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# Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations

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*'International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection.'*<sup>1</sup>

## Abstract

*The peaceful settlement of international disputes by judicial means held a prominent place in Max Huber's work throughout his career both as an academic and legal practitioner. For a number of good reasons, Huber's best known contribution in the field, his 1928 award in the Island of Palmas case, is still renowned as one of the leading cases of our discipline. Although somewhat less well known, the second case in which Huber acted as sole arbitrator (British Claims in the Spanish Zone of Morocco 1923–1925), served as one of the major precedents in the International Law Commission's work on state responsibility. Going far beyond the rather technical (and marginal) issues at stake, both awards owe their lasting importance not least to the firm theoretical foundations on which they rely. In contrast, a third case in which Huber was actively involved in a twofold way has almost completely fallen into oblivion. Huber not only negotiated and signed the 1921 Swiss-German treaty of arbitration and conciliation, but was also called to sit on the bench of the Jacob Salomon Kidnapping case (1935) established under the terms of that very treaty. Although no formal award was rendered, this case is nonetheless a prime example of the pressure that the mere existence of an arbitration procedure can apply even on dictatorial regimes.*

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<sup>1</sup> *Island of Palmas Case (Netherlands/USA)*, RIAA II, 870. P. Guggenheim, *Lehrbuch des Völkerrechts* (1948), i, 1 refers to this phrase even as some sort of 'golden rule' of public international law.

## 1 Huber's Case

This collection of essays pays tribute to Max Huber's rich and multifaceted legacy to the universe of international law and practice. No doubt, his still somewhat neglected and undervalued academic work deserves rediscovery;<sup>2</sup> and his various activities and multiple merits as a legal practitioner are unquestioned.<sup>3</sup> Yet, our discipline probably knows of nobody else whose name is so intrinsically tied to and whose reputation depends so much upon one single and rather isolated professional activity: Max Huber is the 'Island of Palmas case' and the 'Island of Palmas case' is Max Huber. With time, the details of his impressive personality<sup>4</sup> and his broad range of intellectual contributions<sup>5</sup> may not escape the probably inevitable fate of obfuscation – as will happen to the facts underlying the *Palmas* case. Today, most young internationalists may not know who this fascinating man was, and a growing number of scholars may not hesitate to locate our island in the Canaries or somehow associate it with the capital of Majorca. However, there is no indication that the unique symbiosis between the man and 'his' case may soon be erased from the annals of our discipline.<sup>6</sup> To be sure, Huber's role as sole arbitrator certainly favours his identification with the 1928 landmark decision. And at the eve of the dissolution of imperialistic empires, with virtually hundreds of pending or at least potential territorial disputes, the subject matter of the case quickened interest far beyond small circles of specialists. However, the *Palmas* award owes its continuing success and unparalleled echo in the international legal community to something else: there was an immediate feeling that what had been delivered here was not just another merely technical decision on territorial ownership, but that the significance of Huber's deliberations went far beyond the rather marginal issue actually at stake. What Huber indeed did was to grasp the legal fate of the tiny and remote Island of Palmas in order to exemplify essential elements of his conception of international law. This is precisely what makes it more than a coherent and extremely

<sup>2</sup> Cf. Klabbers, 'The Sociological Jurisprudence of Max Huber: An Introduction', 43 *Austrian J Public and Int'l L* (1992) 197: '[l]ess well known, but possibly of equal importance, is Huber's academic work'. This article paved the way for a still rather modest renaissance of Huber's writings. See also O. Diggelmann, *Anfänge der Völkerrechtssoziologie* (2000).

<sup>3</sup> See contributions (in this volume) by Spiermann, 'Judge Max Huber at the Permanent Court of International Justice', at 115–133 and Sandoz, 'Max Huber and the Red Cross', at 171–197.

<sup>4</sup> See in particular the (popular scientific) biographies by F. Wartenweiler, *Max Huber. Spannungen und Wandlungen in Werden und Wirken* (1953) and P. Vogelsanger, *Max Huber. Recht, Politik, Humanität aus Glauben* (1967), the biographical sketch by Vogelsanger, 'Max Huber' (1972) 9 *Neue Deutsche Biographie* (1972) 681, the necrology by Rousseau, 64 *Revue Générale de Droit International Public* (1960) 209 ff, the contributions of a more personal character in the two *libri amicorum* in his honour of 1934 and 1944 and finally the autobiographical work M. Huber, *Denkwürdigkeiten 1907–1924* (published posthumously in 1974) with introductory remarks by Ruegger (at 7–11) and Vogelsanger (at 12–25). See also Schindler, 'Max Huber – His Life', this issue, at 81–95 (with further references).

<sup>5</sup> M. Huber, *Gesammelte Aufsätze (Collected Works)* (1947–1957), consisting of 4 vols: *Heimat und Tradition; Glaube und Kirche; Gesellschaft und Humanität; and Rückblick und Ausblick* aptly demonstrate the broad range of Huber's intellectual interests and academic production. Further, the two *libri amicorum* in his honour bear witness to the esteem Huber enjoyed in other disciplines such as theology, history, history of art, philosophy of culture, and others.

<sup>6</sup> For selected references to the *Palmas Case* in recent international jurisprudence cf. *infra* note 79.

interesting award from a theoretical perspective. Over and above this, it justifies the claim for universal validity of quite a number of its normative findings, something which certainly puts the award in the front row of leading cases in international law. Hence, even if today, regrettably enough, most of Huber's academic work may have fallen into oblivion, essential traits of his sociological approach to international law survive in the *Palmas* Award. No doubt, if ever a judicial decision deserves to be named after its originator, it is certainly this one: The *Palmas* award is truly 'Huber's case'.

## 2 Huber and the Peaceful Settlement of Disputes

In his formative years, three personalities had a particularly strong influence on Huber's intellectual growth: there was first Alfred Escher (1819–1882), one of the major protagonists of the transformation of Zürich into an industrialized liberal community.<sup>7</sup> Second came Johann Kaspar Bluntschli (1808–1881), probably the most prominent 19th-century Swiss jurist, whose professional interests and expertise covered virtually all branches of law from the legal order of his hometown Zürich to international law.<sup>8</sup> And finally, third, specific mention should be made of Bertha von Suttner (1843–1914), who became a leading figure in the peace movement with the publication in 1889 of the novel *Die Waffen nieder!* ('Lay Down Your Arms').<sup>9</sup> Given these intellectual roots (liberalism, pacifism and a strong belief in the indispensability of an effective international legal order), it is hardly surprising that the peaceful settlement of international disputes by judicial means was always given special importance in Huber's career, both as an academic and legal practitioner: As a member of the Swiss delegation to the 1907 (Second) Peace Conference at The Hague, Huber received a first-hand impression of the rather frustrating and in the end futile efforts to subdue sovereign states to a comprehensive system of judicially binding dispute settlement mechanisms.<sup>10</sup> However, it was not until the early 1920s that Huber himself became actively involved in the administration of international justice. In 1921 Huber was appointed judge at the recently established Permanent Court

<sup>7</sup> 'Erst durch die Biographie Alfred Eschers wurde in mir der Wunsch wach, eines Tages einmal etwa Ähnliches zu leisten': F. Wartenweiler, *Max Huber. Spannungen und Wandlungen in Werden und Wirken* (1953), at 23: 'It was Alfred Escher's biography that first awakened in me a desire to one day accomplish similar achievements.'

<sup>8</sup> Huber himself notes (in *Denkwürdigkeiten*, *supra* note 4, at 29) that he had carefully studied Bluntschli's *Das moderne Völkerrecht der civilisierten Staaten (International Law)* (1867) already as a teenager.

<sup>9</sup> See Huber, *Denkwürdigkeiten*, *supra* note 4, at 29 where express mention is made only of Bluntschli and Escher, whereas his affinity to socialist ideas (Bertha von Suttner)—somewhat irritating in his Zurich bourgeois ambience—is discernible only from earlier biographical sketches (see *ibid.*, at 311, note 16 and Wartenweiler, *supra* note 4, 31).

<sup>10</sup> The prevailing tone of Huber's own detailed records of the conference is indeed frustration and bitterness: Huber, *Denkwürdigkeiten*, *supra* note 4, 31 ff, with extensive references to his various initiatives to promote the idea of a comprehensive dispute settlement system. Other publications, however, in particular Huber, 'Die Fortbildung des Völkerrechts auf dem Gebiet des Prozeß- und Landkriegsrechts durch die II. internationale Friedenskonferenz im Haag 1907' [1908] II *Jahrbuch des öffentlichen Rechts der Gegenwart* 470 ff, look somewhat more favourably at the course of the conference and its results.

of International Justice at The Hague,<sup>11</sup> and two years later the Federal Council added his name to the list of arbitrators<sup>12</sup> of another judicial institution at The Hague, created by the 1899/1907 Conventions for the Pacific Settlement of International Disputes<sup>13</sup> and inappropriately called the Permanent Court of Arbitration (PCA).<sup>14</sup> This institution never met the international legal community's high expectations. Nonetheless, in a number of important instances, the Court's facilities of an 'infrastructural' character (arbitrators, premises, library, staff, model-rules) were used by states wishing to settle their disputes by arbitral means.<sup>15</sup> Indeed, after a period of neglect, proceedings under PCA auspices have witnessed a remarkable revival in recent times.<sup>16</sup> However, whereas today the PCA often merely serves as some sort of registry for the parties, up to the 1930s proceedings meticulously followed the relevant provisions of the 1899/1907 conventions. Thus, so did the Netherlands and the United States in 1925 when referring their dispute regarding sovereignty over the Island of Palmas to arbitration and denominating Max Huber as sole arbitrator in accordance with Article 45 of the latter convention.<sup>17</sup>

Before commenting at some length on Huber's most prominent contribution to the corpus of arbitral law, the *Island of Palmas* Award, it should not be forgotten that this Swiss jurist was called to the bench of arbitral bodies in a number of other instances as well. However, as a general rule, Huber was surprisingly reluctant to accept such invitations, essentially for the following reasons: first, Huber was extremely anxious throughout the 1920s to avoid anything that could cast doubts on his integrity and impartiality as a judge at the World Court. Second, in at least two cases<sup>18</sup> Huber felt

<sup>11</sup> In Nov./Dec. 1920 as the Swiss representative in the League of Nations' Sub-Commission of the Third Commission, Huber exerted a major influence on the final drafting of the Court's Statute, in particular with regard to Art. 35 (equality of states before the Court) and—renewing a proposal presented as early as 1907—Art. 36(2) (optional clause as an integral part of the Statute itself: see SdN 1920, Commission III, 380ff); cf. Huber, *Denkwürdigkeiten*, *supra* note 4, at 170 ff and D. Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938), at 9 ff.

<sup>12</sup> Cf. Art. 23 (1899) and Art. 44 (1907): '(1) [e]ach Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator. (2) The persons thus elected are inscribed, as Members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau'.

<sup>13</sup> C. Parry, *Consolidated Treaty Series*, vol. 87 (1898–1899), at 410 and *ibid.*, vol. 205 (1907), at 233.

<sup>14</sup> This still-existing institution provides states willing to settle their bilateral disputes by arbitral means with something which one might call 'judicial infrastructure'. For further information see <http://pca-cpa.org>.

<sup>15</sup> For a complete list of arbitrations before the PCA cf. H.-J. Schlochauer, 'Permanent Court of Arbitration', *Encyclopaedia of Public Int'l L* (1997), iii, 986 (with addendum by Oellers-Frahm).

<sup>16</sup> Cf. the list of recent and pending cases available at <http://pca-cpa.org/ENGLISH/RPC>.

<sup>17</sup> Strangely enough, J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (1999), at 36 ff make no reference at all to this landmark decision; see, however, J.G. Merrills, *International Dispute Settlement* (4th edn, 2005), at 93.

<sup>18</sup> The first case (1922) concerned railway concessions in Palestine (arbitral tribunal established under the terms of the never-ratified treaty of Sèvres) and the second one (1924) was a Hungarian request asking Huber to serve as the President of a similar body established under the treaty of Trianon. However, what Huber himself called 'strict neutrality' was considered by others as a 'pro-German attitude', a stigma which led the Allies not to call him to sit on any of the numerous arbitral bodies established under the terms of the various peace treaties: *Denkwürdigkeiten*, *supra* note 4, at 296.

very uneasy about the legal regime he would have to apply if he accepted the offer to arbitrate. In concrete terms, what was at stake in these cases was the post-World War I peace treaty system, which, due to its (alleged) one-sidedness, he considered 'bad law'.<sup>19</sup> Third, in view of all the difficulties he experienced at the PCIJ, both with respect to procedure and in terms of reaching acceptable results in substance, Huber was not really eager to become integrated into another judicial body. Thus, if at all, his clear preference was to act as sole arbitrator. Fourth, Huber was very well aware of his physical limits and it was simply not in his nature to accept tasks which he would most likely not be able to perform in a timely manner, i.e. in the foreseeable future. And finally last but certainly not least, his somewhat privileged personal background meant that Huber was neither interested in nor did he depend on any extra income. Thus, what in fact remains on his record as arbitrator (apart from the *Palmas* case) are but two other arbitrations: his work in 1923/1925 as sole arbitrator in a dispute between Great Britain and Spain (*British Claims in the Spanish Zone of Morocco*)<sup>20</sup> and his appointment in 1935 as member of an arbitral tribunal in a German-Swiss dispute (*The Jacob Salomon* case).<sup>21</sup> These arbitrations are worthy of examination here.

### 3 Beyond 'Palmas'

#### A *The Jacob Salomon Kidnapping Case (1935)*

In early 1921, the Swiss Government vested Max Huber with the power to negotiate and sign a treaty of arbitration and conciliation with Germany – a quite unusual mark of confidence in a man who at the time held no position whatsoever within the administrative structures of his country. However, since the days of the 1907 (Second) Hague Peace Conference, Huber's particular expertise in this field was uncontested and in the immediate aftermath of World War I he had again been most actively involved in the (re-)formulation of his country's position *vis-à-vis* the emerging mechanisms for a peaceful settlement of disputes on the international plane.<sup>22</sup> The negotiations with Germany offered Huber the rather unique chance to translate into 'hard' law his concept of a specific '*traité-type*' – the 'organic' combination of arbitral and conciliation elements in one single treaty instrument.<sup>23</sup> The treaty eventually elaborated by

<sup>19</sup> *Ibid.*, at 296 ff. '*Ich hätte mich aber auch nicht verpflichten wollen, ein Recht anzuwenden, das die Sieger den Besiegten auferlegt haben und das, zum mindesten wegen seiner Einseitigkeit, ein schlechtes Recht ist*'. 'I would not have wanted to bind myself to apply a law that the victors imposed on the vanquished and which, at least due to its one-sidedness, is bad law.' Huber's difficulties with these treaty régimes also became manifest in his dissenting opinion (together with D. Anzilotti) in the Case of the SS Wimbledon [1923] PCIJ Reps, Series A, no. 1, at 35 ff.

<sup>20</sup> See *infra* III 2.

<sup>21</sup> See *infra* III 1.

<sup>22</sup> Cf. Huber, *Denkwürdigkeiten*, *supra* note 4, at 215 ff.

<sup>23</sup> *Ibid.*, at 222. Huber's major sources of inspiration were K. Strupp's treaty collection, *Die wichtigsten Arten der völkerrechtlichen Schiedsgerichtsverträge* (1917) and H. Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfang – Handbuch des Völkerrechts III. Abteilung* (1914), i.

Huber (together with his German counterpart Friedrich Gaus<sup>24</sup>) and signed by both negotiators on 3 December of the same year<sup>25</sup> became one of the most successful and influential codifications in the history of international law. It served as a blueprint for dozens of similar agreements worldwide,<sup>26</sup> thus triggering the emergence of a whole network of bilateral obligations to settle inter-state disputes by judicial means only. In other respects, too, the treaty bears Huber's very personal 'sociological' signature:<sup>27</sup> for Max Huber, arbitration by mutual consent on a bilateral level mirrored the realities of political life much better than did more idealistic concepts such as the vision of a compulsory jurisdiction at the universal level. It may well be that the only deterrent for the non-performance of obligations arising from an arbitration agreement was (and largely still is!) disapproval on the part of world opinion. However, Huber would probably have held that under a sociological perspective such a comparably modest 'sanction' constituted but a correct portrayal of international realities dominated by sovereign states. And he would likely have added that stigmatization by world opinion does exercise more pressure on disobedient states than do merely fictitious and unrealistic visions of an omnipotent executive power of a supranational character. Fourteen years later, such an assessment was to be proven correct, albeit in a rather tragic context.

It was in 1935 that Max Huber was called by his government to sit on the bench of an arbitral tribunal<sup>28</sup> constituted under the terms of the 1921 treaty in a case concerning the abduction of a fugitive from Swiss soil (Basel) to Germany. Although Germany did everything to obfuscate the attendant circumstances of the kidnapping on 9 March 1935 of Bertold Jacob Salomon (an ex-German political émigré) and his forced transfer to Germany by a private individual of German nationality (Hans Wesemann),<sup>29</sup> the Swiss Government had very good reasons to believe that 'the abductors acted with the

<sup>24</sup> Legal Adviser to the German Ministry of Foreign Affairs.

<sup>25</sup> LNTS XII (1922), at 272. The treaty entered into force on 26 May 1922 (*ibid.*, at 272 note 1).

<sup>26</sup> For details and further references see D. Schindler, *Die Schiedsgerichtsbarkeit seit 1914. Entwicklung und heutiger Stand – Handbuch des Völkerrechts V. Abteilung* (1938), iii, 14 and D. Schindler (ed.), *Les Traités de Conciliation et d'Arbitrage conclus par la Suisse de 1921–1925* (1926); cf. further D. Niquille, *Les traités de conciliation et d'arbitrage conclus par la Suisse entre les deux guerres mondiales* (1944). For a complete listing of relevant European treaty law see 'Schieds- und Vergleichsverträge europäischer Mächte 1920–1934', *Friedenswarte* 1935, 145ff.

<sup>27</sup> On Huber's sociological approach to international law see O. Diggelmann, *Anfänge der Völkerrechtssoziologie* (2000), at 61 ff and Klabbers, *supra* note 2, at 197 ff.

<sup>28</sup> Letter of the Swiss Minister of Foreign Affairs, Motta, of 10 Apr. 1935. The other four designated members included Freiherr von Freytagh-Loringhoven (for Germany), M. Hansson, Y. Juhasz, and R. Erich (as Umpire).

<sup>29</sup> For further details see Preuss, 'Kidnapping of Fugitives from Justice on Foreign Territory', 29 *AJIL* (1935) 503 and for an in-depth research into the whole incident see J.N. Willi, *Der Fall Jacob-Wesemann (1935/1936). Ein Beitrag zur Geschichte der Schweiz in der Zwischenkriegszeit* (1972). See also W. Rings, *Schweiz im Krieg (Switzerland at War) 1933–1945* (8th edn, 1990), at 32–46; D. Bourgeois, *Le troisième Reich et la Suisse 1933–1941* (1974), at 53 ff and R. Ruffieux, *La Suisse de l'entre-deux-guerres* (1974), at 277 ff. By mere chance, detailed case files escaped 'routine' destruction in the early 1960s and are open for consultation in the Staatsarchiv des Kantons Basel-Stadt (Signature: Politisches EE 15.2. – Entführungsfall Berthold Jacob Salomon 1935).

connivance of official German agencies'. In view of the 'grave violation of Swiss sovereignty' attributable to Germany, Switzerland did not confine itself to a mere 'routine' intervention at the diplomatic level. Rather, it chose, in a sharply worded protest, to formulate a 'hard' state responsibility case, including the request for a whole range of remedies under this legal regime: immediate return of Jacob (*restitutum in integrum*), punishment of the guilty functionaries ('satisfaction') and the taking of steps necessary to prevent the recurrence of like incidents ('guarantees of non-repetition').<sup>30</sup> After a further exchange of notes and other diplomatic contacts in which Switzerland did not move an inch away from its legal position, and vigorously requested arbitration,<sup>31</sup> Germany finally agreed on 26 July 1935 to let the dispute – both regarding the facts and the legal consequences arising therefrom – be settled in accordance with the mechanisms provided for in the 1921 agreement. One may wonder what is more startling, the extraordinarily<sup>32</sup> tough Swiss course of action<sup>33</sup> or Nazi-Germany's consent to a peaceful settlement of the dispute by judicial means. In any case, and leaving aside the details, what becomes clear from this incident is that in spring 1935 Germany was not yet immune to world opinion – and the international press' vivid reaction<sup>34</sup> turned out to be Switzerland's major ally in its legal and political conflict with its big neighbour. The Third Reich had indeed good reasons to abstain from another provocation of the international community, given that just a week before the incident at the Swiss-German border it had quarried out another piece from the Versailles treaty by reintroducing compulsory military service in Germany and by augmenting the number of German army divisions to 36. These blatant violations of the Versailles system, together with concern for the forthcoming Olympic Games in Germany, may explain the somewhat unexpectedly conciliatory attitude on the part of the German authorities. Further, possibly due to at least fragmentary information

<sup>30</sup> Text of the Note of the Federal Council to the German Foreign Office of 1 Apr. 1935 in *Journal de Genève*, 3 Apr. 1935. A. Lasserre, *Frontières et camps. Le refuge en Suisse de 1933 à 1945* (1995) rightly speaks of 'le conflit le plus grave' in the mutual relations between the two states.

<sup>31</sup> Possibly with the advice of Max Huber, the Swiss Government soon abandoned the option of bringing the incident before the PCIJ and instead opted for the arbitral avenue.

<sup>32</sup> Switzerland's determined stand was widely applauded in the international press: cf., e.g., *Manchester Guardian*, 1 May 1935: 'Nazi Kidnappers . . . [Switzerland] should have the fullest international support, so that whatever the monster [Nazi-Germany] may do in its own den it will not again push its tentacles into territories than its own'; and *Le Temps*, 3 Apr. 1935: '[I]a Suisse s'est adressée à l'Allemagne en des termes empreints de la plus grande dignité. Son attitude . . . commande la sympathie et le respect . . . On ne peut que s'incliner devant le courage morale dont elle donne l'exemple et dont doivent s'inspirer, aux heures que nous vivons, tous les peuples . . . ui veulent maintenir les règles sans lesquelles il n'est pas de société des états civilisée possible, dont l'abandon marquerait la fin de notre civilisation. L'opinion international sera unanime à approuver cette protestation' (cited from Willi, *supra* note 29, at 421, 416).

<sup>33</sup> It is suggested that the rather courageous 'positive hostility' of the Swiss governing officials *vis-à-vis* the kind of Nazi activity was owed to the fact that this was not an isolated, but just one more, rather serious incident in a whole series of similar cases by which Germany had violated what had come to be regarded as the most sacred national possession – neutrality. Cf. also *The Times*, 30 Apr. 1935: '[i]f the Swiss story is approximately correct a brutal act of violence has been committed against a country which is particularly punctilious about its sovereign rights'.

<sup>34</sup> For an impressive account of the echo which the incident prompted in the press both at home (in Switzerland) and abroad see Willi, *supra* note 29, at 334–425.

by the German Secret State Police (Gestapo) or a lack of communication between the two state agencies, the German Foreign Office initially believed that ‘no evidence has been found that German official authorities participated either directly or indirectly in the events on Swiss territory’<sup>35</sup> and that therefore there existed a good chance of actually winning the case.<sup>36</sup> This expectation came to a sudden end with the presentation on 29 July 1935 of the Swiss Memorial, which contained detailed and obviously incontrovertible evidence of the complicity of German state agents in the kidnapping.<sup>37</sup> Under the new circumstances, and after lengthy and controversial discussions within the various state agencies involved, Germany finally agreed to terminate the arbitral procedure without the rendering of a formal award and to return Jacob to Switzerland. However, the case remained without a happy ending since Jacob Salomon did not survive the war. After his immediate expulsion to France by Switzerland as part of the package deal concluded in order to allow Germany to save face as far as possible, Salomon went on an odyssey throughout Europe and, after having been kidnapped again in Lisbon by German agents, ended up in a Gestapo prison in Berlin (probably awaiting show trial) and died in German custody in early 1944.

What remains with respect to this case is to try to shed some light on Huber’s motives in accepting his appointment as the Swiss member of the arbitral board. Although no longer a judge at The Hague, one has to bear in mind that Huber, as President of the International Committee of the Red Cross, still held a highly important and, in view of the ever longer shadow of crisis in Europe, most sensitive office in the international arena. The ensuing conflict of loyalties is obvious and Huber himself was well aware of it. However, in view of his very deeply felt sense of duty *vis-à-vis* his home country, its institutions and values, Huber did not hesitate to follow the personal request of his foreign minister to place himself in the service of his government. However, probably of equal weight for his affirmative decision was the attractiveness of the legal issues at stake (in particular the scope and limits of territorial sovereignty and fundamental questions of the law of state responsibility). Indeed, this case would

<sup>35</sup> German statement of 13 Apr., issued on 15 Apr. 1935: *New York Times*, 7 May 1935. The German note is described as ‘provokingly truculent’, 37 *The American Jewish Year Book* (5696: 28 Sept. 1935–16 Sept. 1936), at 175, and ‘arrogant’: Willi, *supra* note 29, at 170, which may explain the rather sharp Swiss reaction.

<sup>36</sup> Commentators indeed expected the arbitral award in the *Jacob* case ‘to contribute to the clarification of a difficult and confused branch of international law’, and held that the outcome of the proceedings – at least with regard to the legal consequence arising from the illicit act – was anything but clear: Preuss, *supra* note 29, at 507. It is hardly surprising that C. Schmitt rejected all claims raised by Switzerland on the rather shaky ground of Jacob’s former German citizenship: 40 *Deutsche Juristen-Zeitung* (1935) 490 ff – the commentary culminates in the rather cynical observation: ‘[d]er Gedanke des Völkerrechts ist uns Deutschen zu wertvoll, als daß wir uns an seiner Erniedrigung durch offensichtlichen Mißbrauch mitschuldig machen könnten’ (‘the idea of international law is too precious to we Germans to become complicit in its humiliation by way of open abuse’). For a comprehensive review of the state of the law (with a brief reference also to the *Jacob Salomon Case*) see Bush, ‘How Did We Get Here? Foreign Abduction after Alvarez-Machan’, 45 *Stanford L Rev* (1993) 939.

<sup>37</sup> Prof. Walther Burckhardt acted as counsel for Switzerland and was responsible for this written pleading. However, there are indications that Max Huber was not entirely uninvolved in the drafting (*cf.* Willi, *supra* note 29, at 312, n. 2).



have offered Huber the opportunity to confirm and refine the legal standards developed in his earlier awards in the *Morocco* and *Palmas* cases, thus in a way crowning and accomplishing his contribution in these areas of international law.

The lesson to be learnt from the *Jacob Salomon* case may read as follows: a modern David's slingshot is composed of a somewhat courageous government backed by the pressure of public opinion and the mere existence, on the international plane, of a judicial infrastructure and established rules of substantive law. Shrewdly used and assisted by fortunate circumstances, this weapon may even coerce dictatorial states such as Nazi-Germany to obey international legal standards. In view of the fact that it is more than doubtful that Germany would still have been willing to accept and implement a decision to its detriment a year or so later, it is hardly regrettable that in the case under consideration no award was actually delivered. The mere sword of Damocles of any such judicial decision was obviously sufficient for the German drawback. Apart from prolonging Jacob Salomon's life, what Switzerland achieved with its rigid attitude was to send a clear and unmistakable signal to Berlin that the small Alps Republic would vigorously resist intrusions of any kind on the part of its northern neighbour. Further developments indicate that Germany indeed got the message.

### **B British Claims in the Spanish Zone of Morocco (1923–1925)**

Whilst Huber's contribution to the settlement of the dispute outlined above was rather marginal (although certainly not to be underrated, at least from behind the scenes), the contrary is true regarding a case concerning a total of 51 claims by British subjects or British-protected persons against the Spanish authorities for considerable damage<sup>38</sup> to life or property in the Spanish zone of Morocco suffered in particular<sup>39</sup> during the riots and civil commotion in the wake of the insurrection of a Berber tribe, the Rifkabyls, under the leadership of the charismatic Abdel Krim (1921–1925).<sup>40</sup> Due to the unpredictable workload involved, Huber was again reluctant to accept the joint request by the British and Spanish governments<sup>41</sup> to act as sole arbitrator in this case, with the task of both establishing the relevant facts and determining the legal consequences arising from these findings.<sup>42</sup> Having finally been persuaded by the British ambassador,<sup>43</sup> Huber first travelled to Madrid for a preparatory meeting in March 1924 and then continued his voyage to Morocco for a five-week adventurous and arduous fact-finding mission on the ground. This was probably the only time that Huber had to leave his study in order to resolve a legal problem – and it appears that he

<sup>38</sup> The British claims amounted to a total of approximately 8 million Swiss Francs; even at the time not really an enormous sum.

<sup>39</sup> A number of claims, however, derived from events dating back as far as 1913. Notwithstanding a decade-long exchange of notes, the settlement of the politically and financially rather insignificant issue *via* the ordinary diplomatic channels had proved impossible.

<sup>40</sup> Cf. for details of this flamboyant personality R. Furneaux, *Abdel Krim, Emir of the Rif* (1967).

<sup>41</sup> Put forward by the ambassadors of both countries to Berne on 17 Oct. 1923.

<sup>42</sup> *Denkwürdigkeiten*, *supra* note 4, at 294.

<sup>43</sup> On 24 Oct. 1923 Huber agreed to the arbitration, however subject to the absolute priority of his duties as judge at The Hague.

really enjoyed this extraordinary experience.<sup>44</sup> The juridical output, resulting *inter alia* from this journey, was not less impressive: in six reports, dating from 27 August 1924 to 1 May 1925,<sup>45</sup> Huber dealt with all aspects of the case in a manner which found the unanimous approval of both litigants,<sup>46</sup> thus bringing the case to an unexpectedly speedy end.

To be sure, most of this 'composite award' is no longer of great interest today, at least from a legal perspective. It is mainly concerned, in a rather meticulous manner, with the peculiarities of each and every claim or with certain general, albeit rather technical matters (e.g., the calculation of interests<sup>47</sup>). However, somewhat hidden in report III of 23 October 1924 we find around a dozen pages which certainly belong to the most authoritative and highly influential judicial statements in the field of the law of state responsibility. To the surprise of this author, at the time of its pronouncement, this intellectual treasure attracted very little attention (or none) in the scientific community<sup>48</sup> and it is only recently that the award's legal substance has

<sup>44</sup> Recalling this journey in his memories of those years, Huber used rather untypical, almost euphoric language: '[i]n Marokko . . . war die Aufnahme glänzend, fast wie für ein Staatsoberhaupt . . . In Tetuan und namentlich in dem geheimnisvollen heiligen Scheschauen kam ich erstmals in Berührung mit der mohammedanischen Welt und erhielt tiefe Eindrücke: das schneeweiße Tetuan im grünen Tal, umgeben von hohen, feindselige Kabylen bergenden Gebirgen, mit nächtlichen Straßen wie aus Tausendundeiner Nacht; Scheschauen, ein Stück unberührten Orients, märchenhaft verschlossen, nur auf mühsamen Wegen erreichbar unter starkem Militärschutz; Raisulis Burg in Arcila, auf einem Felsen am brandenden Atlantischen Ozean': *Denkwürdigkeiten*, *supra* note 4, at 295: 'In Morocco the reception was splendid, almost one for a head of state . . . in Tetouan and namely in the mysterious holy Chefchaouen I first came in contact with the muslim world and gained deep impressions: the snowy white Tetouan amid the green valley, surrounded by high, hostile Kabyle-containing Mountains with nightly roads reminiscent of 1001 Nights; Chefchaouen, a piece of untouched Orient, fairy tale like secluded, only reachable via arduous paths under strong military protection; Raisuli's castle in Arcila, on a rock on the roaring Atlantic Ocean.'

<sup>45</sup> First Report on the contestations relating to the classification of certain claims (27 Aug. 1924, RIAA II, at 627–630); Second Report on the conception of arbitrability by the terms of cl. 2 of the agreement of 29 May 1923 (27 Aug. 1924, RIAA II, at 630–639); Third Report on the responsibility of the state under the situations contemplated by the British claims (23 Oct. 1924, RIAA II, at 639–650); Fourth Report on the question of interest (29 Dec. 1924, RIAA, at 650–651); Fifth Report on the individual claims (29 Dec. 1924, RIAA II, at 651–732); Sixth Report on the indemnities provided for cl. 2 of the agreement of 29 May 1923 (1 May 1925, RIAA II, at 732–735).

<sup>46</sup> Both states expressed their gratitude and Huber was even offered the (Spanish) Order of Isabella. However, due to his office as judge at the PCIJ he was barred from accepting this decoration.

<sup>47</sup> However, even these primarily technical deliberations contain certain remarks of general interest. Cf., e.g., ILC Commentary on Art. 38 of the 2001 draft Arts on State Responsibility, where the view that general international law knows of no compound interests is supported by a lengthy citation from our award (RIAA II, at 650): 'the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other . . . is unanimous . . . in disallowing compound interest. These circumstances, very strong and quite specific arguments would be called for to grant such interest'. (Cf. J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 238).

<sup>48</sup> The author could not trace a single comment, article or any other mention of some weight in the scientific literature before 1945. Still referring to the unpublished manuscript, we find some references to the award in P. Guggenheim, *Lehrbuch des Völkerrechts* (1951), ii, at 572 ff.

been rediscovered by small circles of specialists accompanying the respective work of the International Law Commission.<sup>49</sup> The award's wholly unjustified disregard is possibly explicable by the fact that it was only in 1939<sup>50</sup> – viz at the eve of World War II (and thus at a very untimely moment to attract attention) – that Huber's award became known to a wider public. It then took another 15 years for the award to be properly published for the first time.<sup>51</sup> While the use of the French language certainly did not play a major role in its non-consideration,<sup>52</sup> its 'unhandy' format (a series of 'reports' instead of a classical 'one-document' award) may have been a factor in the lack of attention it received.

The award provides a typical example of Huber's masterful ability to pinpoint the legal issues at stake, to place them into a general legal and sociological setting and finally to concisely apply the results of his reasoning to the concrete facts of a given case. The legal positions occupied by the litigants at the outset of the case could hardly have been more contrarian: whereas Spain held that damages suffered by foreigners are strictly a matter of domestic law and jurisdiction (*'est toujours une affaire intérieure, échappant à toute juridiction internationale'*<sup>53</sup>), the British were of the opinion that misconduct by a state triggers its international responsibility, thus paving the way not only for the application of international legal standards but also opening up a whole range of international dispute settlement mechanisms.<sup>54</sup> Unfortunately, it is outside the scope of this article to go into the details of the typically *Huberian* line of reasoning.<sup>55</sup> However, given his sociological approach to international law and the paramount importance he attributes to the legal entity 'state' in international life,<sup>56</sup> it is hardly surprising that in order to resolve this apparently irreconcilable conflict of views, Huber does not resort to a simplistic 'either-or' solution. What he instead does is to identify and analyse the underlying conflict of interests and to deduce from this analysis a solution which at the very outset

<sup>49</sup> See as an example Gattini, 'La notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale', 3 *EJIL* (1992) 253.

<sup>50</sup> Cf. A.M. Stuyt, *Survey of International Arbitrations 1794–1938* (1939), at 370. Stuyt on his part makes no mention at all of certain excerpts of the award, scattered and thus somewhat hidden in Annual Digest of Public International Law Cases 2 (1923–1924) published as early as 1933. The original text, signed by Max Huber and A. Hammarsköld (who acted as Secretary for the ad hoc tribunal) and dated 'La Haye, mai 1925', consisted of 210 pages and was obviously not easily accessible.

<sup>51</sup> RIAA II, at 627 ff.

<sup>52</sup> The '*compromis*' is drafted only in English and Spanish.

<sup>53</sup> RIAA II, at 639.

<sup>54</sup> *Ibid.*

<sup>55</sup> Unfortunately, no reference can be made to an in-depth study, since – at least to the knowledge of the author – there simply are none. See at least Steiner, 'Spanish Zone of Morocco Claims', 4 *Encyclopedia of Public Int'l L* (2000) at 572 ff (however, with no further references, see *ibid.*, at 574). The 'Bibliography Concerning the Arbitral Awards' given in the first three volumes of the RIAA (RIAA III (1949), at 2021 ff) does not list any pertinent Commentaries, nor do the more recent (2004) compilations on the PICT website, available at [www.pict-pecti.org/publications/bibliographies.html](http://www.pict-pecti.org/publications/bibliographies.html).

<sup>56</sup> Cf. M. Huber, *Die soziologischen Grundlagen des Völkerrechts* (1910).

recognizes the legitimate interests of the states involved before carefully weighing them against each other:

*Il est acquis que tout droit a pour but d'assurer la coexistence d'intérêts dignes de protection légale. Cela est sans doute vrai aussi en ce qui concerne le droit international [who could object?]. Les intérêts contradictoires en présence pour ce qui est du problème de l'indemnisation des étrangers sont, d'une part, l'intérêt de l'État d'exercer sa puissance publique dans son propre territoire sans ingérence et contrôle acun des États étrangers, et, d'autre part, l'intérêt de l'État de voir respecter et protéger effectivement les droits de ses ressortissants établis en pays étranger [once more: who could object?]. La divergence des thèses soutenues en cette matière provient, semble-t-il, soit d'une accentuation trop exclusive d'un de ces deux intérêts, soit de l'emploi de formules trop générales et propres à provoquer la contradiction [and again: who could seriously object?].<sup>57</sup>*

Indeed, for anybody acting in good faith, it is hardly possible to escape consenting to these basic considerations. Coming somewhat closer to the law of state responsibility, Huber then goes on to develop (or at least formulate) certain principles, the accuracy of which can hardly be denied either and which therefore still belong to the very core of this branch of international law, and deservedly so:

*La responsabilité est le corollaire nécessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale.<sup>58</sup>*

These are probably the kind of statements that Antoine de Saint-Exupéry had in mind while formulating: *'Il semble que la perfection soit atteinte non quand il n'y a plus rien à ajouter, mais quand il n'y a plus rien à retrancher.'*<sup>59</sup> A glimpse at the 2001 ILC draft confirms that its Article 1 is actually nothing but a paraphrasing of this formula: 'Every international wrongful act of a State entails the international responsibility of that State.'<sup>60</sup>

Now, approaching the problem of how to balance the legal interests of states in a like situation, Huber once again does not simply cut the Gordian knot but instead chooses to carefully untie it:

*D'une manière générale, une personne établie dans un État étranger est, pour la protection de sa personne et de ses biens, placée sous la législation territoriale et cela dans les mêmes conditions que les ressortissants du pays.<sup>61</sup>*

<sup>57</sup> RIAA II, at 640: '[Unanimity prevails that] every law aims at assuring the coexistence of interests deserving of legal protection. This is undoubtedly true also of international law. The conflicting interests in connection with the question of indemnification of aliens are, on the one hand, the interest of the State in the exercise of authority in its own territory without interference or control by foreign States, and, on the other hand, the interest of the foreign State in seeing the rights of its nationals in a foreign country respected and effectively protected.'

<sup>58</sup> 'Responsibility is the necessary corollary of rights. All international rights entail international responsibility.'

<sup>59</sup> *Terre des Hommes* (chap. III: *L'Avion* (1939), at 60: '[p]erfection is achieved, not when there is nothing more to add, but when there is nothing left to take away': (*Wind, Sand and Stars* (1939)).

<sup>60</sup> Cf. also ILC Commentary on Art. 1, n. 45. This wording goes back to an earlier draft by R. Ago, who 'may have been influenced by Judge Max Huber' as Rosenstock and Kaplan, 'The Fifty-Third Session of the International Law Commission', 96 *AJIL* (2002) at 412 (n. 3) rightly remark (reference is made to RIAA II, at 641).

<sup>61</sup> 'Generally speaking, a person resident in a foreign State is, in regard to the protection of his person and his property, bound by the territorial legislation on the same footing with the nationals of the country.'

No doubt, for Huber the state as a form of social organization is characterized primarily by its territorial fixation and the basis and nature of its exclusive authority is therefore territorial, not personal:

Le caractère territorial de la souveraineté est un trait si essentiel du droit public moderne, que l'intervention étrangère dans les rapports entre l'État territoriale et les individus soumis à sa souveraineté ne peut être admise qu'à titre exceptionnel.<sup>62</sup>

However, a somewhat narrow and traditionalist 'territory-owner ethos'<sup>63</sup> is but the starting point for Huber's reflections. Anything but a dogmatist, Huber is, above all, guided by a strong sense of realism:

D'autre part, il est incontestable qu'à un certain point l'intérêt d'un État de pouvoir protéger ses ressortissants et leurs biens, doit primer le respect de la souveraineté territoriale . . . Ce droit d'intervention a été revendiqué par tous les États: ses limites seules peuvent être discutés. En le niant, on arriverait à des conséquences inadmissible . . .<sup>64</sup>

Huber does not systematically develop and verify the conditions required to establish the existence of a wrongful act (under international law), but rather confines himself to a statement of principle:

L'État dont un ressortissant établi dans un autre État se trouve lésé dans ses droits, est en droit d'intervenir auprès de cet État *si la lésion constitue une violation du droit international*.<sup>65</sup>

It is as simple as that: a state is responsible in international law for conduct in breach of its international obligations – and only then! Huber finally turns to the crucial issue at stake: What are the responsibilities incumbent upon a state or a protecting power

<sup>62</sup> RIAA II, at 641: 'The territorial character of sovereignty is such a fundamental feature of modern public law that foreign intervention in the relations between the territorial State and individuals under its sovereignty can only be admitted by way of exception.' From here it is indeed but a small and consequential intellectual step to Huber's casting vote in the *Lotus Case*, which raised the crucial question whether international law is a prohibitive or a permissive system. Huber vigorously supported the latter view, thus allowing Turkey to exercise criminal jurisdiction over the French officer held responsible for the incident: '[r]estrictions upon the independence of states [i.e., its sovereign right to prosecute anybody present on its territory] cannot therefore be presumed': [1927] PCIJ Rep, Series A, No. 9, at 18. Cf. further: '[L]e principe de l'indépendance des États exclut que leur politique intérieure ou extérieure fasse dans le doute l'objet de l'activité d'une juridiction internationale': RIAA II, at 642, emphasis added.

<sup>63</sup> For a critical assessment of the philosophy underlying traditional international law and its 'delict-property-contract ethos' cf. P. Allott, *New Order for a New World* (1990), at 296, 335.

<sup>64</sup> RIAA II, at 641: 'On the other hand, it is unquestionable that, up to a certain point, the interest of the State in being able to protect its nationals and their property must carry more weight than respect for territorial sovereignty . . . The right of intervention has been claimed by all States: only its limitations can be subject of discussion. Denial of this right would lead to inadmissible consequences . . .' Whether or not it is permissible to exploit this statement in the context of the recent discussion of the permissibility of armed intervention (for humanitarian reasons) (cf., e.g., A. Pellet and V. Tzankov, 'Can a State Victim of a Terror Act Have Recourse to Armed Force?', 2 *Humanitäres Völkerrecht. Informationsschriften* (2004) 72) is disputable. However, admittedly, the formulation is somewhat ambiguous and thus susceptible to uncertainties or even abuse.

<sup>65</sup> RIAA II, at 641: '. . . where the rights of a national in a foreign State are interfered with, that national's State is entitled to intervene [only] *if the injury constitutes a violation of international law*' (emphasis in the original).

respectively, in case of insurrection, rebellion or other forms of civil unrest? It is precisely here that the focal point of Huber's doctrinal input into the law of state responsibility lies. Unfortunately, space constraints do not allow us to closely follow Huber's line of argument:<sup>66</sup> Apart from certain classical formulae (e.g., '*Il paraît incontestable que l'État n'est pas responsable pour le fait d'une émeute, révolte, guerre civile ou guerre internationale, ni pour le fait que ces événements provoquent des dommages sur son territoire*'<sup>67</sup>) and neologisms (e.g., '*responsabilité dérivée*'<sup>68</sup>), Huber makes a considerable contribution to a number of delicate questions, such as the role of fault ('due diligence' – 'force majeure'), the principle of independent responsibility and its exceptions, in particular the responsibility of a dominant state for conduct formally attributable to a dependent state<sup>69</sup> and, finally, the complex issue of wrongfulness resulting from omissions.<sup>70</sup> All this makes Huber's '*Morocco case*' one of the leading precedents in the law of state responsibility. However, this award is not only a masterpiece of legal reasoning but above all it constitutes a zenith point in the art of arbitration: The balanced, elaborate, interest-oriented and explicative *modus operandi* followed by Huber made the award (and in particular its 'basic' report no. III) easily acceptable for both Spain and Great Britain, thus exemplifying the very gist of arbitration proceedings: the reconciliation of the parties involved and the comprehensive and enduring pacification of a long-lasting conflict.

## 4 The *Palmas (Miangas)* Case

### A *Prelude and Postlude*

Exactly 100 years have passed since a certain Major-General Leonard Wood, on 21 January 1906, set foot on a remote island situated at approximately 5°35' N and

<sup>66</sup> The award is not only worth a careful re-reading, but also deserves rediscovery by an in-depth analysis.

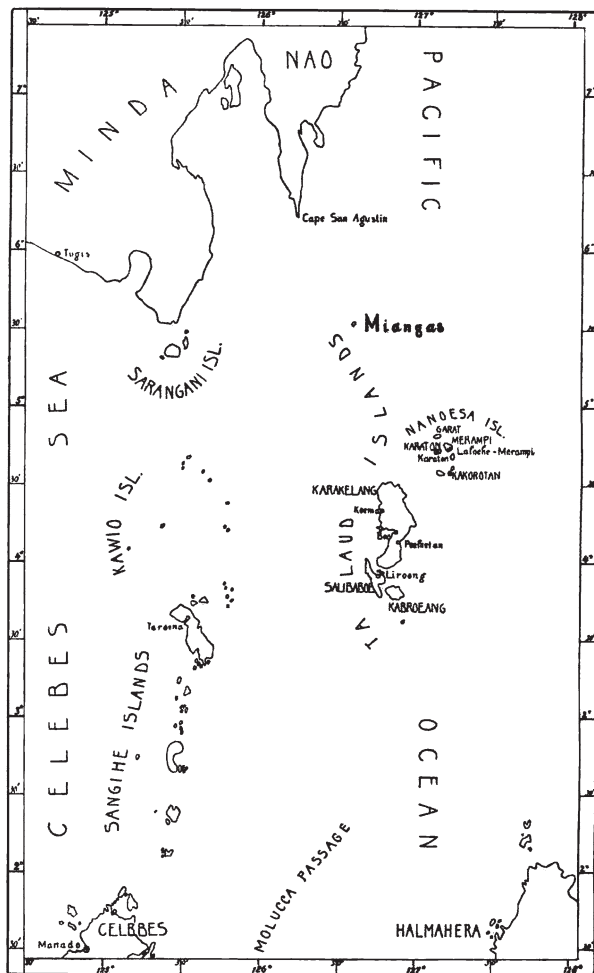
<sup>67</sup> RIAA II, at 642: '[It seems incontestable] that the State is not responsible for the fact there is a rising, revolt, or a civil or international war, nor for the fact that these events involve losses on its territory.' The recent violent clashes between Israel and the Hezbollah on the territory of Lebanon (in July/Aug. 2006) provide a case in point.

<sup>68</sup> RIAA II, at 648: This expression frequently appears in the ILC Commentary to the draft Arts on State Responsibility. Cf. Crawford, *supra* note 47, at 145–159: '[i]t is justified . . . that responsibility under *Cahpater IV* is in a sense derivative' (with express reference to the formulae coined by Huber in the *British Claims Case*, *ibid.*, at 147, n. 285).

<sup>69</sup> For a discussion of Huber's corresponding remarks see ILC Commentary Art. 17 para. 3.

<sup>70</sup> Cf., e.g., '[s]i l'État n'est pas responsable des événements révolutionnaires eux-mêmes, il peut être néanmoins responsable de ce que les autorités font ou ne font pas, pour parer dans la mesure possible, aux suites. La responsabilité pour l'action ou l'inaction de la puissance publique est tout autre chose que la responsabilité pour des actes imputables à des personnes échappant à l'influence des autorités ou leur étant ouvertement hostiles': RIAA II, at 642.

<sup>71</sup> These are the coordinates given in the preamble to the Special Agreement of 23 Jan. 1925. H.J. Lam, *Miangas (Palmas)* (1932) gives slightly different coordinates (at 15 with further references in n. 3). Minor differences with modern coordinates, such as those used for the Indonesian Archipelagic Baseline System (cf. US Under Secretary of Defense for Policy (ed.), *Maritime Claims Reference Manual* (DoD 2005.1-M, June 2005), AT 280 ff, 288 ff), are in particular due to certain changes in the reference system used in and for the region at stake (see, e.g., for the Philippines Mugnier, 'The Republic of the Philippines', *Grids & Datum* (1999), at 853 ff).

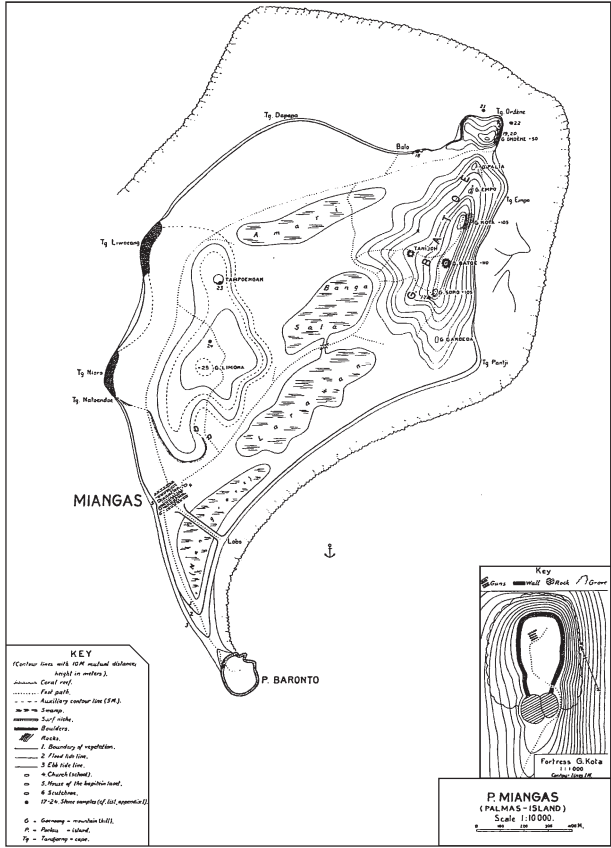


PI. I Miangas and surrounding islands.

126°36' E,<sup>71</sup> that is around 48 nautical miles off the south-eastern tip of the Island of Mindanao (Cape San Augustine) and just a couple of miles more from the most northerly point of the then Dutch Talud Islands (Netherlands East Indies).<sup>72</sup> Newly appointed US Governor of the Moro Province (Mindanao), Wood was on an inspection mission to the outer limits of the territory that Spain had ceded to the United States by way of Article III of the Treaty of Paris of 10 December 1898.<sup>73</sup> It must have come somewhat as a shock to General Woods that the small boat which came out to bring him to shore

<sup>72</sup> Cf. maps reproduced here from Lam, *supra* note 22 (PI. I: Miangas and surrounding islands, *ibid.*, at 7; PI. II: Map of the island of Miangas, *ibid.*, at 15).

<sup>73</sup> Parry, *supra* note 13, vol. 187, at 100.



PI. II Map of the Island of Miangas. Scale about 1: 16.667.

was flying the Dutch flag. It is quite possible that the Governor had a quick second look at his map, but he didn't err: This was the 'Isla de las Palmas' (the Island of Palmas) or 'Miangas Island'. Most commentators associate this latter denomination with 'exposed to pirates' in the Talaud language,<sup>74</sup> whereas others suggest that the word derives from the Malaysian word 'nangis', that is 'to weep'. In view of the most deplorable consequences of pirate attacks, this etymological dispute makes obviously no great difference in substance!<sup>75</sup> To exclude all possibility of doubt, Wood may even have proceeded to

<sup>74</sup> Probably the most renowned expert in the field at the time, Adriani (1865–1926), remarked, 'Miangas speaks the Talaud language and the Philippine languages spoken north of this island are neither used nor understood on the latter, although they are fairly closely related to the Talaud language': see N. Adriani, *De Indische Gids* (1916), i, at 221.

<sup>75</sup> Cf. Lam, *supra* note 71, at 39.



a meticulous rereading of the Paris Treaty,<sup>76</sup> accompanied by a careful consultation of the nautical instruments on board – but the result would have been no different: he was at the scheduled spot. In his report to the military secretary US Army he recorded:

As far as I could ascertain, the Dutch flag has been there for the past fifteen years, one man said he thought it had always been there – The people trade with the Philippine Islands and appear to have little communication with the Celebes, except through the annual visit of a Dutch ship.<sup>77</sup>

What followed was a rather bustling activism on both sides: the presence of both Dutch and American representatives on the island underwent a sudden and hitherto unknown intensification, as did the almost two-decade long diplomatic correspondence concerning the island.<sup>78</sup> American or Dutch – this was the rather simple question? Unable to reach an amicable arrangement, the governments finally entrusted Max Huber with the task of authoritatively solving the issue of sovereignty over the island. Pointing to the groundbreaking and long-lasting success of Huber's award is probably like carrying coals to Newcastle.<sup>79</sup> However, it is far less well known that soon after the delivery of the award in April 1928, Pulau Miangas itself, as the island is now commonly called, fell into oblivion again, as did its inhabitants. Still today,

<sup>76</sup> The relevant passage from Art. III reads as follows: 'Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following lines: A line running from west to east along or near the twentieth parallel of north latitude, . . . thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4°45') north latitude, thence along the parallel of four degrees and forty five minutes (4°45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119°35') east of Greenwich'. Since Palmas (Miangas) is clearly situated to the north of the latter line, this passage is wholly unambiguous: see Parry, *supra* note 13, vol. 187, at 101.

<sup>77</sup> Report from Zamboanga, 26 Jan. 1906, Netherlands Counter Memorial, at 83 (cited from: W.J.B. Versfelt, *The Miangas Arbitration* (1933), at 4).

<sup>78</sup> For references see: Instituut voor Nederlandse Geschiedenis (ed.), *Documenten betreffende de buitenlandse politiek van Nederland 1919–1945* (Period A 1919–1930, vols i–vi = 7/1919–8/1925) (1976–1992)). For the period up to 1919 see: Instituut voor Nederlandse Geschiedenis, *Bescheiden betreffende de buitenlandse politiek van Nederland 1848–1919* (third period 1899–1919), (1957–1974), 8 vols.

<sup>79</sup> It is hardly exaggerated to observe that the Palmas Award (available at <http://pca-cpa.org/english/rpc/#eritrea>), almost right away, became the most influential precedent regarding the rules governing the attribution of territory. Still today (at least) one quotation from the award seems to constitute an integral and indispensable prerequisite to both pleadings before and decisions of international courts and tribunals: In the recent past, reference to Huber's award has been made, *inter alia*, in the first stage of the Eritrea–Yemen Arbitration (Award of 9 Oct. 1998, paras 104, 454 ff); ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 Sept. 1992, Sep. Op. Torres Bernárdez, at para. 97; in ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 Oct. 2002, at para. 205, *ibid.*, Sep. Op. Al Khasawneh, at paras 5 ff and Mbaye, at paras 86, 92; in ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 Dec. 1999, Sep. Op. Kooijmans, at para. 14; and

the island's main features are its isolation<sup>80</sup> and . . . hundreds and thousands of palm trees.<sup>81</sup>

## B The Award

Probably the most memorable event in the recent history of this island took place in a study in the Peace Palace at the Hague between 1925 and 1928 – the years during which the decision about the political destiny of Palmas was in Max Huber's hands.<sup>82</sup> Unlike his rather complex task in the *Morocco* case, this time his mandate was very clear:

The sole duty of the arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.<sup>83</sup>

As Huber much later confessed, his work on this question constituted one of the happiest and most satisfying moments in his professional life: 'I am not aware of many similar instances in my life.'<sup>84</sup> The award itself is, once again, a paragon of clarity and precision. This holds true, first, for its overall structure:<sup>85</sup> the 1925 Special Agreement is reproduced and a summary of the proceedings (I) is followed by certain general

in ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 Mar. 2001, at para. 100.

<sup>80</sup> Cf., e.g., the article by Harsono, 'Miangas, Nationalism and Isolation', *Tempo Magazine*, 6 Dec. 2004. It is barely a year since the island's connection to the Indonesian telephone network was announced. Cf. 'Telkom to install lines in Miangas Island', available at [www.JakartaPost.com](http://www.JakartaPost.com) (17 Oct. 2005). Whether or not this announcement has really been implemented awaits confirmation. (Until the very recent past, communication with the island was available only using very small aperture terminal (VSAT) satellite technology.) Transportation facilities to the island are equally scarce. The population of the hardly more than 3 square mile island has not significantly risen during the last 100 or so years, being more or less stable at approximately 150 families (678 individuals in 2003). It is finally significant that the Britannica Atlas (*Encyclopedia Britannica* (1984 edn)) cuts the sheets in such a way as to omit 'Miangas' both from the Indonesian map (at 112–113) and from the map of the Philippines (at 116–117). The island thus simply does not exist for the cartographers.

<sup>81</sup> Reporting from a 1926 visit to island, H.J. Lam notices: '[a]lmost the whole island is covered with coconut groves': *supra* note 71, at 26.

<sup>82</sup> Max Huber's contribution to the history of Miangas still holds a prominent place even in popular media, such as the *Wikipedia Encyclopedia* in the Dari language (in a short article entitled 'Miangas'): 'Belanda menguasai pulau ini sejak tahun 1677. Filipina sejak 1891 memasukkan Miangas ke dalam wilayahnya. Miangas dikenal dengan nama La Palmas dalam peta Filipina. Indonesia kemudian bereaksi dengan mengajukan masalah Miangas ke Mahkamah Arbitrase Internasional. Mahkamah Arbitrase Internasional dengan hakim Max Huber pada tanggal 4 April 1928 kemudian memutuskan Miangas menjadi milik sah Indonesia. Filipina kemudian menerima keputusan tersebut.'

<sup>83</sup> Art. I of the Special Agreement between the USA and the Netherlands of 23 Jan. 1925: RIAA II, 832.

<sup>84</sup> The following is an excerpt from a series of interviews given by Huber to his biographer F. Wartenweiler in 1947: '[w]enn die Tätigkeit in Haag immer aus solchen Arbeiten bestanden hätte! Hier kamen schöpferische Fähigkeiten zur Entfaltung! Hier konnte ich Recht neu schaffen helfen! Bei dieser Arbeit war ich so beglückt, daß ich über mich selbst hinauswuchs. Trotzdem es mir freistand, für das ausführliche Urteil meine Muttersprache zu verwenden, schrieb ich es selbst in englisch. Zu meinem Erstaunen fand sogar der vereidigte Englisch-Dolmetscher im Gericht sozusagen nichts auszusetzen an der Sprache. . . . Die Freude gab mir Schwung und Kraft, die ich gewöhnlich nicht besitze. Ähnliche Beispiele aus meinem Leben kenne ich nicht viele': Wartenweiler, *supra* note 4, at 203.

<sup>85</sup> Cf. RIAA II, at 829 ff.

observations (II), a comprehensive discussion of both the US (III) and Dutch (IV) legal and factual argument, the whole being concluded by Huber's thorough evaluation of the material laid before him, culminating in the final dictum: 'The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.'<sup>86</sup> Yet, the enormous success of the award may be attributed to its certain clear and precise normative statements and their somewhat laconic or even aphoristic linguistic wrapping.<sup>87</sup>

Rereading the award is an intellectual pleasure for those with a particular interest in the rules of international law governing the acquisition of territorial sovereignty – core elements of the doctrine relating to this special field of interest can be found there in a nutshell.<sup>88</sup> However, in addition to this, and in 'typically Huberian' manner, as one is tempted to say, the Swiss arbitrator most willingly grasps the opportunity to underpin his technical considerations and conclusions with certain far-reaching doctrinal statements of a general character, thus making the *Palmas* Award of relevance to almost everybody working in the field of international law.

Unlike the earlier *Morocco* award (the numerous) considerations going beyond the dispute at stake are not limited to the 'general observations' (II.), but are rather scattered throughout the award. Probably the most fundamental lines are thus to be found somewhat hidden at its very end: 'International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection.'<sup>89</sup> Once again irresistibly clear and brief, this is nothing but the essence of Huber's sociological approach to international law.<sup>90</sup> However, Huber does not pause at a mere theoretical exposition, but actually makes his intellectual credo the (implicit) starting point for the whole construct of ideas put forward in the award: if the United States' legal representatives had carefully studied Huber's academic writings<sup>91</sup> (which they most likely did not do, if only for the fact that no English translation existed at the time – and still does not exist today), they would probably have recognized at an early stage of the proceedings that their chances of winning this case were extremely slight. Indeed, what legitimate interest does and can a state put forward with respect to a territory in which it had never really shown any interest, let alone displayed any substantive authority over the land and its people? Is a title based on mere discovery some 500 years ago followed by no subsequent act whatsoever<sup>92</sup> really worthy

<sup>86</sup> Cf. *ibid.*, at 871. Moreover, questions of form and substance are separately dealt with in each case.

<sup>87</sup> With a view to the conciseness of certain statements, there might even be some truth in an analogy to the 'Law of the Twelve Tables' (cf. Vogelsanger, *supra* note 4, 151), even though for the rest such a comparison is greatly exaggerated.

<sup>88</sup> It may be recalled that, e.g., R. Jenning in his brilliant and most influential paper on the subject in *The Acquisition of Territory in International Law* (1963) not only makes extensive references to the award, but even reproduces it (at almost full length, omitting only the formal part I) as its sole appendix (at 88 ff).

<sup>89</sup> *Island of Palmas Case (Netherlands/USA)*, RIAA II, 870.

<sup>90</sup> Cf. Klabbers, *supra* note 2, at 210 ff.

<sup>91</sup> In particular see M. Huber, *Die soziologischen Grundlagen des Völkerrechts* ('*The Sociological Foundations of International Law*') (1910).

<sup>92</sup> '[T]he documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas. Neither is there any official document mentioning the Island of Palmas as belonging to an administrative or judicial district of the former Spanish Government of the Philippines': RIAA II, at 851.

of legal protection? To ask these questions is to deny them, at least if one maintains (as Huber vigorously does) that law ought to be orientated towards the fulfilment of certain social and political functions:

If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be orientated to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which – supposing it to be recognized in international law – has not yet received any concrete form of development.<sup>93</sup>

The conflict of views underlying the Palmas dispute is indeed a rather classical one: the US as legal successor to Spain with respect to title to the Philippines, bases its claim to sovereignty primarily<sup>94</sup> on discovery of the island by the latter power. The Netherlands for their part held that at the time of cession in 1898 title was theirs due to an effective occupation of the island.<sup>95</sup> It goes far beyond the scope of the present article to provide another in-depth analysis of the entire award.<sup>96</sup> The following remarks will attempt to exemplify certain general features of this landmark decision of international arbitration.

A number of Huber's propositions, advanced with dogmatic certainty, have grown into the corpus of international law: Discarding any relevance of Article III of the 1898 treaty of cession (delimitation of the Philippines),<sup>97</sup> Huber held: 'It is evident that Spain could not transfer more rights than she herself possessed' and '[i]t is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third powers'. Elsewhere, and in an entirely different context, we read: 'The title of contiguity, understood as a basis of territorial

<sup>93</sup> *Ibid.*, at 870.

<sup>94</sup> Other titles invoked by the US included: Recognition by treaty (on the part of the Netherlands) and the principle of contiguity. Jessup, 'The Palmas Island Arbitration', 22 *AJIL* (1928) 735, at 742, however, holds that Huber's supposition that the US based its claim on the latter title was merely a misapprehension of the American argument.

<sup>95</sup> Henley, 'Conflict, Justice and the Stranger-King: Indigenous Roots of Colonial Rule in Indonesia and Elsewhere', 38 *Modern Asian Studies* (2004) 85, at 88 ff, provides most interesting and somewhat surprising insights into the peculiarities of the origin and sources of Dutch colonial power in the region.

<sup>96</sup> *Cf.*, *inter alia*, Jessup, *supra* note 94, at 735; F.K. Nielsen, *The Island of Palmas Arbitration* (1928); de Visscher, 'L'arbitrage de l'île de Palmas (Miangas)', 56 *Revue de droit international et de législation comparée* (1929) 735; W. Fuglsang, *Der amerikanisch-holländische Streit um die Insel Palmas vor dem Ständigen Schiedshof im Haag* (1931); W.J.B. Versfelt, *The Miangas Arbitration* (1933); Homan, 'The American-Netherlands Dispute over the Island of Miangas/Palmas', 98 *Tijdschrift voor Geschiedenis* (1985) 25; see also Doerner, 'Palmas-Fall', in H.-J. Schlochauer (ed.), *Wörterbuch des Völkerrechts* (1961), ii, 724; Lagoni, 'Palmas Island Arbitration', 3 *Encyclopedia of Int'l L* (1997) 876.

<sup>97</sup> However, the treaty, having been duly notified to the Netherlands as early as 3 Feb. 1899, Huber's supposition that 'sovereignty [of a third state] could [not] be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him' was hardly substantiated (RIAA II, at 843).

sovereignty, has no foundation in international law.’ (Full stop!) The same determination exists regarding certain issues of procedures, such as the evidence from maps:

indications of such a nature [e.g., the political distribution of territories] are only of value when there is reason to think that the cartographer has not merely referred to already existing maps . . . but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued. . . . The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy.<sup>98</sup>

Still today, counsels before international courts and tribunals are well advised to carefully observe these rules.<sup>99</sup>

Further, triggering a sophisticated, not always fruitful, doctrine building, it was Max Huber who introduced the concept of the so-called ‘critical date’<sup>100</sup> – today belonging to the standard repertory of our discipline’s terminology. Moreover, he coined hitherto classical formulations such as the ‘continuous and peaceful display of territorial sovereignty’<sup>101</sup> as an indispensable prerequisite for a valid title arising from occupation.<sup>102</sup>

Finally, certain lines of thought, in particular on sovereignty in its relation to territory and the question of inter-temporal law, proved so elementary that it is difficult to imagine our discipline without them. Since there is no adequate way to paraphrase Huber’s words, let him talk for himself:

Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state . . . Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. . . .

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and

<sup>98</sup> RIAA II, at 852 ff.

<sup>99</sup> The existence of a distinct category of ‘official maps’ (Ress, ‘The Demarcation of Frontiers in International Treaties and Maps’, 14 *Thesaurus Acroasium* (1983) 398: ‘those issued or approved by government authorities’) is as undisputed today (see, e.g., the Award of 18 Apr. 1977 in the *Beagle Case*, 52 *International L Rep* (1979) 93, at 203 ff and for further references D.-E. Khan, *Die Vertragskarte* (1996), at 38 n. 190), as are other standards concerning the evidentiary value of maps developed by Huber.

<sup>100</sup> RIAA II, at 843: In fact, Huber himself used the term ‘critical moment’ for a rather simple, if not obvious, idea, namely that a certain point in time seems to be ‘critical’ in the sense that the decision one way or the other would largely turn upon what was found to be the legal position at that very moment. For Huber, quite naturally, the ‘critical moment’ was the year 1898 in which Spain ceded the Philippines to the US, since it was decisive for the US claim whether or not Spain enjoyed sovereignty at the moment of cession: ‘Spain could not transfer more rights than she herself possessed’: *ibid.*, at 842.

<sup>101</sup> RIAA II, at 839.

<sup>102</sup> Referred to as the standard formula, e.g., by M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (2nd edn, 2005), at 284.

in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. . . . International law . . . cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.<sup>103</sup>

It goes without saying that these general observations made at the very outset of the award already sounded the death knell for the American argumentation based on the mere discovery of the island by the Spanish in the early 16th century ‘without concrete manifestations’. But again, ‘typically Huberian’, the Swiss arbitrator, in very few words, offers much more, namely deep insights into international society’s normative and structural framework called international law. For example, what Huber makes unmistakably clear is that the transfer of sovereignty has nothing in common with the transfer of property in land since, as Robert Jennings, referring to the *Palmas Award*, put it:

A territorial change means not just a transference of a portion of the earth’s surface and its resources from one regime to another; it usually involves, perhaps more importantly, a decisive change in the nationality, allegiance and way of life of a population.<sup>104</sup>

This is indeed precisely the gist of Huber’s argument – obviously with far-reaching consequences. It is certainly true, Huber’s world is not the same world as ours and his fixation on inter-state relations seems somewhat outdated today, as does the preponderance of elements such as ‘exclusive sovereignty’ and ‘territoriality’.<sup>105</sup> However, the essence of his argument is as valid today as it was almost 80 years ago. Most of his conclusions<sup>106</sup> therefore still rightly meet with the almost unanimous support of the scientific community, making critics in a way the odd ones out: ‘that learned judge spoke with dogmatic certainty leaving nothing to possible interpretations?’<sup>107</sup>

<sup>103</sup> RIAA II, at 838 ff.

<sup>104</sup> R. Jennings, *The Acquisition of Territory in International Law* (1963), at 2 ff.

<sup>105</sup> However, for the sake of justice, it should be recalled that Huber was already well aware of certain ‘erosive’ tendencies regarding both the law and organization of the international community, but he rightly maintained that certain ‘special cases . . . do not fall to be considered here and do not, for the matter, throw any doubt upon the principle which has just been enunciated’: RIAA II, at 838. Anyhow, under a realistic perspective, even admitting the emergence of a ‘stateless’ world society (cf. the contributions in G. Teubner (ed.), *Global Law without the State* (1997)), it can hardly be denied that the state still plays a pivotal role on the international scene and the question ‘why do we still need states?’ will for a long time to come remain merely a rhetorical one: P. Saladin, *Wozu noch Staaten?* (1995).

<sup>106</sup> Huber’s treatment of certain side issues, however, met with very harsh criticism. This is particularly true for his analysis of the legal nature and effect of contracts between Colonial Powers and native princes or chiefs, which he deemed invalid under international law (‘not an agreement between equals . . . rather a form of internal organisation of a colonial territory’), albeit ‘not wholly void on situations governed by international law’: see RIAA II, at 858: ‘[t]he problem with Max Huber’s analysis is not its lack of clarity but rather that it is clearly wrong’ (reasons omitted); *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 79, sep. op. Judge Al-Khaswneh, at para. 5.

<sup>107</sup> *Ibid.*

The second pivotal issue raised in the *Palmas* case is the problem of changing conditions related to particular principles of international law during a lapse of time ('inter-temporal law'). The standard-setting character of Huber's treatment of this fundamental question is likewise unquestioned. Indeed, the *Palmas* award which hitherto gained prominence both in literature and in international practice,<sup>108</sup> is prevalingly considered the leading case on the subject.<sup>109</sup> It is due to Max Huber that today, as Judge Higgins put it, 'the so-called rule of Inter-Temporal-Law [is] known to every international lawyer'.<sup>110</sup> Once again, his point of departure was virtually uncontroversial and met no criticism whatsoever:

a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.<sup>111</sup>

What followed then, however, generated not a little confusion and led to a lively controversy.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

In concrete terms, acts must be assessed against the law of the time when performed (i.e., mere discovery as valid title in the 16th century) but at the same time the claimant (i.e., the United States) must keep up with the law in the course of the centuries in order to maintain their title.

Again, this is not the place to dive deep into the debate on the reasonableness and practicability of this second element of Huber's doctrine, a debate which was initiated by Philip Jessup as early as 1928<sup>112</sup> and has continued ever since. It is probably true, this part of Huber's doctrine seems to be somewhat sweeping or at least easily

<sup>108</sup> See, *inter alia*, Higgins, 'Time and the Law: International Perspectives on an Old Problem', 46 *Int'l and Comp L Quarterly* (1997) 501; D. Greig, *Intertemporality and the Law of Treaties* (2003); Sørensen, 'Le problème Dit du Droit Intertemporal dans l'ordre International', 55 *Annuaire de l'Institut de Droit International* (1973), at 1 ff. For further references, in particular to relevant jurisprudence, see M. Shaw, *International Law* (5th edn., 2003), at 429 ff.

<sup>109</sup> See as an example Elias, 'The Doctrine of Intertemporal Law', 74 *AJIL* (1980) 287.

<sup>110</sup> Higgins, *supra* note 108, at 515.

<sup>111</sup> RIAA II, at 845. This formula has not only found countless entries into scholarly writings and judicial findings on territorial issues of all kinds, but is also widely referred to in almost all areas of international law: *cf.*, e.g., Gattini, 'Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War', 7 *EJIL* (1996) 69 and Inter-American Court of Human Rights, Advisory Opinion No. 16/99 of 1 Oct. 1999 (*Solicitada pelos Estados Unidos Mexicanos o direito à informação sobre a assistência consular no âmbito das garantias do devido processo legal*), para. 9, n. 8. One cannot therefore but agree with Judge Higgins' assessment: '[f]ew arbitral *dicta* have been more widely cited, or have come to assume a more important place in international law, than that of Judge Huber in the *Island of Palmas* case': *supra* note 108, at 515. However, as Judge Higgins convincingly demonstrates, even this so apparently well established principle seems to have its exceptions: *ibid.*, at 516 ff.

<sup>112</sup> Jessup, *supra* note 94, at 739 ff.

misunderstood. It certainly leads to intolerable consequences if interpreted as suggesting that a right simply ceases to exist at the very moment that its holder fails to comply with new rules for its emergence and/or continuance which are different from those valid at the time when the right was lawfully obtained. Jessup provides us with a highly topical illustration of the problem raised by Huber's statement:

Assume that State A in a certain year acquires Island X from State B by a treaty of peace after a war in which A is the victor. Assume Island X is a barren rocky place, uninhabited and desired by A only for strategic reasons to prevent its fortification by another Power. Assume that A holds Island X, but without making direct use of it, for two hundred years. At the end of that time suppose that the development of international law has so far progressed as to change the previous rule of international law and that the new rule is that no territory may be acquired by a victor from the vanquished at the close of a war [this scenario comes indeed very close to the post World War II state of the law]. Under the theory of 'intertemporal law' as expounded, it would appear that A would no longer have good title to Island X . . . Such a retroactive effect of law would be highly disturbing.<sup>113</sup>

What is in fact highly disturbing is the rigidity of the second element of Huber's doctrine: It most likely cannot be denied that, in the event that Huber's doctrine were applied as it stands, remote border areas, scarcely inhabited and even less controlled by state authorities would become highly susceptible to the covetous aspirations of more powerful neighbours. International legal practice provides us with overwhelming evidence that this is far more than a mere academic scenario – a number of recently decided or still pending cases before the ICJ being but a few of the numerous instances in which the practical relevance of the problem appears or is likely to appear in the future.<sup>114</sup> Numerous efforts have been made to save, in one way or the other, at least the core of Huber's argument. For Higgins, for example, the second limb of the doctrine should be strictly limited to the context of establishing and maintaining territorial title – 'no more and no less'. However, within these topical limits she maintains that '[p]erpetuation of that right, demonstrated by effective occupation (as required by later law), is necessary'.<sup>115</sup> It is obvious that even such a narrow understanding cannot eliminate the difficulties arising from a literal reading, as Jessup and others have aptly demonstrated.<sup>116</sup>

<sup>113</sup> *Ibid.*, at 740.

<sup>114</sup> Higgins recalls the controversial oral and written pleadings on this point in the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *supra* note 108, at 516, and it is likely that the issue may return soon to the great hall of justice in The Hague as a side aspect of the proceedings in the *Case concerning the Maritime Delimitation in the Black Sea (Romania v. Ukraine—'Serpent Island')*. For further references to the application of the principle as a whole see Shaw, *supra* note 108, at 430 and, for a comprehensive survey of the later jurisprudence see Elias, *supra* note 109, at 285, 289 ff.

<sup>115</sup> Higgins, *supra* note 108, at 516. Further, it is highly doubtful whether Huber's formula really allows for a 'careful and flexible' interpretation, as Shaw, *supra* note 108, at 430 suggests.

<sup>116</sup> See, e.g., M. Akehurst, *A Modern Introduction to International Law* (6th edn., 1987), at 153. Probably the correct explanation for the understanding and evaluation of Huber's dictum is given by Shaw: '[t]he better view is to see it as one element in the bundle of factors relevant to the determination of effective control, but one that must be applied with care': *supra* note 108, at 430.



Most likely, the only way out is to frankly admit that the gist of what Huber writes here lies somewhere else: it may be recalled that the core of his theoretical thinking consists in the conviction that international law is – or at least should be – not an abstract set of rules and that in order to maintain its regulatory force, the international legal order should not deviate too much from its social and political foundations. To allow century-old titles or rights, rooted in an entirely different social and political environment, to continue to claim validity today certainly constitutes a challenge to the credibility and acceptability of the international legal order. Various aspects of colonialism in general and the phenomenon of slavery in particular may serve as a telling illustration in this regard. No doubt, once again Huber's jurisprudence is perfectly in line with his theoretical conviction that international lawyers should strive for a dynamic understanding of international law in accordance with the changing international society rather than cling to a static interpretation of rules. The fact that Huber somehow disregards the equally important aspect of legal certainty as a core element for the stabilization and hence pacification of international relations is certainly regrettable. However, in view of the fact that, given the concrete facts of the *Palmas* case, this element of the doctrine constitutes but a mere *obiter dictum*,<sup>117</sup> one should not overestimate this 'theoretical overkill'. The message Huber tries to convey to his learned readership is a simple and noble one: 'International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection.'<sup>118</sup> And worthy of such protection are essentially those rules which reflect today's social realities and not those of a distant past – who would dare to object?

The welcoming address delivered by the then President of the International Court of Justice, Judge Shi Jiuyong, at the occasion of the visit by the president of the Swiss Confederation, Joseph Deiss, to the Court on 25 May 2004<sup>119</sup> bears witness to the extraordinary high esteem enjoyed by Huber in the international legal community up to the present day. An entire lengthy paragraph of this speech on the Swiss contribution to the cause of international law and justice is indeed dedicated to Max Huber. Excerpts with special emphasis on Huber's role as judge and arbitrator read as follows:

The expanding peace movement prior to World War I saw a notable display of international interest in the promotion of peace. And while there have been many who have contributed to the development of modern international law, the work of one particular man stands out. Dr. Max Huber, a Swiss delegate who participated in the Second Hague Conference of 1907 and who was entrusted by the Swiss Federal Council with the preparatory work for a Third Peace Conference, was an individual who has undoubtedly helped shape the course of international law and international dispute resolution. . . . Huber's achievements and qualifications found

<sup>117</sup> It is true, under the concrete circumstances of the case, that the issue was not at all decisive for Huber's ultimate conclusions and therefore, strictly speaking, no necessity existed for the arbitrator to touch upon this delicate question at all.

<sup>118</sup> *Island of Palmas Case (Netherlands/USA)*, RIAA II, at 870.

<sup>119</sup> Available at [www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeech\\_president\\_shi\\_joseph\\_deiss\\_switzerland\\_20040525.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeech_president_shi_joseph_deiss_switzerland_20040525.htm).

international recognition when he was elected Judge of the Permanent Court of International Justice during the first election of the Court in 1921. In 1924, Huber was elected President of the PCIJ and served as President of the Court from 1925–1927 and as Vice-President from 1928–1930. I am sure that my colleagues will agree with me when I say that Huber has indeed left a deep and lasting imprint on the PCIJ. Huber also served as Member of the Permanent Court of Arbitration from 1923–1940. He was selected by the parties to sit as sole arbitrator in the *Island of Palmas* case of 1928, and his classic dicta in this case constituted an important landmark on the concept of sovereignty and the means for the acquisition of territory in international law. . . . Dr. Huber stands out as a forerunner in the struggle for humanitarian rules and as an exceptional international jurist and scholar; his work continues to serve as a powerful inspiration to both lawyers and humanitarian activists alike.

There is simply nothing to add to this: we cannot but share the thoughts expressed in this eulogy.