voked,[23] and the intended meaning of an instrument may be properly sought in the light of "stipulations of other treaties concluded by the parties with respect to subjects similar to those dealt with by the treaty under consideration, and the conduct of the parties with respect to such treaties." [24] The fact of certain municipal laws may naturally enter into calculation, to show, for example, that negotiators would not have put into a convention a rule which, from their knowledge of existing municipal law, they must have known would be impossible of application.[25] The background of international law against which treaties are presumed to be made sometimes calls forth some statement on this point, as from the Mexican-French Claims Commission under the Convention of September 25, 1924.[26] Although resort to arbitration implies an engagement to submit in good faith to the award, it is still to be remembered, as pointed out in a legal opinion on which was based an award between Great Britain and Nicaragua in 1881, that the "interpretation of a treaty can never supersede the treaty interpreted, and the judicial decision creates no new right, but only affirms and establishes the existing right." [27]

Only a few aspects of a large subject have been referred to in this brief comment. The function of interpretation remains a necessary one and requires high judicial skill. To the ordinary difficulties are added, in the case of treaty construction, peculiar ones due to divergences in legal systems and to texts in different languages, more than one of which may be authentic. Whether evidence be principally of an extrinsic, or of an intrinsic sort, international judges must decide what has been intended and what has been done by treaty-makers. Much verbiage in the course of many arbitrations seems to attest the effort exerted to demonstrate the soundness of conclusions reached. In the last analysis, interpreters are expected, within and always subject to provisions of agreements authorizing their work, to perform a practical task with as much objectivity and impartiality as can be brought to bear upon it.

ROBERT R. WILSON

INTERNATIONAL LAW AND "PUBLIC ORDER"

The astonishing changes which are taking place in political thought and methods among states today necessarily react upon international law, and

[23] As by the American members of the Alaskan Boundary Tribunal under the treaty of Jan. 24, 1903. Sen. Doc. (cited in note 6, *supra*), p. 49. The Americans endeavored to support their argument by a reference to a view which had become "part of the common understanding of mankind."

[24] Opinions of Commissioners, United States-Mexican Special Claims Commission under Convention of Sept. 10, 1923 (document cited in note 5, *supra*), p. 61.

[25] Societa commerciale d'Oriente *c.* Gouvernement turc, *Trib. Arb. Mix.*, *ibid.*, IX, 612, 614.

[26] Georges Pinson claim, *Jurisprudence de la commission Franco-Mexicaine* (*1924–1932*), p. 104. [27] J. B. Moore, International Arbitrations, V, 4966.

furnish new problems for those who practice that law. One of these is the "exception of public order"—not entirely a new problem, but one which becomes more and more a matter of concern as its potentialities and ramifications are considered. These possibilities appear in various fields of international law and, in addition to particular effects in these fields, raise fundamental questions as to the prestige and force of international law in general.

In an earlier issue of this JOURNAL, Dr. Max Habicht has discussed the effect upon private international law of the "exception of public order," particularly in connection with the recognition of new governments.[1] Recent cases involving this problem are well known. The *Institut de Droit International*, in Article 17 of its *règlement* adopted at Brussels in 1936, says:

> Recognition *de jure* of a government implies the recognition of the judicial, administrative or other organs, and the attribution of extra-territorial effects to their acts, in conformity with the rules of international law and particularly under the customary reservation of respect for public order, even if these acts had been consummated before any previous *de facto* recognition.

In the field of state succession, it has been maintained that an obligation to which a state succeeds after transfer of territory to it need not be accepted if in conflict with the public policy of that state. Thus, in Alvarez y Sanchez *v.* United States (216 U. S. 167), Mr. Justice Harlan said that it was inconceivable that the United States should recognize the salability of public offices in perpetuity "or to so restrict its sovereign authority that it could not, consistently with the treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions."

A provision of this nature is to be found in the Polish Minority Treaty of June 28, 1919: "All inhabitants shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals." [2]

A number of states have now claimed the privilege, as a policy of the state effectuating a new political philosophy, to destroy entirely, or to restrict severely, the right of private property. International law, which developed during a period in which private property rights were recognized by all states, gives a certain amount of protection to such rights, in the case of aliens; as a general principle, private property belonging to an alien can not be confiscated arbitrarily and without compensation.[3] When some states so change

[1] M. Habicht, "The Application of Soviet Laws to the Exception of Public Order," this JOURNAL, Vol. 21 (1927), p. 238. See also Herbert Briggs, The Law of Nations (New York, 1938), pp. 95–97. [2] This JOURNAL, Supplement, Vol. 13 (1919), p. 426.

[3] As to this point, see the questions raised by J. L. Brierly, *Recueil des Cours, Académie de Droit International*, 1936, Vol. 58, p. 170; A. V. Freeman, The International Responsibility of States for Denial of Justice (London, 1938), pp. 515–521; and the address of Professor Borchard and discussion following in PROCEEDINGS of the American Society of International Law, 1939, p. 51 ff.

their political philosophy and legal principles that they no longer admit a right to private property, they may plausibly argue that the responsibility for the protection of the property of aliens in international law which they formerly observed they now need no longer accept, because their internal public order has been changed with the consequence that the right to private property is denied. If this be conceded, then the foundation of acceptance upon which the international law of responsibility for protection of aliens is in part taken out from under it. Must it be conceded that the former rule of international law no longer holds good because certain states which formerly accepted it can no longer do so consistently with their new public order? Or, on the other hand, should it be said that these states are bound by international law, and cannot therefore change their internal systems into conflict with that law? [4]

One may imagine many questions in other fields of international law arising from such internal changes in state policy. It has long been an accepted rule of international law that the property of a state within the territory of another is not subject to the jurisdiction of the latter state. Where a state has nationalized all property so that what was formerly, and would ordinarily be regarded as, private property has now become state property, must another state still accept this rule, and deprive itself therefore of control (such as taxation) over much property of an ordinary commercial character? Or may this latter state deny the rule on the ground that application of the rule would conflict with its own public order and put it at a disadvantage?

Again, there are rules of the law of neutrality to the effect that, while individuals may sell certain articles to belligerents, their governments may not do so. Does it follow that when a state has taken over ownership of all property therein, it is deprived of the right to sell anything of a contraband nature to a belligerent? Or may it declare that, its public order having changed since the law of neutrality was made, the government will now exercise the rights formerly exercised by its citizens? Many states have, in varying degrees, taken over ownership or control of something, and might therefore be affected by such a situation. In the United States, helium is government controlled; could it be sold to a belligerent?

When one begins to think in this direction, it is difficult to find a boundary line. If the United States amends its Constitution and public order to prevent the sale of liquor, thereby depriving some aliens of their property, is this to be regarded as contrary to international law, and if so, can it be excused or justified on the ground that it is an act of public policy? If the city of Cincinnati, in the exercise of its police power, forbids aliens to operate poolhalls within the city, thus depriving them of their means of livelihood, is it public policy which justifies such discrimination? Could a totalitarian state, whose

[4] "The fact that individual states have officially adopted communism does not, of course, change or influence international law as long as the majority of states are opposed to it." E. H. Feilchenfeld, Public Debts and State Succession (New York, 1931), p. 636.

public policy requires all sacrifices by the individual for the benefit of the state, take over for its own use the property of aliens as well as nationals, or require labor services from aliens for the same ends? Why should not a South American state reject denial of justice in international law by the simple assertion that the public order within that state requires the administration of justice in a certain fashion, no matter what international law might say? Or why, for that matter, should not the United States, in accordance with its policy of conservation of natural resources, extend her maritime jurisdiction to cover the disputed fishing areas around Alaska? If one concedes that public order within a state justifies the rejection of international law in some cases, it is difficult to know where to stop with such denials. Perhaps the public order of Japan requires the subjugation of China, or that of Germany demands the conquest of its neighbors!

It has usually been said that international law stands superior to domestic law, and that a state has the duty to execute, within its jurisdiction, the obligations of international law. Yet, in these cases, a state may apparently decide for itself, and without the necessity of reference to an international tribunal, that its internal order entitles it to exemption from obedience to international law. Such a view can not be accepted; and international tribunals have, in fact, rejected it. Thus, the Permanent Court of International Arbitration, in the case of the Norwegian Shipping Claims, said: "But should the public law of one of the parties seem contrary to international public policy, an international tribunal is not bound by the municipal law of the states which are parties to the arbitration." Reference may be made also to the opinion of the Permanent Court of International Justice, in the case of the Tunis-Morocco Nationality Decrees, in which it was said:

> The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the court, in principle within this reserved domain.[5]

One may indeed, as did Judge Schücking in his dissenting opinion in the Oscar Chinn case, speak of "an international public policy." [6]

Yet, while it may justly be insisted that international law must stand superior to domestic law, it would be dangerous to assert that a state is not permitted to make changes in its domestic order, no matter how fundamental, because such changes might produce some conflict with existing rules of international law. Such an attitude might result in undesirable uniformity

[5] See also the case of Polish Upper Silesia, Series A, No. 7, p. 22.

[6] "The court would never, for instance, apply a convention the terms of which were contrary to public morality. . . . The attitude of the tribunal should, in my opinion, be governed in such a case by considerations of international public policy, even when jurisdiction is conferred on the court by virtue of a special agreement." P. C. I. J., Series A/B, No. 63, p. 150. See also the article by Niboyet, in A. de La Pradelle and J. P. Niboyet, *Répertoire de Droit International* (Paris, 1931), Vol. X, p. 160.

in national systems, prevent the rise of new ideologies, and hinder progress in the science of government. The exception of public order is not to be regarded as an undesirable manifestation of national sovereignty, but rather as showing that the growth of international government has reached such a point that it becomes necessary to distinguish more clearly between the powers "delegated" to the international government and those reserved to the "sovereign" states. Attempts have been made at such a differentiation, but no satisfactory answer appears yet to have been found.[7] It is a problem to which international lawyers must devote attention.

CLYDE EAGLETON

THE RECONSIDERATION OF "NEUTRALITY" LEGISLATION IN 1939

When the so-called "Neutrality Act" of May 1, 1937, was passed by Congress, the divergence of views which has been in evidence since 1935,[1] prevented a final agreement upon certain basic propositions. The result of the lack of unanimity was recorded in Section 2 of the 1937 Act which adopted the "cash and carry" plan but only for two years, that is, until May 1, 1939. Instead of allowing ample time for the consideration of the problem in 1938, Congress waited until the spring of 1939 to begin its restudy of this legislation. As could have been foreseen, the time was too short to make it possible for an agreement to be reached, and Section 2 of the 1937 Act expired by its own terms on May 1 of this year. Meanwhile both the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs had been holding hearings and numerous bills were before both committees.[2]

Although the whole process can scarcely be cited as a shining example of the efficiency of democratic government, it is encouraging to find that the false basis laid by the popular labels of the Acts of 1935, 1936 and 1937 was, at least in part, swept away. Senator Pittman, the Chairman of the Senate Committee on Foreign Relations, very properly entitled his bill (*S. J. Res. 97*) the "Peace Act of 1939." The fact that it was not really "neutrality

[7] See the article by Habicht to which reference has been made above.

[1] See this JOURNAL, Vol. 29 (1935), p. 665; Vol. 30 (1936), p. 262; Vol. 31 (1937), p. 306.

[2] Neutrality, Peace Legislation, and Our Foreign Policy, Hearings Before the Committee on Foreign Relations, U. S. Sen., 76th Cong. 1st Sess., April 5, 1939–May 8, 1939; American Neutrality Policy, Hearings Before the Committee on Foreign Affairs, House of Rep., 76th Cong. 1st Sess., April 11–May 2, 1939. The bills considered in the hearings are conveniently found in the combined Committee Prints entitled "[Committee Print] March 31, 1939, Text of Legislation Relating to Neutrality, Peace, and Our Foreign Policy, Pending in the Committee on Foreign Relations, United States Senate, Printed for the use of the Committee on Foreign Relations," and "[Committee Print] April 8, 1939, Text of Present Neutrality Law (Printed in Bill form), Proposed Amendments Thereto, and Related Legislation Affecting the Foreign Policy of the United States, Pending in the Committee on Foreign Affairs, U. S. House of Representatives, Printed for use of the Committee on Foreign Affairs." Two additional bills not included in the House Committee Print are Mr. Fish's *H. R. 3419* and Mr. Tinkham's *H. J. Res. 295*.