abroad which it believes to be committed against the state, but the exercise of this sovereign right is held in check by the possibility that other states might claim reciprocity in this respect. As a result, a balance is struck in practice which operates as a *modus vivendi*. The right to punish nationals is admitted by practically all states. The right to punish non-nationals is still contested except as to a few cases. Such conflicts of sovereign rights are as a rule appropriate matters for agreements between states covering particular classes of cases, and such agreements as they multiply through the years will no doubt point the way to a rule of practice which may in the end be adopted in a general international convention.

In this connection it is interesting to refer to Pitt Cobbett's summary of the disadvantages of the extraterritorial principle. He says:

> Nevertheless the system under which a criminal jurisdiction is claimed or exercised by a State over offenses committed outside its territory is, for the most part, and saving certain necessary exceptions,[1] at bottom a bad one. It tends to obstruct or impede the course of justice by making the prosecution of crime difficult and expensive, owing to need of transporting witnesses and proofs to another country than that in which the crime is committed. By disassociating punishment from the locality of the offense, it also tends to diminish its deterrent effect. Nor is it commonly necessary; for the reason that the escape of the offender to another country can generally be met by a proper system of extradition. It is also anomalous, for the reason that whilst it rests in some measure itself on a territorial basis—*viz.*, the presence of the offender within the territory—it is really subversive of the territorial principle. Finally, as was pointed out in *Cutting's Case*, it is a system which, when applied to offenses committed by foreigners in foreign territory, is open to grave abuses.[2]

L. H. WOOLSEY.

LEGAL STATUS OF GOVERNMENT SHIPS EMPLOYED IN COMMERCE

Among the questions placed at the outset by the Committee of Experts for the Progressive Codification of International Law on its provisional list of subjects concerning which international regulation seemed desirable and realizable at present was "The legal status of government ships employed in commerce." At the same time a subcommittee composed of M. de Magalhaes and Professor Brierly was appointed to inquire further into the subject and report whether in its opinion the problems which have recently arisen in consequence of the immunities hitherto enjoyed by such ships are capable of solution by means of international conventions. The conclusions of the subcommittee are embodied in a report which sets out the reasons in support

[1] "As where the offense is committed in territory not occupied by a civilized Power, or where the act done outside the territory depends for its character on some act previously done within the territory, or where the offense affects the safety or public order [or public credit] of the state exercising jurisdiction."

[2] Pitt Cobbett's Leading Cases on Int. Law, 4th ed. by Bellot, pp. 235–6.

of its view that the question is one the regulation of which by international agreement is both desirable and practicable.[1] The full committee approved the conclusion of the subcommittee, but refrained from expressing an opinion on the merits of the particular solutions proposed by the subcommittee, for the reason that its own task was merely that of preparing a list of subjects upon which international agreement seemed to it to be desirable and realizable, and not that of proposing the form or content which the agreements ought to take. The subcommittee did not consider it necessary to discuss the anomalies of the present situation resulting from the immunities enjoyed by government-owned or operated vessels engaged in the business of ordinary commerce carrying, or to advance reasons why it ought to be altered. It contented itself with simply affirming what everybody now admits, that the problem to which the existing situation has given rise "insistently calls for solution," and that therefore it may be assumed "with certainty that the states are prepared to accept a decision on this subject in the immediate future."

The necessity of agreement being assumed, the problem narrows itself down largely to a matter of detail: What classes of public vessels, if any, shall continue to enjoy immunities? What shall be the terminology employed for describing both them and other vessels not entitled to such immunities? What shall be the nature and extent of the immunities recognized in the one case and the liabilities established in the other? What vessels, if any, shall be exempt from seizure or attachment for the execution of judgments against them? What courts shall have jurisdiction of actions brought against non-exempt public vessels? etc.

The subcommittee in its report deals with some of these matters, although, strictly speaking, they lie outside its province, which, as stated above, was to report whether in its opinion the regulation of the question by international agreement was desirable and practicable at the present time. It pointed out that the solution of the problem had already been greatly facilitated by the discussions, criticisms and proposals of learned jurists, experts on maritime law, admiralty courts and, most important of all perhaps, the International Maritime Committee, notably at its recent conferences at Gothenburg and Genoa. The subcommittee in its report analyzed and discussed the draft conventions of the two latter conferences which were, in a sense, made the basis of its own conclusions. The former convention virtually proposes to abolish the immunity from both arrest and liability to suit, of all sea-going vessels owned or operated by sovereign states, of cargoes owned by them and of cargoes and passengers carried on such ships. States owning or operating such vessels and cargoes were declared to be subject, in respect of claims arising out of the ownership or operation of them, to the same rules of liability, and to the same obligations as those applicable to private vessels, persons or cargoes. This was the general principle pro-

[1] Printed in Special Supplement to this JOURNAL, July, 1926, pp. 260–278.

posed: the abolition of all distinctions between the liability of the state and the liability of private ship- and cargo-owners, and the placing of both on the same footing in respect to their responsibility for the satisfaction of maritime claims against them.

The general principle thus laid down was, however, qualified by several exceptions. In the first place, it will be noted from the above statement, that the liability of state-owned and operated vessels is limited to claims arising out of the operation of such vessels, and does not include those which may have their origin in other sources. The preliminary draft of the London Conference of the International Maritime Committee (1922) did not contain this restriction, but it was added at the Gothenburg Conference (1923) upon demand of the French *Association de droit maritime*, which pointed out that as the draft was originally phrased, anyone who had a claim against the state, whatever the origin of the claim, might enforce it by a suit against a state-owned ship, if there were one. It was the idea of the French *association* that the liability of state-owned ships should be limited, not only to maritime creditors, but apparently that each such ship should be liable only for the particular claims arising out of its ownership or operation. In short, a claimant against a particular ship or cargo should be allowed no right to enforce his claim against other ships or cargoes owned or operated by the state.

As to the courts which should have jurisdiction of actions for the enforcement of such liability, the general rule was laid down that any tribunal which was competent to entertain a damage suit against a privately-owned ship or cargo should be equally competent to hear a similar suit against a state-owned ship or cargo. But here again the general principle of equality of status was qualified by an exception introduced in the case of warships, other state-owned or operated vessels employed only in "governmental non-commercial work" and state-owned cargoes carried only for the purpose of "governmental non-commercial work," on ships owned or operated by the state. Actions for the enforcement of liability arising in connection with all such vessels could be brought only in the competent tribunals of the state owning or operating the ship in respect of which the claim arose, whereas actions against other vessels or cargoes not falling within these classes might be brought in the courts of other countries than those to which the ship belonged, as damage, salvage and other suits against privately-owned vessels are often brought.

The phraseology employed in the Gothenburg draft to describe the particular classes of vessels against which suits could be brought only in the courts of the state which owned or operated them was the subject of considerable criticism by various representatives at the conference, notably by Sir Graham Bower and Sir Norman Hill, who pointed out that the expression "ships of war" is more or less indefinite. It might mean only "fighting ships," but it might also include, as was contended during the World War,

merchant vessels armed for defensive purposes; it might also include colliers, oil carriers and auxiliary naval vessels generally. The term "ship of war" should therefore be defined by the convention, otherwise the courts would be obliged to do so, and their interpretations would doubtless be different and perhaps conflicting. On the other hand, it was replied that attempted definitions or enumerations are usually inadequate, sometimes dangerous, and in this case it was unnecessary, since the expression "ships of war" in the draft convention was followed by the supplementary expression "and other vessels owned or operated by the state and employed only in governmental non-commercial work"—two categories which together would embrace all vessels which it was desired to bring within the excepted class. What was evidently intended to be included in the category of "other vessels owned or operated by the state and employed only in governmental work" was such vessels as revenue cutters, sanitary, police, and patrol ships, state yachts, and ships employed in connection with piloting, lighting, signalling, cable laying, dredging, etc.; in short, all state-owned or operated ships employed in other services than that of ordinary carriers of commerce.

The matter of phraseology was threshed over again at the Genoa Conference of the International Maritime Committee, and a slight change of wording was adopted, but it is doubtful whether it constitutes an improvement on the Gothenburg draft. It is almost inevitable that, whatever language is employed, differences of interpretation will arise among the courts of the different countries in which suits will be brought against public vessels. In order to meet this situation, M. Bischopp proposed at the London Conference that the Permanent Court of International Justice be given jurisdiction to render the final decision in such cases, so as to insure a uniform rule of interpretation. The proposal was renewed at the Gothenburg Conference, but no action was taken on it through fear that insistence upon it might jeopardize the adoption of the convention. Professor Brierly in his report endorses the proposal at least to the extent of making recourse to the Permanent Court optional in such cases. It is worth noting in this connection that the draft conventions of neither the Gothenburg nor Genoa Conferences lays down a rule by which the courts shall be guided in determining the nature of the service in which a vessel is engaged—that is, whether it is commercial or non-commercial. In the absence of such a rule, will the court be bound by the municipal law of the state to which the vessel belongs, or must it base its decision upon the law of the state in which the case is tried (the *lex fori*)? There is a difference of opinion on this point among the authorities, although the preponderance of sentiment is in favor of the latter principle.

A question which has been much discussed by the authorities on maritime law is whether state-owned or operated vessels against which suits may be brought, shall be liable to arrest and attachment, as privately owned ships are. Professor Matsunami, in his book, *Immunity of State Ships*, 1924 (Ch.

VI), points out that the question of the liability of a state ship for damages and its liability to arrest are two separate and distinct things, which are often confused. The arrest of the ship, he maintains, is not an essential part of the procedure for obtaining damages. The important thing for the individual who has a claim against the state, arising in connection with the ownership or operation by it of a ship, is to get satisfaction for the damage which he has sustained, and the notion that a judgment against the state is worthless unless the creditor has the right to seize the ship, is a fallacy. The right of attachment which is allowed in the case of a suit against a privately-owned ship is based on the principle that the private owner may be insolvent and, therefore, unable to pay the amount of the judgment, or he may refuse to pay it, in which case the seizure of the vessel may be a necessary remedy. In the case of judgments against the state, however, the situation is entirely otherwise. The state is not likely to be insolvent, and the presumption that it would refuse to pay a judgment recovered against it in pursuance of an international convention to which it is a party, is not admissible. Professor Matsunami, while advocating the complete abolition of the immunity of state-owned or operated ships so far as their liability to suits for damages is concerned, favors their immunity from arrest as a means of enforcing judgments against them. Other high authorities on the subject, among them Sir Norman Hill, judge of the Probate, Divorce and Admiralty Division of the English High Court of Justice, adopt the contrary view and maintain that all state-owned or operated ships, without exception, should be liable to arrest equally with privately-owned ships, for the enforcement of judgments recovered against them. Considerations of simple justice and equality, they argue, require that no distinction, either as to their liability and the procedure for enforcing it, should be made between public and private vessels. The great preponderance of opinion is, however, against this extreme view. Clearly, there are important reasons of public policy why ships engaged wholly or mainly in the public service of the state, and especially war vessels, should not be subject to arrest and attachment at the instance of a private suitor; otherwise the performance of some of the essential public services of the state may be seriously interfered with. But manifestly these considerations do not apply in the case of state-owned ships employed as ordinary carriers of commerce. In any case, as stated above, it is not likely that the remedy of attachment will ever be necessary to insure the enforcement of judgments against the state.

The Gothenburg draft convention contained no pronouncement on this matter, but at the Genoa Conference an amendment was adopted which declares that warships, state yachts, patrol ships, hospital ships and other vessels belonging to a government, or operated by it, and employed exclusively in other than commercial work, shall not be liable to attachment, and the same immunity is accorded cargoes transported for governmental and non-commercial purposes on board ships belonging to or operated by the state.

This leaves only state vessels which are employed as ordinary common carriers liable to attachment. They are, therefore, on a footing of equality with privately-owned ships in respect to their liability to seizure for the execution of judgments against them, and there would seem to be no good reason why they should be otherwise.

On the principle that in time of war the immunity of public vessels from interference ought to be larger than in time of peace, the Genoa draft convention provides that ships belonging to a belligerent state or managed by it—apparently including even those which are employed as ordinary commerce carriers—and cargoes belonging to such state or borne on such ships, shall not be liable to attachment, seizure or detention by a foreign court of justice. But, by the express terms of the convention, suits may be brought during the war against such ships or cargoes in the courts of the state which owns or manages them. Whether they may be subjected to attachment or seizure will, presumably, be determined by the state itself.

Finally, as to the application of the proposed convention, the Gothenburg draft declared that its provisions should "be applied in all cases where the claimant is a citizen of one of the contracting parties," subject to the provision that nothing in the convention should prevent any of the contracting states from determining by its own legislation the rights of its own citizens before its own courts. This means that only citizens of a state which is a party to the convention can invoke its benefits in claiming damages for injuries committed by the ships of a foreign state, and that the liability of a state to its own citizens may be determined by it without regard to the rules of the convention.

At the Genoa Conference of the International Maritime Committee a new article was added to the Gothenburg draft, which declares that the convention shall not be binding on a belligerent state in respect to claims arising during the period of belligerency. The effect of this restriction is to limit to peace times the liabilities and obligations of states in respect to claims arising out of the operation of ships belonging to them or under their control, as those liabilities and obligations are fixed by the convention. In this respect it is analogous to the International Air Convention of 1919, which is binding on the parties only in time of peace.

Such, in summary form, are the proposals of the International Maritime Committee and which, in the main, are approved by the subcommittee of the Committee on Progressive Codification, although, as stated in the beginning of this note, the committee itself declined to pronounce in favor of or against them, since that did not seem necessary in determining whether the regulation of the subject by international agreement was desirable and practicable. The committee, however, in its report adverted to the work of the conferences at Gothenburg and Genoa and called attention to a draft convention which has been submitted to the Government of Belgium with a request that the Belgian Government call a diplomatic conference to prepare a conven-

tion for adoption and signature by the various states. It added that, in case the Belgian Government should comply with the request, it might seem superfluous for the committee to transmit the subject to the various governments in accordance with the resolution of the assembly providing for the appointment of the committee. In these circumstances the committee decided to transmit the report of the subcommittee to the Council of the League, with an expression of opinion that the subject is one which it is desirable and at present practicable to regulate by international agreement, either in the manner proposed by the International Maritime Committee, or in such other manner as the Council may deem appropriate.

As to the general principle, namely, the abolition of the distinction between the liability of the state and that of private individuals in respect to claims arising out of the ownership or operation of ships, there is now virtual unanimity of opinion among text writers, jurists and experts on maritime law and usage. A few, like the learned Professor Rippert, of Paris, would make an exception only in the case of warships, which he thinks should be exempt from damage suits.[1] But the vast majority of present-day authorities are opposed to any exceptions whatever, although most of them favor relieving state vessels which are employed in services of a distinctly public character, as contradistinguished from that of ordinary trade, from liability to seizure and attachment. The now generally accepted view is thus stated by Mr. Justice Hill of the English Admiralty Court: "If sovereign states engage in trade and own trading ships of their own, or use trading ships of private persons, they should submit to the ordinary jurisdiction of their own and foreign courts, and permit those courts to exercise that jurisdiction by the ordinary methods of writ and arrest."[2] As stated above, he goes even to the length of maintaining that warships and other public vessels should be placed on the same footing with vessels engaged in ordinary commerce, both in respect to their responsibility for damages and their liability to seizure and attachment in execution of judgments against them. Judge Loder, member of the Permanent Court of International Justice, also maintains that when a state goes into the business of manufacturing or shipping, it should answer before the courts for the damages which individuals sustain in consequence of its acts. M. André Weiss, likewise a judge of the Permanent Court of International Justice, in his lectures before the Academy of International Law in 1924[3] vigorously defended the same thesis, and so does Dr. Matsunami in his work cited above. The same view has recently been expressed by numerous other authorities.[4]

[1] See his article in the *Revue Internationale du Droit Maritime*, Vol. 34 (1922), pp. 22–23.

[2] Note on Immunity of Sovereign States in Respect of Proceedings against Maritime Property.

[3] *Recueil des Cours*, 1924, t. I, pp. 531 ff.

[4] The opinions of some of them are cited in my article "Immunities of State-Owned Ships Employed in Commerce." *British Year Book of International Law*, 1925, p. 128 ff.

The admiralty courts, in many cases which have recently come before them, while sometimes upholding the old doctrine of immunity, have not hesitated to express their regret at being obliged by the doctrine of *stare decisis* to support a theory which must be condemned upon every principle of justice and public policy. A few, like Judge Mack of the United States District Court for the Southern District of New York, have repudiated the ancient doctrine of immunity and laid down the principle that a foreign vessel employed as an ordinary merchant ship in time of peace should be immune neither from damage suits nor from arrest or attachment (*The Pesaro*, 1921, 277 Fed. Rep. 473).

As I write these lines, the Supreme Court of the United States has overruled this decision of Judge Mack, and affirmed the principle that a foreign state-owned vessel, employed as an ordinary commerce carrier, is entitled to the same immunity as a warship or other public vessel, and is not therefore liable to seizure or attachment.[5] The court relied upon the doctrine enunciated by Chief Justice Marshall in the case of the *Exchange* (which related only to the status of warships), and held that the principle laid down by him was equally applicable to a state-owned vessel engaged in the carrying trade, when, as in the present case, the purpose of the service was to increase the revenue of the state and the advancement of the economic welfare of the country owning the ship. The *Pesaro* must therefore be regarded as a public vessel and accordingly entitled to the immunities heretofore recognized as belonging to such vessels. The effect of this decision is virtually to sweep away the now generally recognized, and, it is believed, perfectly natural distinction between state vessels operated for distinctly public purposes and those operated as ordinary commerce carriers, since if a ship operated in the latter capacity must be regarded as a public vessel because it earns revenue and increases the economic power of the state, it is hard to conceive any vessel operated by the state as being other than a public vessel. The principle of this decision is contrary to the now almost universal opinion of jurists, it is contrary to the conclusions of the International Maritime Committee, of the subcommittee of the Committee on Codification, and of the expressed opinions of two judges of the Permanent Court of International Justice. It is a reaffirmation of the ancient doctrine of immunity which grew up in an age when the operation of merchant vessels by the state was unknown, and when all state-owned or operated ships were in a real sense public vessels, and when there was some excuse for the immunities which were accorded them. Today, when conditions are wholly different and when thousands of state-owned vessels are engaged in the ordinary carrying trade in competition with privately owned vessels, a judicial pronouncement by the highest court of one of the great Powers, which affirms that such vessels must still be regarded as public vessels and entitled

[5] Berizzi Bros. Co. *v.* The Steamship Pesaro [June 7, 1926]. Printed in Judicial Decisions in this JOURNAL, *post*.

to special immunities which their private competitors do not enjoy, only serves to accentuate the necessity of an international agreement which will remove the anomalous and unjust inequality which, in the opinion of the Supreme Court of the United States, is still the law of the United States, if not the law of nations.

J. W. GARNER.

JAPANESE DRAFT CODE OF INTERNATIONAL LAW

Inspired no doubt by the invitation of the League of Nations Committee of Experts for the Progressive Codification of International Law, the Japanese branch of the International Law Association, jointly with the International Law Association of Japan, has prepared and adopted a series of nine projects as parts of a Draft Code of International Law. They are entitled as follows:

I. Principles concerning the acquisition and loss of nationality.
II. Rules concerning responsibility of a state in relation to the life, person and property of aliens.
III. Rules concerning the jurisdiction of offences committed abroad and concerning extradition.
IV. Rules concerning the extent of littoral waters and of powers exercised therein by the littoral state.
V. Rules concerning the status of men-of-war and other public vessels.
VI. Rules concerning the privileges and immunities of diplomatic agents.
VII. Rules concerning the functions and privileges of consuls.
VIII. Rules concerning the treatment of aliens, their admission and expulsion by a state.
IX. Principles for the equitable treatment of commerce.

Seven of these are upon the first tentative list of subjects adopted by the Geneva Commission as more or less suitable for codification. Two others, one as to the status of ships of war, the other as to the admission and treatment of aliens, are added, the latter of extreme interest. Taken as a whole, these draft projects exhibit the great difficulties of such undertakings, and direct attention to the wisdom of the procedure adopted by the Geneva Commission in laying the foundation for ultimate formulation by preliminary studies, questionnaires, and reports. To some extent the drafts represent the law as it is, or, in other words, they are statements by a group of experts of the positions which an international court might reasonably take, were cases involving the legal propositions actually before it. Others express what it is conceived the law ought to be, not necessarily as regards so-called "gaps" in the law, but as changing fairly definite rules of law as recognized in state practice.

It would be scarcely less than human if national proclivities, if not national policies, failed to make their impression, and to that extent adoption by