueninger v German Government* (26 January and 27 March 1923) 3 Recueil TAM 20.

209 *Loriaux c État allemand* (n 16) 679.

excluded for two more reasons. On the one hand, such measures had to be taken in Germany. On the other hand, Article 297 (d) VPT implied that exceptional war measures could be recognised as final and binding. Being 'the most flagrant and most atrocious violation of the law of nations' ('*la violation la plus flagrante et la plus atroce du droit des gens*'), the deportations could in no way have benefitted from such recognition.[210] Moving on to Article 304 (b) VPT, the MAT held that the existence or not of a work contract between the deportee and the Reich was irrelevant since Annex I Part VIII VPT did not make that distinction when mentioning forced labour and that the Belgian Government had adopted the same view within the Reparation Commission. Noting that the 144 million francs earmarked for the deportees by that Commission were part of the 132 billion Goldmark set as 'the extent of [Germany's] obligations' ('*le total [des] obligations [de l'Allemagne]*') mentioned in Article 233 VPT, it stressed that this expression did not cover claims such as those made by the deportees before the MAT. Quite to the contrary: it exclusively referred to Germany's obligation to pay the reparations due pursuant to Part VIII VPT, using the procedures provided for under Part VIII VPT. The only exceptions to this principle were set out in Article 242 VPT, which only mentioned Sections III and IV Part X VPT, notably Article 297 VPT, but not Article 304 VPT, which was part of Section VI Part X VPT. Accordingly, the potentially more than 100 000 decisions issued by the MAT against Germany following suits by deportees pursuant to Article 304 VPT would run counter Article 233 VPT and interfere with the payments provided for under that provision. The Tribunal also flatly rejected Pirenne's argument, according to which Part VIII VPT only covered damages caused to the Belgian State, noting that its Annex I expressly mentioned 'damage caused to civilian victims', thereby excluding this interpretation. As for Pirenne's assertion that the Allies could not have deprived their nationals of their rights vis-à-vis the German State, the MAT essentially validated the arguments already put forward by Max Illch, which relied on the logic of diplomatic protection allowing states to act on behalf of their nationals. Noting that without the conclusion of a peace treaty, Allied nationals would probably have had no remedies at all against acts committed by the German State's *jure imperii*, it recalled that states frequently negotiated on behalf of their nationals following such acts. This power also meant making determinations on their nationals' private rights, including by renouncing these rights, as

210 ibid.

the Treaty of Versailles had expressly done in several of its provisions.[211] Moreover, in the case of the deportees' alleged work contracts:

> even in cases where a work contract actually existed, the transformation of the private debt of the German State vis-à-vis the deportees in a public law obligation vis-à-vis the Belgian State is all the more understandable as the contracts in question resulted in fact from acts of violence which, having been systematically inflicted upon a whole part of the civilian population, constitute the most severe violation of the law of nations.[212]

Having thus repeated its leitmotiv, the MAT endorsed the argument already used by Max Illch regarding the advantages of the Reparation Commission over the MATs for allied nationals, notably its composition and the fact that it could issue decisions based on equity alone.[213] The Tribunal's discussion of the deportees' main claim ended with a rejection of Pirenne's reading of the *Milaire* decision. For the MAT, it was simply wrong to assert that there was no difference between forced labour and free contractual labour in the context of German-occupied Belgium. Not only had *Milaire* expressly relied upon this distinction, as it constituted a basic principle of contractual law, but it had also been used by the Belgian war damages courts to refuse compensation to any worker who had voluntarily signed a contract with the occupier. Based on all these considerations, the Belgian-German MAT declined jurisdiction on the deportees' claim regarding unpaid salaries in favour of the Reparation Commission.[214]

The Tribunal's discussion of the deportees' three other claims was much shorter. Regarding disability compensation, it held that it had to decline jurisdiction on the same grounds as on unpaid salaries. As for the wear and tear of the deportees' clothes, the MAT declared that it was not the direct result of the deportation order but a factor that should have been integrated into the calculation of the 'just remuneration' of which the

211 ibid, 682–83.

212 '… *dans les cas mêmes où un véritable contrat de travail s'est formé, la transformation de la dette privée de l'État allemand envers les déportés en une obligation de droit public envers l'État belge se comprend d'autant mieux que les contrats de travail dont il s'agit ont en fait leur origine et leur source dans des violences qui, systématiquement exercées sur toute une partie de la population civile, constituent la plus grave des violations du droit des gens*'. ibid, 683.

213 ibid.

214 ibid, 684.

deportees had been deprived according to para. 8 Annex I Chapter VIII VPT, falling therefore within the remit of the Reparation Commission.[215] It was only for the last of the deportees' claims, namely compensation for living expenses borne by their families, including lost parcels, that the Tribunal was able to come up with a partly positive answer. Although it declined jurisdiction on living expenses as such on the same ground as that mentioned in relation to worn and torn clothes, it held that the deportees were entitled to compensation for lost parcels based on the shipping contract concluded between their families acting in their name and the German State acting as a carrier. The decision ended with an invitation to the claimants to provide the Tribunal with additional information regarding their lost parcels.[216] From a legal perspective, the outcome of Pirenne's legal mobilisation had turned out almost exactly as predicted by Henri Rolin.

For Germany, the decisions in *Loriaux* and the nine other test cases were a huge relief. In a letter to the German Ministry of Foreign Affairs, Lenhard announced the news of the decisions as 'a great success of the German defence, … with major financial consequences'.[217] As could be expected, the claimants were disheartened. In a press release, Eugène-Paul Lévêque declared that the deportees and their supporters had felt 'bitterness' ('*amertume*') upon learning that Germany's violations of international law 'by resorting to the deportation and enslavement of peaceful civilians' had been met with impunity.[218] Nevertheless, concluding from these reactions that the decisions amounted to a total victory for the Reich would be excessive.

On the one hand, taking their case to the MAT had allowed the deportees to achieve a measure of success that they had been unable to attain on the national stage. The proceedings had had two major outcomes for them. The first of these outcomes was public recognition of their status as victims, patriots, and heroes – something which Belgian institutions and public opinion had always been somewhat reluctant to grant them.[219] The 'major international trial' at the Hôtel Matignon had offered the deportees

215 ibid, 684–85.
216 ibid, 686.
217 German original: '*[ein großer] Erfolg der deutschen Verteidigung … von erheblicher finanzieller Tragweite*'. Lenhard to German Ministry of Foreign Affairs (12 June 1924) BA (Lichterfelde), R 3001/7477.
218 French original: ('*en déportant des civils inoffensifs et en les réduisant à l'esclavage*'. 'Le procès des déportés' *Le Soir* (Brussels, 4 June 1924).
219 Claisse (n 39) 127.

the attention of the press, the compassion and admiration of the public, and the moral condemnation of the state that had deported them to forced labour. The FND had acknowledged the importance of this objective in its public discourse. At the end of the Paris hearing, Lévêque had thanked the reporters who had attended the event, noting that their work was an integral part of the Federation's strategy:

> Thanks to the press, we shall achieve one obvious success: the condemnation of Germany from a moral point of view.[220]

Seeing the German representatives confronted with the factual and legal dimensions of the Reich's wartime policies had also provided a more personal and emotional form of satisfaction to the deportees. According to Loriaux and a fellow FND delegate, the hearing had had a 'comforting' ('*réconfortant*') effect on them, as the painful account of their sufferings and their patriotism had been followed by 'the warmest and sincerest marks of admiration' from a very broad range of actors, including the Belgian Agent-General and the Association of French Combatants.[221]

The second major outcome of the deportees' suit against the Reich was the payment of compensations. Securing this payment proved almost as arduous as the legal proceedings before the MAT. Since examining each and every of the roughly 48 000 claimants' situations individually would have been too time-consuming, Pirenne had signalled to the Belgian Agent-General the deportees' willingness to negotiate a settlement with Germany. His precondition had been that the Belgian Government would make an advance payment of the sums agreed to under the settlement, which he had estimated at 75 million francs. Based on Belgium's limited payment capacity, Sartini van den Kerchove had brought that sum down to 40 million.[222] This allowed Pirenne to enter into negotiations with the German State Agent. Based on the estimation that 80 % of the deportees' parcels had been lost, he suggested awarding each deportee a lump sum of

220 '*Nous obtiendrons, grâce à la presse, un succès évident : la condamnation de l'Allemagne au point de vue moral*.' 'Les déportés contre le Reich' *Le Soir* (Brussels, 12 January 1924).

221 French original: '*les marques d'admiration les plus chaleureuses et les plus sincères*'. 'Le retour des délégués des déportés' *La Dernière Heure* (Brussels, 12 January 1924).

222 Pirenne to Prime Minister Theunis (3 December 1924) AGR, BE-A0510/I 530/5593.

1000 francs.[223] Lenhard wanted to bring this down to 200 francs, a sum that Pirenne found unacceptable.[224] In the meantime, Germany had found an unlikely ally in the Belgian Minister of Economic Affairs, Romain Moyersoen (1870–1971), who, deeming the deportees' claims 'fanciful' ('*fantaisistes*'), opposed the deal altogether and threatened to derail it.[225] However, after brandishing the threat of political action by the FND[226] and relying on the support of Paul Hymans, now back in government as Minister of Foreign Affairs,[227] Pirenne had eventually convinced the Belgian Government to agree to a lump sum of 500 francs per deportee.[228] This opened the way for a settlement with the German Government, signed by Pirenne, Lenhard, and Sartini van den Kerchove on 8 July 1925.[229] Securing the implementation of this agreement provoked new frictions with the Belgian Government, which had threatened not to homologate the settlement unless the deportees accepted payment in government securities.[230] In his own recollection, Pirenne had solved this problem by issuing a counterthreat during a meeting with the Belgian Minister of Finance, Albert-Édouard Janssen (1883–1966). Asserting that Article 304 (g) VPT[231] allowed the forced execution of MAT decisions in all signatory states, he had announced that he would have the French authorities seize as many locomotives of the Brussels-Paris express train as were needed to compensate the deportees.[232] This was, at best, a bluff, as Pirenne's claim was not backed up by actual state practice.[233]

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223 Memorandum to the German State Agent (undated, likely early 1925) AGR, BE-A0510/I 530/5596.

224 2nd memorandum to the German State Agent (undated, likely early 1925) AGR, BE-A0510/I 530/5596.

225 Pirenne to Hymans (20 January 1925) AGR, BE-A0510/I 530/5593.

226 Pirenne to Prime Minister's office (12 February 1925) AGR, BE-A0510/I 530/5593.

227 Pirenne to Hymans (n 225).

228 Sartini van den Kerckhove to Pirenne (30 March 1925) AGR, BE-A0510/I 530/5601.

229 Settlement between Germany and the deportees (8 July 1925) AGR, BE-A0510/I 530/5601.

230 Sartini van den Kerckhove to Pirenne (1 August 1925) AGR, BE-A0510/I 530/5593.

231 'The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.'

232 Pirenne, *Mémoires…* (n 30) 112–13.

233 Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) 18 Jahrbuch des öffentlichen Rechts der Gegenwart 378, 446.

Nevertheless, it proved effective: Janssen finally gave in with his legal adviser validating Pirenne's assertion. Shortly afterwards, the deportees' lawyer was able to distribute 48,707 cheques among his clients.[234] Although much less than the sum they had initially requested before the MAT, the 500 francs received by each were still more than the 150 francs lump sum awarded to many deportees by the Belgian Government.

On the other hand, beyond simply issuing a moral condemnation of Germany's wartime deportation policies, the Tribunal's decisions had also formally characterised them – twice – as severe violations of international law. By doing so, they backed up the statements to that effect already issued by both Allied and neutral states during the war and undermined any German efforts to present them as compatible with the Reich's obligations under international law. Admittedly, the effect of the Tribunal's dicta regarding the 'severe' illegality of the deportations was somewhat weakened by their laconicism. In 1926, under the influence of the German Ministry of Foreign Affairs and the former head of its Legal Department, Johannes Kriege,[235] the Reichstag Special Committee on World War I used the absence of any reasoning preceding the MAT's finding as a pretence to reject it as merely anecdotal and assert the legality of the wartime deportations.[236] In this regard, the judicial restraint shown by the MAT seems somewhat unfortunate, especially considering that the deportations' incompatibility with Article 52 Hague Regulations had been discussed extensively during the proceedings. Nevertheless, the Tribunal's repeated use of superlatives ('the most flagrant and atrocious', 'the most severe') had enriched the Tribunal's characterisation of the deportations with an additional layer, corroborating their special status within the realm of internationally wrongful acts. Echoing the language used by Pirenne and Hymans – but also, remarkably, by Illch –, it confirmed that they belonged to a category of acts that went beyond mere violations of the Hague Regulations but were radically incompatible with what Western states at that time deemed to be the customary obligations distinguishing 'civilised nations' from 'barbarous' or 'savage' ones. As Ethiopia had recently found out at its admission to the League of Nations in 1923, the most prominent

234 Pirenne, *Mémoires…* (n 30) 113.

235 Thiel (n 52) 312–13.

236 Resolution (2 July 1926) in Johannes Bell (ed), *Völkerrecht im Weltkrieg: Dritte Reihe im Werk des Untersuchungssausschusses* (vol 1, Deutsche Verlagsgesellschaft für Politik und Geschichte 1927) 193, 194.

of these obligations was renouncing slavery.[237] Accusing Germany of having broken that rule was a recurring theme among all those who had denounced the Belgian deportations. While stopping short of making an express statement to that effect, the German-Belgian MAT, by characterising the latter as the supreme violation of the law of nations, had nonetheless contributed to blurring the lines between the recent phenomenon of deporting nominally free civilians to forced labour and the 'barbarous' practice *par excellence* of wartime enslavement.

6. *Conclusion: Changes and Continuities*

On 7 November 1926, following a proposal by Jacques Pirenne, the International Congress of Deportees convened by the FND in Lessines adopted a motion mandating the FND to present to the League of Nations, via the Belgian Government, a request for the purpose of:

1) incorporating within the Law of Nations clear and precise provisions prohibiting wartime deportations of workers and all requisitions not authorized by the Hague Conventions;
2) protecting the freedom of labour in times of war by incorporating within the rules of Private International Law provisions to the effect that all work imposed by the occupier upon the population of the occupied country, whether benefitting the occupier or its nationals, shall result between the occupier and the forced labourers of the occupied state in a genuine work contract, with all legal consequences thereof, and for which only the victims of the imposition shall be able to raise a plea of nullity;
3) persuading the League of Nations to potentially mandate an International Tribunal to monitor the implementation of the international regulations to be adopted in these matters.[238]

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237 On this issue, see: Jean Allain, 'Slavery and the League of Nations: Ethiopia as a Civilised Nation' (2006) 8 Journal of the History of International Law 213.

238 '*1. d'incorporer aux règles du Droit des Gens des stipulations formelles et précises prescrivant les déportations ouvrières en temps de guerre, ainsi que toutes les réquisitions de la population non autorisées par les Conventions de La Haye de 1907; 2. de protéger la liberté du travail, en temps de guerre, en inscrivant dans les règles du Droit International Privé, une série de dispositions aux termes desquelles tout travail imposé, en violation des règles du Droit des Gens, à la population d'un pays envahi par le pouvoir occupant, soit au profit du dit pouvoir, soit au profit de ses ressortissants, fera naître entre l'État occupant et les travailleurs forcés de l'État occupé un véritable*

As pointed out by Arnaud Charon, this text shows that for Pirenne and the deportees, the decisions handed down by the German-Belgian MAT were, above all, revelatory of the 'shortcomings' of post-Versailles international law when it came to protecting civilians in occupied territories. The main result of these shortcomings, namely the impunity of those responsible for the deportations, was the legitimation of a discourse advocating for further violence against civilians, which was eventually implemented during the Second World War via even more gruesome deportations.[239]

Based on this consideration, one might be tempted to place the deportees' suit against the Reich within a narrative of 'restatement-and-renewal', where periodic restatements of post-Westphalian international law, with its imperial characteristics and its numerous injustices, are followed by periodic calls for renewal, with the aim of ridding international law of some of its residual shortcomings and injustices and adapt it to contemporary understandings of 'modernity', thus allowing it to 'progress'.[240] In that narrative, the proceedings before the MAT, the latter's decision, and the disappointment it triggered amongst the deportees would all have acted as a catalyst triggering a visionary call for renewal that would only have crystallised into positive law after the horrors of the Second World War. The deportees' call for 'clear and precise provisions' on the prohibition of wartime deportations and forced labour, as well as for an 'International Tribunal' monitoring their implementation, would fit especially neatly within such a narrative. Indeed, Germany's massive recourse to deportations during World War II, which largely built on its prior experience during World War I,[241] eventually resulted in treaty provisions expressly prohibiting this practice. In 1945, Article 6 of the Nuremberg Charter listed 'deportation to slave labour' (French: '*déportation pour des travaux forcés*') as a 'war crime' and 'enslavement' (French: '*réduction en esclavage*')

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contrat de travail, dont seules les victimes de la violence seront en droit d'invoquer la nullité; et qui sortira tous les effets juridiques prévus pour le contrat de travail; 3. d'obtenir de la Société des Nations qu'elle charge éventuellement un Tribunal International de veiller à l'exécution des règlements internationaux à intervenir en ces matières'. Motion adopted by the International Congress of Deportees (7 November 1926) AGR, BE-A0510/I 530/5594.

239 Charon, 'The Claims…' (n 27) 58–59.

240 Nathaniel Berman, 'In the Wake of Empire' (1999) 14 American University International Law Review 1521, 1523.

241 Ulrich Herbert, *Fremdarbeiter: Politik und Praxis des 'Ausländer-Einsatzes' in der Kriegsgefangenschaft des Dritten Reiches* (2nd edn, Dietz 1999) 32–40.

as a 'crime against humanity'.[242] Established pursuant to that instrument, the International Military Tribunal at Nuremberg in 1946 convicted Fritz Sauckel (1894–1946), Nazi Germany's 'General Plenipotentiary for Labour Deployment' ('*Generalbevollmächtigter für den Arbeitseinsatz*') on both accounts, sentencing him to death.[243] Since 2002, the *ad hoc* Nuremberg Tribunal has had a permanent successor in the International Criminal Court, established pursuant to the entry into force of its 1998 Statute. Article 7 (2) (c) of that instrument, which gives a definition of 'enslavement'[244] largely relying upon that provided by the 1926 Slavery Convention,[245] can be seen as further validating a characterisation already made by numerous observers of the Belgian deportations during World War I. Likewise, one cannot help but notice the similarities between the criterion laid out in Article 7 (1) Rome Statute, according to which crimes against humanity share the characteristic of having been 'committed as part of a widespread or systematic attack directed against any civilian population' and the German-Belgian MAT's finding in *Loriaux c État allemand* that the severity of the deportations resulted from them 'having been systematically inflicted upon a whole part of the civilian population'.[246]

However, it would be an oversimplification to describe the deportees' case before the German-Belgian MAT as a mere illustration of the limitations of the international legal order established by the post-World War I peace treaties. Examining the deportees' second request to the League of Nations, which advocated the international recognition of the *de facto* contractual nature of the relationship between an occupying power and the civilians subjected by it to forced labour, a more complex and am-

242 Agreement for the prosecution and punishment of the major war criminals of the European Axis: Charter of the International Military Tribunal (8 August 1945) 82 UNTS 284.

243 International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal* (vol 1, International Military Tribunal 1947) 320–22, 366–67.

244 This definition reads as follows: 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

245 Art 1 (1) of that convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

246 *Loriaux c État allemand* (n 16) 683.

bivalent picture emerges. Granted, Pirenne's proposal to that effect was partially motivated by the will to give 'private' rights guaranteed by domestic labour laws and, more generally, 'human dignity', a measure of recognition on the international plane.[247] One might, therefore, once again conclude that post-World War II international law, via its recognition of human rights – including the freedom of labour and social and economic rights – and the establishment of international human rights bodies, has vindicated the 'visionary' proposals put forward by Pirenne and the deportees in the 1920s. Considering that today's international prohibition of forced labour is not subject to any geographic restrictions, one might even note that it is less selective than the prohibition that Pirenne, a fervent admirer of Leopold II's murderous colonial policies, seems to have envisaged only for the citizens of 'civilised nations'.[248]

That said, neither the substantive rights nor the procedural avenues granted to individuals under post-1945 international law have been able to overcome two fundamental issues already at play in the deportees' case. The first of these issues is the limited capacity of international courts and tribunals to resolve what Karen J Alter and Mikael Rask Madsen have characterised as 'mega-political' disputes, ie disputes '[involving] substantive issues that deeply divide societies such that one can predict that at least one important social group will be upset by the outcome of international adjudication'.[249] This notion includes 'inter-state driven mega-politics', ie disputes 'where both the respective publics and governments of the disputing states perceive strong stakes in the outcome',[250] with peace settlements after mass atrocities being a prime example of such disputes.[251] Although international courts sometimes manage to resolve such disputes or at least some of their underlying issues without generating too much backlash, they often choose not to engage with them at all.[252] In this regard, the German-Belgian MAT's judgment was no different from present-day international courts' decisions, sidestepping a case's mega-politics while

247 Memorandum by Pirenne for the International Congress of Deportees (undated typoscript, probably November 1926) AGR, BE-A0510/I 530/5594, 4–5.
248 Pirenne, *Mémoires…* (n 30) 25–28.
249 Karen J Alter and Mikael Rask Madsen, 'The International Adjudication of Mega-Politics' (2021) 84 Law and Contemporary Problems 1, 8.
250 ibid, 9–10.
251 ibid, 16.
252 Karen J Alter and Mikael Rask Madsen, 'Beyond Backlash: The Consequences of Adjudicating Mega-Politics' (2021) 84 Law and Contemporary Problems 219, 224.

still finding ways to uphold the law.[253] The second issue that has not fundamentally changed since 1945 is the deportees' main claim: their right to individual compensation for the harm Germany inflicted upon them. Granted, post-World War II reparations placed a comparatively much greater emphasis on the compensation for wartime mass atrocities than the Versailles Treaty, which had focussed – rather counterproductively – on economic damage.[254] Similarly, whereas the Belgian deportees were never able to capitalise on their limited success before their movement eventually petered out in the 1960s,[255] legal mobilisation by Central and Eastern European World War II forced labourers in the 1990s resulted in significant compensation payments by Germany.[256] There are also indications that international law is now evolving toward granting victims of such atrocities a right to individual compensation.[257]

Nevertheless, none of these developments has called into question the international law principle invoked by Max Illch against Jacques Pirenne's arguments: namely that states may very well make determinations regarding their nationals' rights, including by limiting or renouncing these rights on their behalf.[258] Based on the consideration that wars result in enormous amounts of damages, that these damages affect many different categories of private persons in many different ways, and that demands for full reparation from the author of the damage are either materially impossible or politically unsustainable, their aftermath implies a selection and prioritisation of claims not unlike those in insolvency procedures.[259] While legal mobilisation by individual private actors might contribute to this process, its overall architecture will ultimately have to be shaped by sovereign public actors.

253 ibid, 229.
254 Pierre d'Argent, *Les réparations de guerre en droit international public: La responsabilité internationale des États à l'épreuve de la guerre* (LGDJ/Bruylant 2002) 206–207, 825–29.
255 Charon, 'The Claims…' (n 27) 57.
256 On this issue, see: Roland Bank and Friederike Foltz, 'German Forced Labour Compensation Programme', in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2020).
257 d'Argent (n 254) 788–91.
258 ibid, 791.
259 Burkhard Hess, 'Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht' (2003) 40 Berichte der Deutschen Gesellschaft für Völkerrecht 107, 173–75.

Chapter 10: The Hungarian Optants Cases before the Romanian-Hungarian Mixed Arbitration Tribunal: International Lawyers, the League of Nations and the Judicialization of International Relations

Marilena Papadaki

1. *Introduction*

> *... if the Council can use its powers as mediator to obtain a solution on the fringe of the Law, an extra-legal solution, it cannot seek to impose a solution against the Law, an anti-legal solution. The real political interest of the question is not the immediate one, no matter how serious it may be: it is a more distanced/general political interest, but yet superior to all others, that of the definitive construction of permanent Peace … (that) can only be established on the basis of institutions and legality.*[1]

French internationalist George Scelle used these words to describe the role the Council of the League of Nations (LoN) was called upon to play within an international dispute regarding the jurisdiction of the Romanian-Hungarian Mixed Arbitral Tribunal (MAT) established under Article 239 of the Treaty of Trianon.[2]

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1 Georges Scelle, 'Le litige roumano-hongrois devant le Conseil de la Société des Nations' in *La Réforme Agraire Roumaine en Transylvanie devant la Justice Internationale et le Conseil de la Société des Nations* (Éditions Internationales 1928) 318 [citation translated from French].

2 Art 239 Treaty of Trianon: '(a) Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Hungary on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned. In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustav Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.' Treaty of Peace between the Allied and Associated Powers and Hungary

Although the protection of the private property and private rights of ex-enemies, even during wartime, was accepted in some cases by many international lawyers at the time, the 1919 Treaties empowered the Allied and Associated Powers to retain and liquidate the private property of ex-enemies.[3] The aim was to provide resources to compensate Allied nationals for damage caused to them by war measures, feed into the Reparations Fund and eliminate the competition of ex-enemy enterprises from the economic activity of the Allied Nations.[4]

The MATs were established in order to deal with various individual claims that arose from World War I. Most notably, nationals of the Allied and Associated states could bring claims before the MATs against the former Central Powers for compensation of damage or injury inflicted upon their property, rights or interests. By contrast, nationals of the defeated states could not challenge Allied liquidation measures before the MATs.[5] Nevertheless, as far as Austrian and Hungarian nationals were concerned, the liquidation system was not implemented for their property situated in the territories of the former Austro-Hungarian Monarchy annexed to certain successor states, notably Romania and Czechoslovakia. The Treaties of Saint-Germain (Arts 78 and 267) and Trianon (Arts 63 and 250), which had initially included provisions for the application of the liquidation system, exempted the property and rights of Austrian and Hungarian nationals by declaring that those which had been seized or sequestered before the entry into force of the Treaties would be restored in kind and that they

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(signed 4 June 1920, registered 24 August 1921) 6 LNTS 187. Some archival documents of this MAT are preserved at the French National Archives. See: Liberto Valls, Bernard Vuillet and Michèle Conchon, 'Application des traités de paix. Traité de Trianon (4 juin 1920) : Archives du tribunal arbitral mixte roumano-hongrois et autres tribunaux arbitraux mixtes (1919–1943) : Répertoire numérique détaillé (AJ/2/1-AJ/22/171, AJ/22/NC/1-AJ/22/NC/46)' (Archives nationales 2019) at: <https://www.siv.archives-nationales.culture.gouv.fr/siv/rechercheconsultation/consultation/ir/pdfIR.action?irId=FRAN_IR_057371>.

3 Nicolas Politis, 'Lois et coutumes de la guerre sur terre. L'interprétation anglaise de l'article 23h du règlement de la Haye' (1911) 18 RGDIP 249–59; Nicolas Politis, 'Effets de la guerre sur les conventions internationales et sur les contrats privés' (1912) 25 Annuaire de l'Institut de droit international 611–50.

4 Scelle (n 1) 301.

5 For the jurisdiction, organization and legal nature of the Mixed Arbitral Tribunal, see: Marta Requejo Isidro and Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239–76.

would remain exempt, for the future, from any liquidation measure. Moreover, individuals opting for Hungarian and Austrian nationality, even though obliged to transfer their residency to the State in favour of which they opted, would still retain their real estate in the annexed territory.

The preferential treatment given to Austrian and Hungarian landowners was dictated by well-known motives. The Austrian delegation in the 1919 Paris Peace Conference had pointed out that, since Austrian subjects had most of their real estate and businesses in the annexed territories, their dispossession without compensation (since Austria would be unable to compensate them) would lead to the economic paralysis of the new state and probably to its collapse and subsequently impact the economic status of Central Europe.[6] In contrast to Article 267 Treaty of St Germain, Article 250 of the Treaty of Trianon also provided Hungarian nationals with the right to present any resulting claims to the MAT established by Article 239 of that same treaty.[7]

2. *Romanian-Hungarian MAT*

From the outset, the Romanian-Hungarian MAT had to deal with various cases under Article 250 of the Treaty of Trianon. As early as August 1922, it received claims from Hungarian optants, ie people living or owning land in the territories ceded after the war by Hungary to Romania and who had opted for Hungarian nationality. Their property, which was now on Romanian territory, was confiscated within the framework of the Romanian

6 Scelle (n 1) 302.

7 Art 250 Treaty of Trianon: 'Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions. Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question. Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239. The property, rights and interests here referred to do not include property which is the subject of Article 191, Part IX (Financial Clauses). Nothing in this Article shall affect the provisions laid down in Part VIII (Reparation) Section I, Annex III as to property of Hungarian nationals in ships and boats.'

agrarian reform of the Liberal Government of Ionel Bratianu[8] and specifically the agrarian law of 30 July 1921 applicable to Transylvania, the Banat and the districts of the Crisana and the Maramures.[9] This law mainly targeted groups that for centuries had exercised power and held wealth and which, since 1919, had become minorities: Baltic barons of German origin, German aristocrats from Bohemia, great Magyar landlords from Transylvania etc, to the benefit of lowly peasants.[10] However, according to a Hungarian request to the LoN Council, the majority of individuals impacted by these measures in the region of Transylvania were people, , who owned small or medium properties, including widows and orphans. As these properties represented 83 % of the total Transylvanian territory, Hungary claimed there was no urgent need for a reform and redistribution of land in this region. Therefore, the Romanian Government was accused of intending to ruin and make disappear these populations under the pretext of agricultural reform. Moreover, although the Romanian Government had promised to compensate those affected by these agrarian measures, the collapse of the Romanian currency had considerably decreased the value of the compensation.[11] Nevertheless, even though the Hungarian arguments did actually present the true situation in which the agrarian reform had

8 The Editors of Encyclopaedia Britannica, 'Ionel Brătianu', in *Encyclopedia Britannica* (20 November 2021) at <https://www.britannica.com/biography/Ionel-Bratianu>.

9 The Romanian Law of Agrarian Reform applicable to Transylvania, the Banat and the districts of the Crisana and the Maramures was published on 30 July 1921. The prior and subsequent decrees of 12 September 1919, 12 January 1920, 12 July 1922 etc were applicable: 1.to the property in the territories that was formerly part of the Austro-Hungarian Monarchy and were transferred to the Kingdom of Roumania by the Treaty of Trianon; 2.to persons who had their rights of citizenship (*pertinenza*) in these territories, and who opted for Hungarian nationality either in accordance with arts 63 or 64 Treaty of Trianon; 3. to persons who remained *ipso facto* Hungarian nationals under the Treaty of Trianon. Hugh H L Bellot, 'Opinion as to the rights of Hungarian subjects with regard to their lands situated in territories transferred to Roumania', in *La Réforme Agraire Roumaine en Transylvanie devant la Justice Internationale et le Conseil de la Société des Nations* (Éditions Internationales 1928) 87–120).

10 Pierre Gerbet, Marie-Renée Mouton and Victor-Yves Ghébali, *Le rêve d'un ordre mondial : De la SDN à l'ONU* (Actes Sud 1996) 47–48. For the history of the region of Transylvania, see: Mariana Cernicova-Bucă, 'Hungarian-Romanian Relationships – The Hard Way Towards Mutual Trust: A Romanian View' (1999) 2 SEER: Journal for Labour and Social Affairs in Eastern Europe 135.

11 'Request by the Hungarian Government to the Council of the League in Accordance with Article 11 of the Covenant' (15 March 1923) 4 League of Nations Official Journal 732–33. See also 4 League of Nations Official Journal 887.

put hundreds of small or medium landowners (with some exaggeration in the percentages no doubt), it is difficult to imagine an agricultural reform imposed by law excluding certain areas of the State as it would be viewed as a discriminatory measure towards the rest of Romanian population.

Agrarian reform movements were widespread throughout Eastern Europe after WWI.[12] In Romania they were part of wider reform movements and had their roots in the increasing poverty of the peasantry, the democratization of countries where peasants dominated the population, the state modernization process via the transformation of the landed aristocracy into a class of agricultural entrepreneurs, the threat of Bolshevism, the defeat of Germany and Austria-Hungary, and various demands of war veterans. Agrarian reforms could be considered not only as the state's need to transform peasants into citizens whose loyalty to the new state would be unquestionable (Weberian approach), but also as instruments of territorial policies, which pursued the strengthening of national cohesion and unity of the new states that emerged in South-Eastern Europe during the 19th century.[13] In addition, expropriation and redistribution of land previously owned by defeated foreign nobles was the easiest target, since the interests of these former landowners were no longer represented in the national governments.

In Romania, land reform begun during the War continued under parliamentary regimes after the War. It was more radical in newly acquired Bessarabia, where land was hastily distributed to the peasantry out of fear of Bolshevism. In Transylvania, land which had been owned by Hungarian nobles was distributed primarily to Romanian peasants, although Hungarian peasants did also receive a portion of the redistributed land. Similarly, in Dobruja, Romanians rather than Bulgarians residing there, acquired most of the redistributed land. By 1930, distribution of land in Romania was heavily skewed towards small land holdings.[14]

In August of 1922, the Hungarian Government complained to the Conference of Ambassadors[15] about the liquidation of Hungarian nationals

12 See also Stanivuković and Djajić (ch 13).

13 Cornel Mica, 'Social Structure and Land Property in Romanian Villages (1919–1989): The Agrarian Question in Southeast Europe' (2014) 19 Martor 133.

14 Sarahelen Thompson, 'Agrarian Reform in Eastern Europe Following World War I: Motives and Outcomes' (1993) 75 American Journal of Agricultural Economics 840.

15 The Conference of Ambassadors of the Principal Allied and Associated Powers was an international governing body created in 1920 by the Allied Powers as a successor of the Supreme War Council in order to enforce peace treaties and to

and optants by the Romanian Government, under Article 63 or 64 of the Treaty of Trianon and Article 3 of the Treaty for the Protection of Minorities signed by Romania. However, the Conference considered that these claims fell within the competence of the LoN because they referred to the provisions of the above-mentioned Minorities Treaty.[16] As a result, in 1923, Hungary turned to the LoN Council and asked it, *inter alia*, to declare the international illegality of Romanian Agrarian Law and order the return of their property to Hungarian optants. As Romania and Hungary did not reach a bilateral agreement on this matter in 1923, after a series of negotiations various Hungarian optants filed individual claims before the Romanian-Hungarian MAT, seeking to declare that the measures taken against them were contrary to the provisions of Article 250 of the Trianon Treaty. They subsequently required Romania to return their property or provide them with decent compensation.[17] Two main issues that will be discussed related to this question, which provoked great controversy and divided international lawyers, academics and politicians of that period for more than a decade: First, the jurisdiction of Romanian-Hungarian MAT; Second, the role of the LoN Council following the withdrawal of the Romanian arbitrator from the MAT.

2.1. The Jurisdiction of Romanian-Hungarian MAT

The Hungarian optants cases before the Romanian-Hungarian MAT can be considered one of the most interesting and highly politicized legal disputes of the interwar period as embodying the discussions of both international lawyers and politicians about the power of the Treaties and the respective roles of international courts and the League. Apart from their state agents, both sides appointed high-profile legal figures as counsels. The Romanian Government was represented by: Alexandre Millerand, a

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mediate in case of international conflicts. It consisted of the ambassadors of Great Britain, Italy, and Japan accredited in Paris and the French Ministry of foreign affairs.

16 Marcel Sibert, 'Une phase nouvelle du différend roumano-hongrois : L'affaire des optants devant le Conseil de la Société des Nations (17–19 septembre 1927)' (1927) 34 RGDIP 561. For the text of the Treaty for the protection of minorities with Romania, see: Treaty between the Principal Allied and Associated Powers and Roumania (signed 9 December 1919, entered into force 4 September 1920) 5 LNTS 336.

17 Nicolas Politis, 'La Société des Nations et les Tribunaux arbitraux mixtes' (1927) 65 Revue Bleue 675–76.

French lawyer, statesman, former Prime Minister and President of France; Nicolas Politis, a well-known figure in the LoN, Greek diplomat, and former professor of international law in Paris; and Solomon Rosental, later a famous Romanian lawyer. The Hungarian optants were represented by: Jules Lakatos, jurist and Hungarian statesman; Gilbert Gidel, Joseph Barthélemy and Réné Brunet, renowned French academics of international law; and Aurel d'Egry, a Hungarian lawyer. The counsels of both sides were also supported by distinguish legal advisors of various nationalities such as Léon Duguit, Antoine Pillet, Charles Dupuis, Alfred Geouffre de La Pradelle, Jules Basdevant, Charles de Visscher, Karl Strupp, Frederick Pollock, Georges Scelle, Antonio Salandra, and many others.[18] The impressive number of international jurists that gave their opinion on the cases is explained by the many issues related to international law that arose. Whether a legal expert expressed his opinion within the framework of his academic activity or was asked to do so by the respective governments is not always clear. What is clear, however, is that the cases mobilized almost all the well-established academic international law networks of the day. The issues they tackled were very well known and widely discussed among legal experts and, sometimes, even beyond. One can assume that the main reason for that, was that the cases related indirectly to the

18 For the legal supporters of Romania's argumentation, see*: Réclamations des optants hongrois de Transylvanie contre la réforme agraire en Roumanie : Débats sur la compétence (15-23 décembre 1926) : Plaidoiries de MM. Millerand, Politis et Rosental, avocats de l'État roumain et observations de M. Popesco-Pion, agent du gouvernement roumain* (Bucarest 1927); See also: *La réforme agraire en Roumanie et les optants hongrois de Transylvanie devant la Société des Nations : Études rédigées par Alejandro Alvarez, Jean Appleton, Etienne Bartin, Jules Basdevant, H. Berthelemy, J.L. Brierly, René Cassin, Jules Diena, Léon Duguit, A. Pearce Higgins, Edouard His, Gaston Jèze, Louis Le Fur, J. Limburg, Charles Lyon-Caen, J.E.G. de Montmorency, Paul Pic, Maurice Picard, Nicolas Politis, André Prudhomme, Robert Redslob, Albéric Rolin, Walther Schucking, Marcel Sibert, Antoine Sottile, Karl Strupp, Donnedieu de Vabres, Charles de Visscher, Albert Wahl, Yves de La Brière, Henri Capitant, Arrigo Cavaglieri, Descamps, Prospero Fedozzi, Henri de La Fontaine, Scipione Gemma, Gaston Jeze, André Lenard, Barbosa de Magalhaes, Theodor Niemeyer, Antonio Salandra, Quintiliano Saldana, Gabriele Salvioli, Marcel Sibert, M. De Taube, Louis Trotabas et José de Yanguas* (2 vol, Imprimerie du Palais 1927–28). For the legal supporters of the Hungarian optants' case, see: *La Réforme Agraire Roumaine en Transylvanie devant la Justice Internationale et le Conseil de la Société des Nations : Quelques opinions* (Éditions Internationales 1928), with opinions by Alfred Geouffre de La Pradelle, Charles Dupuis, Hugh H. L. Bellot, E.L. Vaughan Williams et Frederick Pollock, Antoine Pillet, J.L. Kunz, R. Brunet, Josepth Barthélemy, George Scelle, E.M. Borchard, A. Hopkinson, Leslie Scott, John A. Simon and Ralph Sutton, James Vallotton, Georges Ripert.

subject of the revision of the Treaties, an issue of great interest for both international law experts and politicians in a period when Hungary was looking for a new role on the international stage, while the other Great Powers were trying to re-evaluate prewar policies in Central Europe. Most jurists engaged in the cases were French or French-oriented, which is easily explained given the French interests in Central Europe and the Balkans (Romania together with Czechoslovakia and the Kingdom of Serbs, Croats and Slovenes – later Yugoslavia – formed the Little Entente, a union of States in the Balkan area under the French zone of influence). The choice of some French jurists, such as Albert Geouffre de La Pradelle, not to support Romanian interests can possibly be explained by their wish at that time to establish the concept of international responsibility of the States for damage caused in their territory to foreigners ('*étrangers*'), as was expressed in the 1927 Lausanne session of the Institute of International Law. Other jurists, such as Scelle, legitimized the Romanian-Hungarian MAT to participate in the international law-making process, in order to enforce international law and impose it over political procedures for the settlement of international disputes. As for the counsels, many factors can possibly add to the international law expertise in order to be chosen to support one or the other side. Alexandre Millerand was the politician that had unsuccessfully tried to incorporate Hungary into the French zone of influence together with Little Entente in his famous letter, for which he was accused of holding out hope to Hungary that her borders might be re-negotiated by the LoN.[19] Nicolas Politis was a friend of the Romanian diplomat and later Prime Minister of Romania, Nicolae Titulesco; they had studied together in Paris and worked together within the LoN framework. During the dispute, legal argumentation was exhausted to the point that sometimes it resulted in completely contradictory conclusions, even though the legal experts cited the same sources. Jurists that were usually on the same wavelength found themselves in different 'camps'.[20] Examples of this include Nicolas Politis and Albert Geouffre de Lapradelle or French

19 Tamás Magyarics, 'Balancing in Central Europe: Great Britain and Hungary in the 1920s', Aliaksandr Piahanau (ed), *Great Power Policies Towards Central Europe 1914–1945* (International Relations Publishing 2019) 79; Jean-Phillipe Namont, 'La Petite Entente, un moyen d'intégration de l'Europe centrale?' (2009) 30 Bulletin de l'Institut Pierre Renouvin 45–56.

20 Albéric Rolin, 'Les réformes agraires en Roumanie et la compétence des Tribunaux Arbitraux Mixtes' (1927) 54 Revue de droit international et de législation comparée 438, 443.

academic Georges Scelle supporting for the first and only time a different opinion than his spiritual father, Léon Duguit.[21]

The Romanian State at first appeared in the proceedings of many suits brought before the MAT by Hungarian nationals under Article 250, only to challenge the Tribunal's jurisdiction later on. Romania's counsel raised the objection that the MAT lacked jurisdiction in agrarian matters and was not competent to try claims made by Hungarian nationals, regarding their property expropriated under the Transylvanian Law of Agrarian Reform. They mainly argued that Agrarian reform measures did not constitute liquidation measures within the meaning of Article 250. When Article 250 spoke of retention or liquidation measures, it only referred to 'bellicose dispositions for war purposes.' The interpretation of the term 'liquidation' would, from then on, be at the heart of the dispute.

Romania's legal team claimed that agrarian reform was a domestic matter of public utility related to an economic and social necessity in which no international body was entitled to interfere. They also emphasized the law's general character, as its application made no distinction of nationality and was administered impartially.[22] Politis insisted that international courts had the right to intervene only within the limits strictly assigned to them by the treaties. The exceptional nature of arbitral tribunals required the utmost caution in their action; it was not their responsibility to exceed, in the name of equity, the limits that the texts or the spirit of the treaty assigned to their jurisdiction.[23] An abusive interpretation would risk leading to a sentence tainted with abuse of power. As far as the Romanian-Hungarian MAT was concerned, Politis claimed that it was exceptional in three ways: exceptional in general, like any MAT; exceptional in a special way, because in respect of claims relating to the liquidation of the property of defeated countries it derogated from the common law of peace treaties; exceptional in an even more special way because it existed only in respect of a certain category of victorious countries, the successor States of Austria-

21 Fabrice Melleray, 'Léon Duguit et Georges Scelle' (2000) 21 Revue d'Histoire des Facultés de droit et de la science juridique 49. See also: Georges Scelle, 'L'arrêt du 10 janvier 1927 du TAM Roumano-Hongrois dans les affaires dites "agraires" et le droit international' (1927) RGDIP 433 and Léon Duguit, 'Le différend roumano-hongrois et le Conseil de la Société des Nations' (1927) 54 Revue de droit international et de législation comparée 469.

22 Paul De Auer, 'The Competency of Mixed Arbitral Tribunals' (1927) 13 Transactions of the Grotius Society xxv.

23 Léon Duguit, 'Le différend roumano-hongrois et le Conseil de la Société des Nations' (1927) 54 Revue de droit international et de législation comparée 480.

Hungary, and in respect of a single defeated country, Hungary.[24] Finally, counsel for Romania argued that on 26 May 1923, at a bilateral conference held in Brussels under the auspices of the League, Hungary had signed a declaration recognizing that, in instituting the agrarian law, Romania had remained loyal to the principles laid down in the Peace Treaty.[25]

Speaking for Hungary, Gidel and Brunet pointed out that national legislation could not override the stipulations included in a Treaty and a government's allegation that such legislation constituted an economic and social necessity was quite irrelevant. Many other jurists questioned the motives of the reform claiming that in the region of Transylvania large estates represented only 17 % of the properties and therefore the necessity of the reform in the regions of the enlarged Kingdom was questioned. They also accused the Transylvanian agrarian law of including an 'absenteeism' factor connected to automatic expropriations for all Hungarian citizens that were absent from the country (art 6) from December 1918 until the law entered into force, at a period when many Hungarian nationals were driven out of the territory because of the occupation of Romanian forces, a period when the borders had not been determined and many persons were uncertain of their nationality or were refused visas upon their return. The retrospectivity of the law was also criticized since no notice was given to the Hungarian landowners prior to the law coming into force. The law was therefore accused of being 'disguised liquidation' or in the best case '*liquidation de bonne foi*' or a law of elimination of the Hungarian element and an attempt towards 'Romanization'. Some believed that Romania was ceded the territories of the ex-Austrian and Hungarian Empire from the Paris Peace Conference on condition that it give up its sovereign right to apply a law of expropriation of an indefinite extent to all property of Hungarians to profit from the transfer of the ceded territories. The Romanian

24 According to Politis, the exceptional character of any international tribunal was a universally recognized principle and had been consistently applied in law cases. The Permanent Court of International Justice proclaimed this in its first judgment on the *Mavrommatis Palestine Concessions* in 1924. The Court took into consideration the fact 'that its jurisdiction is limited, that it is always based on the consent of the parties and cannot subsist outside the limits within which that consent has been given' and invoked 'the general rule that States are free to submit or not to submit their disputes to the Court' Jules Basdevant, Gaston Jèze and Nicolas Politis, 'Les Principes juridiques sur la compétence des juridictions internationales et, en particulier, des Tribunaux Arbitraux Mixtes organisés par les Traités de Paix de Versailles, de Saint-Germain, de Trianon' (1927) 1 Revue du droit public et de la science politique en France et à l'étranger 45–52.

25 Paul De Auer (n 22) xxvi.

State could apply such a law for purposes of public utility in view of the general principles of international law, only if accompanied by an adequate indemnity, which was not the case, as only 1 % of the market value of their land was offered as compensation to the Hungarian optants. Hence, the Romanian Law of Agrarian reform was of a confiscatory character and consequently a violation of the 'general principles of international law'.[26]

The Hungarian Government also based its argumentation on the equivalence of its case with the Permanent Court of International Justice's judgment on the merits in the *Certain German Interests in Polish Upper Silesia* case, which had recognized that specific private rights related to expropriation of German property were protected under Title III of the Geneva Convention of 15 April 1922 relating to Upper Silesia.[27] However, the Romanian side confronted this argument by stating that even if there were similarities, this was a case of interpretation of a special Convention between Germany and Poland and had no immediate connection with Article 250 of the Trianon Treaty. Even if the German citizens escaped liquidation, German property could perfectly well be expropriated as foreign property, by application of the general rule of expropriation.[28]

By a vote of two to one, handed down on 10 January 1927 in the case of *Emeric Kulin (senior) v Romanian State*, the Tribunal and its President, de Cedercrantz, declared itself competent. According to the Tribunal, the question as to whether the liquidations referred to could be executed in terms of the agrarian law did not fall within the question of jurisdiction. The liquidations mentioned by Article 250 of the Treaty of Trianon could be both war and post-war liquidations.[29] Furthermore, the MAT decided that the declaration of the Hungarian Government's delegate in Brussels

26 Hugh H L Bellot (n 9) 94–98.

27 *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits)* PCIJ Series A No 7; The German Government claimed that the application of Articles 2 and 5 of the Polish Law of July 14, 1920, constituted a measure of liquidation within the meaning of art 6 and the subsequent articles of the Convention of Geneva of 15 May 1922 in the sense that in so far as the said articles of the Geneva Convention authorized liquidation, that application must be accomplished by the consequences attached to it by the said Convention, in particular the entry into operation of Articles 92 and 297 of the Treaty of Versailles prescribed by the said Convention and that in so far as those articles did not authorize liquidation, that application was illegal. Hugh H L Bellot (n 9) 110–11.

28 Rolin (n 20) 456.

29 'Arrêt du Tribunal arbitral mixte roumano-hongrois, Affaire Emeric Kulin père c/ État roumain No R.H. 139' in *La Réforme Agraire Roumaine en Transylvanie*

was not a reason for the non-establishment of its competency. It then fixed a two-month term within which the Romanian State had to submit its defense on the merits.[30]

As a result, on 24 February 1927, Romania decided that its arbitrator, Antoniade, would no longer sit on cases concerning agrarian matters before the Romanian-Hungarian MAT. The Hungarian Government, making use of Article 239 of the Trianon Treaty, which provided the LoN Council with certain functions with reference to the MAT, asked the Council to complete the MAT by appointing two neutral arbitrators and enabling it to function despite the withdrawal of the Romanian arbitrator. Moreover, the Council was asked to bring the question of jurisdiction before the PCIJ.[31] The MAT's judgment sparked a new controversy among international jurists.

The Romanian side claimed that the competence of the MAT would subject Romania to a real regime of capitulations, in the sense that any measure of provision of common law could be questioned before the MAT under the pretext that it constituted a disguised liquidation and for an indefinite period, since the competence of the MAT was not limited in time.[32] In response, Scelle, supporting Hungary, believed that this was a rather childish fear because as he claimed: 'The MAT will die when it will no longer be possible to invoke before it the connection between the dispossession measures and the events of the war'.[33] International jurists supporting a total judicialization of international relations went as far as to claim that the MATs should not be considered as mere arbitral tribunals created by the parties involved in the disputes before them, but as international judicial institutions deriving their jurisdiction directly from the Peace Conference and the Peace Treaties. As such, they were halfway between arbitration and permanent international courts. According to these jurists, the Parties did not have the right to dispose of, restrict or repudiate the MATs' jurisdiction.[34] On 24 February 1927, during the second public section of the Council, the Romanian representative, Nicolae Titulescu,

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devant la Justice Internationale et le Conseil de la Société des Nations (Éditions internationales 1928) 233–43. See also: 7 Recueil TAM 138.

30 Paul De Auer (n 22) xxvi.

31 See above (n 2).

32 Many observers of the interwar period intent to prove a nexus between the MATs and Colonial-era Mixed Courts (notably those of Egypt). On the subject, see Theus (ch 1).

33 Scelle (n 1) 309–310.

34 ibid, 312.

commenting on the above idea of an all-powerful MAT, was particularly sarcastic:

> If liquidation is a violation of international law and if the Mixed Tribunal is competent for liquidation, international law has found its guardian: it is the Mixed Tribunal... Read Article 250! What the Hague Court, the highest institution in the world, the hope of the world cannot do without the consent of a State: sanction common international law, the Mixed Arbitral Tribunal can do... Read Article 250! Compulsory arbitration is no longer an ideal towards which humanity moves slowly. It already exists... Read Article 250![35]

2.2. The Role of the Council

Upon the Hungarian request to the Council to appoint two neutral substituting arbitrators, the question arose as to whether a Romanian-Hungarian MAT had the right to decide upon its own jurisdiction, whether was possible to appeal to another international authority against its decision or whether its decision was obligatory. Romania, insisting upon the invalidity of the decision, brought the dispute before the Council of the League of Nations under Article 11, paragraph 2 of the LoN Covenant.[36]

For the Romanian advocates, without a fixed procedure to determine abuse of power by the MAT, the Council's intervention 'replaced that of justice' but had to consider the various aspects of the issue before taking a decision. Did the Council have the right not to recognize the MAT's jurisdiction? Politis recognized that the refusal to allow the MAT to continue its work, as demanded by Romania, would constitute an annulment of the award by which it had recognized its jurisdiction and, consequently, aviolation of a major principle of order and legality, that of the authority of *res judicata*. Almost all jurists involved in the dispute had as a standpoint the rule of international law stating that international courts had the right to decide definitely upon their own competence (competence-compe-

35 League of Nations, Council, 44th session, 2nd meeting (public) (7 March 1927) 8 League of Nations Official Journal 350, 355.

36 Art 11 para 2 League Covenant: 'It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends'. Covenant of the League of Nations (adopted 28 June 1919) 225 CTS 195.

tence doctrine).[37] According to Politis, if the right to decide upon the competence of international courts was given to the Council, international justice, which the League advocated as a cornerstone of international relations, would no longer be above politics, as it should be, but would be rewarded and dominated by it. Nevertheless, according to him, the authority of *res judicata* imposed in modern societies as a means of ensuring order ceased to be imposed in cases where instead of ensuring order, it might compromise it.[38] To support his argument, he used a theory recently developed by the French publicist Gaston Jèze (1869–1953) in his *Principes généraux du droit administratif*.[39] The latter argued that, on the domestic level, the government had the obligation to refuse the execution of *res judicata* when such execution would result in a breach of social peace and public order. Transferring this theory to the international level, Politis claimed that decisions of international tribunals – especially where these tribunals were, such as the MATs, still in the process of formation and organization – could be refused if world public order, ie international social peace, was in danger.[40] Politis claimed that the authority of *res judicata* was only concerned with a regular and valid judgment. However, the award of

37 Concerning especially the MATs, the Peace Treaties contained the following provision: 'The High Contracting Parties agree to regard the decision of the MATs as final and conclusive and to render them binding upon their nationals.' See, eg, art 239 (g) Treaty of Trianon. Paul De Auer (n 22) xxvii.

38 According to Politis, the French Conseil d'État applied this idea in its judgment of 30 November 1923 in the *Couitéas* case, where the French Government had refused, for exceptional reasons, to assist in the execution of a judgment ordering the eviction of thousands of local inhabitants from the property of a European settler in the French protectorate of Tunisia. According to the Conseil d'État, the French Government had 'merely used the powers conferred to it for the maintenance of public order and security in a protectorate country', adding that 'The Government has the duty to assess the conditions of this execution and the right to refuse the assistance of armed force as long as it considers that there is a danger to order and security. Nicholas Politis (n 17) 678.

39 Gaston Jèze, *Principes généraux du droit administratif* (3rd edn, M Giard 1925) 279–80.

40 Politis' position supporting the use of LoN mechanisms in order to preserve international peace is explained by his 'political' engagement within the LoN. His legal theory is closely tied to Scelle's theory supporting a total juricialization of international relations, only Politis' political engagement make him support more 'realistic', moderate paths in order to achieve what he calls social peace at the international level. (For Politis' monistic theory of international law and personality see 'The European Tradition in International Law: Nicolas Politis', (2012) 23(1) European Journal of International Law (Contributions of Marilena Papadaki, Robert Kolb, Umut Özsu, Nicholas Tsagourias, Maria Gavouneli).

the MAT in the *Emeric Kulin* case could not have had that character since it was vitiated by an excess of power *(abus de pouvoir)*. And the decision of a Court judging outside its jurisdiction could only be considered invalid and void ('*nulle et non avenue*'). The objection based on the authority of *res judicata* was therefore inoperative. Having exceed its power, the judgment of the MAT was null and void and had no legal effect.[41]

Consequently, another objection was raised by both sides. To admit the alleged existence of an excess of power, it was not enough for it to be asserted by one of the parties; it was also necessary for it to be certified by a third authority whose decision could be legally imposed on the other party. However, this authority could not be the League Council because it only had political power, whereas the issue to be resolved was essentially legal. The only authority that could play such a role would, according to various jurists from both sides, be the PCIJ. Therefore, the Council would have a duty to consult it, on condition that the international organization had reached the same degree of perfection as the internal organization, where the separation of powers or functions prohibited political organs from interfering in judicial affairs. 'But in the international order, even after the creation of the PCIJ', claimed Politis, 'we are still far from such an organization'. According to him, without a fixed procedure to determine an excess of power, the Council had a dual duty: 'a duty of formality or procedure and a duty of substance or political opportunity'. The first was dictated by Article 239 of the Trianon Treaty, invoked by Hungary: it was to enable the MAT to function by appointing two substitute arbitrators. The second was dictated by Article 11 paragraph 2 of the Covenant, invoked by Romania: since its attention is drawn to a 'circumstance likely to affect international relations and which subsequently threatens to disturb peace or good understanding between nations, on which peace depends' it 'must take appropriate measures to effectively safeguard the peace of nations.[42]'

According to Politis, the Romanian-Hungarian conflict fell within the provisions of Article 11 of the Covenant. For the good understanding between the two countries concerned, it constituted more than a threat; it was a real danger that the Council had a duty to eliminate. The appointment of arbitrators would, according to Politis, only aggravate the conflict as the Romanian Government would not bow to a possible unfavorable ruling on the merits. In such a case, the Hungarian Government would

41 Basdevant, Jèze and Politis (n 24) 45–52.
42 Politis (n 17) 679.

not fail to invoke the final provision of Article 13 of the Covenant, according to which 'in the absence of enforcement of the sentence, the Council shall propose measures to ensure its effect'. The Council, Politis pointed out, would be unable to assist in an award that would contradict its 1923 decision supporting the Agreement of Brussels, for the full compatibility of Romanian land reform with the provisions of the Trianon Treaty. The resulting disturbance to peace would be infinitely greater. Hence, between the two duties, the Council had to choose the political duty, because it was the most compelling, pressing, and effective. 'To prefer the other', argued Politis, 'would not only be to sacrifice substance for form, but to abdicate its essential mission to safeguard peace. This would be the failure of the LoN, which, in the presence of an international dispute, must spare no effort in mediation and conciliation to restore good understanding between nations.'[43]

Nevertheless, Scelle and many other eminent jurists standing for the Hungarian side argued that the attitude of the Romanian Government when it appealed against the decision of the MAT to the League Council, ie to an international, but not a judicial organ, was contrary not only to the Treaty, but also to general principles of International Law. If it were admitted that the decision of an international Court could be revised by a political body or simply not carried out by one of the parties, this would mean the end of international adjudication.[44] International Justice had to be protected because as Scelle claimed: 'the real political interest of the question is the definitive construction of permanent Peace based on institutions and legality.'[45]

3. Conclusions

After Romania presented the cases before the LoN Council, the latter set up a three-member commission of inquiry, consisting of Austen Chamberlain, and the representatives of Japan and Chile, which in November 1927 declared the arbitral tribunal incompetent in agrarian matters.[46] More negotiations followed, but none succeeded in finding a commonly accepted solution. As Georges Scelle had predicted, on the eve of the Second World

43 ibid.
44 Paul De Auer (n 22) xxviii.
45 Scelle (n 1) 318.
46 9 League of Nations Official Journal (July 1928) 933.

War, as international tensions grew, the activity of the Romanian-Hungarian MAT became lethargic and was finally suspended.[47]

The study of the cases of Hungarian optants before the Romanian-Hungarian MAT is of historical interest insofar as it contains information on the exploitation of large properties in the territories ceded to Romania by Hungary after the First World War. It is indicative of the process of state building, that here took the form of agricultural modernization for the country's overall development. It is also interesting to follow the policies and strategies of a new State to become centralized and effective by controlling the peasantry in areas that previously had a very distinct solidarity and economic dependance, as well as many different legacies hosted in the past intense ethnic, religious and economic contacts and exchanges, following the dissolution of the great empires after the First World War.[48]

Moreover, studying these cases allows one to identify the interaction between international legal theory and governmental practice during the interwar period. It is all the more interesting because it takes place in the mid-twenties, ie during a period which might be said to be the high-water mark of international arbitration (let us not forget that in 1924, the Geneva Protocol appeared as the corollary of the efforts to impose compulsory arbitration for any dispute between states). In a period of rapprochement of former rivals, we see many international lawyers of the victorious countries advocate for Hungarian 'ex-enemy' individual rights, presenting the cases as necessary to prove the importance of juridical over political solutions, to stabilize an international legal order that would promote international peace.

The Hungarian optants cases before the Romanian-Hungarian MAT are also indicative of the fact that individuals from defeated countries did actively use, and sometimes place their trust in the new legal system of the MATs that had originally been created mainly to protect the victorious countries' individual rights.[49] The same can be said concerning the trust shown by a defeated country in both the new political and juridical instances, such as the LoN and the PCIJ, used as mechanisms to promote political agendas as well as both individual and state rights.

By studying the dispute through the specialized journals of international law, one can follow the networking of international lawyers in the new

47 Scelle (n 1) 309–310; Requejo Isidro and Hess (n 5) 275.

48 Stefan Dorondel, Stelu Şerbau, 'A Missing Link: The Agrarian Question in Southeast Europe' 19 Martor 7.

49 See also: Zollmann (ch 4).

academic space that emerged during the interwar period, as well as their role/functions, on one hand as promoters of a new international legal order based on social development and institutional renewal, and on the other hand as practitioners, arbitrators, international lawyers and – at the same time – political actors promoting concrete state interests and political agendas. In the Hungarian optants' cases, one can follow the multiple roles and levels international lawyers are often called to play. We see for example jurists such as Nicolas Politis, rapporteur of the 1924 Geneva protocol for the Pacific Settlement of International Disputes – which introduced the concept of compulsory legal arbitration -, as advocate of the Romanian State to support more realistic approaches that included moderate paths and the use of 'political' over 'legal' solutions. Scelle reproached Politis, Millerand and Rosental for their 'political' and not only academic engagement.

Finally, the Hungarian optants cases, which made use of all possible international political and juridical dispute settlement mechanisms of the interwar period, allows one to follow the interaction between these mechanisms, namely the MATs, the League and the PCIJ, as well as their common contribution to the codification, development, and evolution of both public and private international law.