RIVERS AND INTERNATIONAL SIGNALS.


by

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I.

There is nothing surprising in the fact that the curators of our academy have desired that a series of lectures for the first year of activity of the academy should be devoted to international rivers and canals. In fact, the Treaty of Versailles and the other Treaties of Peace in a fine outburst of internationalism have wished to indicate clearly the beginning of a new era in the evolution of law of international navigable ways. In indicating this desire, the Peace Conference has resumed the work which a century before the Congress of Vienna had inaugurated in the drawing up of Articles 108 to 117 of their Final Act (Note: International collection of Treaties of the 19th Century, Vol.1, page 467). The first chart or map of general international law of navigable ways. The task which the Congress of Vienna and the Peace Congress of Paris have taken upon themselves offers an interesting illustration of the fact well known besides that after the world war the world experienced the need to improve in this or in that domain its judiciary and international life and it is thus the great treaties of peace contained more and more along with clauses uniquely political, some divisions of law of a general nature, as for example, the Treaty of Versailles in the matter of communications is the one which now claims our attention. If the Congress of Vienna succeeded in drawing up the rules of general river right associating itself to the aforementioned international rivers C. to D., which separate or traverse several states, the conference of 1919 must have completed its work before the reunion of the General Articles of 1815 has been concluded. In these conditions, the Treaties of Peace while containing several articles for certain international navigable ways, have been compelled to limit themselves in foreseeing a general convention concerning the international system of navigable ways. (Note: This refers to the conference of the League of Nations at Barcelona, a complete text of the conventions and recommendations adopted preceded by an introduction 1921). As is proven at the place where the navigable ways are found in the Treaty of Versailles - to-wit, the 12th part devoted to transit ports, navigable ways and
railroads - the statesmen assembled at Paris have regarded the navigable ways as one of the most vast problems of international communications. This problem is the most important that the League of Nations has had trusted to it in 23rd Article of its treaty which bears the inscription, for example, which the members of the league will take up the necessary propositions to assure the guaranty and the support of the liberty of communications and of transit. Likewise, an equitable treatment of the commerce of all the members of the league. I do not wish to repeat here the history of all that which unites itself to that part of the activity of the League of Nations; it is necessary to recall that after the French government had taken the initiative of the reunion of a commission to study and complete the uncompleted task by the Peace Conference the first assembly of the League of Nations instituted the organization of communications and of transit and that is the first general conference of this organization, that of Barcelona in 1921 which formulated a general convention concerning the international regime of navigable ways, already foreseen as I have just said by the Treaty of Versailles. A certain number of states represented at Barcelona have already signed and ratified this convention.

From that which has preceded results that we can consider the Final Act of Vienna as a first edition of General International Law of Navigable Ways, the convention at Barcelona in the attempt of a new edition of this general law. It is fitting to say right now that this very interesting tendency of unifying the international right of navigable ways ought not to lead us to lose sight of the fact that before Vienna and after Vienna and probably also after Barcelona, these are always the very determined waterways which for one cause or another are in a certain period of the evolution of fluvial rights the bearers of this evolution; This is a new world commencing by the international Mississippi at the end of the 16th Century and following the Escalot and the Rhine, the last always the most important of international rivers and then the Danube and at the end of the 19th Century the Congo and Suez Canal and finally the Panama Canal. When we consider closely and carefully the systems of navigable ways already quoted and many others we are deeply impressed by the diversity of these systems, in fact each one of them has its own individuality.

Let us compare for example the Amazon and the Rhine. Mr. Alvarez whom we shall have the pleasure of hearing this next week has recently insisted upon the fact that the great American river flowed through or along said states with a small
population and an economic production still in its infancy; sometimes even certain ones of these courses of water have yet unexplored parts. (Note: Work of Barcelona Exposed by Several of its Authors 1922, page 44). Compare this landscape, almost virginal to the Rhine which in normal times the convoys or tug boats follow one another unceasingly and where one counts by scores the great ports. It is evident that the judicial regimes of these two rivers must differ in their entirety. Or compare the Suez canal with the Escaut or the Elba. In the first case a navigable way of which the navigation is in the first sea coast rank, while to the Elba at least up stream from Hamburg it is only a question of an internal navigation; this applies a series of judicial consequences of which I shall mention here only the contents of the certificates of proficiency of navigation and the inspection of boats. In the case of the Elba a special regulation for this program is necessary while as for that which concerns the navigable ways as the Suez Canal or the Escaut upon which sail vessels of the sea of all sea-faring nations one can well suppose that they see to it that their ships are well equipped and that their captains are capable. Such a regulation is not necessary. Or compare the Escaut to the Danube. In the second case, a river which in order to become navigable in a satisfactory manner has need of considerable hydrotechnical works. For example, at the very entrance at the mouths and at the mountain passes of the Danube, consequently the hydrotechnical works occupy an important place in the Danubian regime. That which was not necessary up to the present time for the Escaut, or, finally, let us compare, the Danube where everything is political to the courses of water anti-political as has been and perhaps will remain the Rhine. If in behalf of the Rhine we draw up a harmonious living right evolving in a continuous manner, while on the contrary for the Danube regarded in its entirety of action upon high politics it has produced up to the present time as a result a state of law not at all satisfying. One of the causes of this system so little satisfactory of the Danube has been the politics of the old Austria which desiring to occupy a place much to important of all the rivers, a political system of which it is very interesting to follow the manifestations, I shall interline this fact because history can repeat itself.

Of several comparisons that I have just made between some of the principal international navigable ways there clearly results a unification of law of the right of international navigable ways discovers quickly enough its limits. This is what will comprise the Congress of Vienna. It wished that the general principles of Articles 103 to 117 should serve only as the base of special Acts of Navigation for the different rivers and in the same order of ideas as the general convention of Barcelona foresaw at several revivals of special rules for such a navigable way. Nevertheless, in taking up the different parts of right of navigable ways we shall have occasion to ask ourselves if the convention of even Barcelona is mindful enough of the fact that each navigable way constitutes a proper or a
different individuality. These individualities of right to manifest themselves after the Barcelona Convention or when one compares the two acts of navigation which I believe are the most recent, the one of the Danube in 1921 and the one of the Elbe in 1922, we note considerable difference.

I should like to call your attention to two differences between the Rules of Vienna and those of Barcelona. While the former constitutes, without contradiction, a step forward in the internationalization of navigable ways we cannot always affirm the same thing with the rules of Barcelona. This is explained in part by the fact that the general convention in its own name desires to endorse all the countries of the world and in attempting to do this has had to bear in mind, in a large measure, the views in each of the least advanced cases.

In the second place it must be noted that if the element of the victory on Napoleon first does not play a great role in the perfection of the Articles of Vienna, it is not so in that which concerns the rule of a century later. On one side the rivers of the central conquered powers entered very much in the rules of Barcelona in view of their particular international interest and on the other part either attempted to give them their legitimate place in the general convention concerning the international system of navigable ways to the most international navigable ways, viz: the inter-ocean canals and of course this system has remained useless in the presence of the classified refusal of the great victorious world powers which dominate these canals. Besides, the desire to see the greatest internationality among their neighbors but not in their own country is a trait that we shall meet with again elsewhere.

An element of political geography of great importance in the emancipation of fluvial navigation, is the proposition of the state in the territory of which is found the mouth of an international river. These are the states which can prevent and which in fact have often prevented the states up the stream from reaching freely the sea and vice versa. These states can equally prevent maritime commerce from penetrating the states up the river. In a certain measure one can today see that the free navigation of international rivers should have been conquered in the first place against the states who dominate the entrance to these rivers. The attack is made at first by the states up the stream and in certain cases and later also by non-river bordering maritime powers. The communication with the sea of one part and of another part, the penetration of the maritime commerce into the continents, these are the two
great economic interests which join in the attack of the protective and exclusively political system of states which dominate the mouths of rivers. This is a struggle for the free communications which recalls those of two centuries earlier employed by the Netherlands for the liberty of the seas when the little book of Mr. Grotius entitled "Mare liberum sive de jure quod Bativis comptit ad Indicam commercia" was written against the pretensions of Portugal, was published against those of Spain and won over the world against those of Great Britain, the three powerful seabearing nations of that time who were then claiming the exclusive rights upon the seas.

One can cite a great number of international rivers where the efforts with a view of realizing the liberty of navigation concentrate around the state which possesses the mouths of these rivers. The United States knew well these efforts: At the time when the Mississippi was still international, it was Spain, situated at the mouth of the river, offered at the end of the 18th Century difficulties to the United States which situated up the stream desire to reach the sea through Spanish territory (Note: John Bassett Moore, a Digest of International Law, Vol. I, 623 SS) And afterwards when the St. Lawrence had become an international river up the mouth of which Great Britain was in authority, the U.S. had to struggle for many years in the first half of the 19th Century before the ancient metropolis consented to granted its former colonies a free passage to the ocean. (Note: Vol. 631 SS.) In South America, the United States this time in the character of maritime navigators aided numerous states up the stream of the enormous basin of the Amazon: viz: Peru, Bolivia, Ecuador, Columbia and Venezuela, to open this gigantic river of international navigation up to the point where Brazil finally consented to it in 1867 by a onesided legislative act (Note Moore, supra, Vol. I, 640)

A similar coalition of the countries up the stream and of the maritime countries beyond the sea against the state placed at the mouth of an international river was formed insofar as the Danube is concerned at the time of the Crimean war, notably by Austria, and Great Britain against Russia (Note: De Morgny Book Question of the Danube published in 1911, page 71 SS). On the other hand, in the case of the Escaut in 1792 it was France that imposed against the advantage of Belgium up stream the opening of the Escaut which the United Provinces of the Netherlands had the right to keep closed in virtue of the treaty of Westphalia.
The opening of the Escaut is often considered as the commencement of the free navigation upon other navigable ways other than the sea. The liberty of navigation considered as a part of the law of people in general, in fact, we find here the presence of an application of some great principles of liberty of French revolution in an international content. But we note in like manner that revolutionary France has borrowed in part her ideas from North America. And as far as the material for substance in which we are now engaged, is concerned, we must recognize that the United States demanded the free navigation upon the Mississippi before France of the revolution had demanded it for the Escaut. The argument of these two strong and young democracies were not made exactly identical, but in both cases the judicial case is that of natural law, this intangible law which has so often produced the great reforms and which beginning with each epoch is only the ideal of positive law of the same time. The French deduction of the famous resolution of the provisory execution comes of the French Republic of the 16th of November, 1792, is well known (Note: Caratheodory International Law Concerning the Great Water Course 1861, page 161). But it is too characteristic not to be read to you in part:

"The Executive Council deliberating on the conduct of French armies in the countries which they are occupying specially in Belgium, one of its members has observed:

"Art.1- That the impediments and obstacles which up to the present navigation and commerce have suffered as much on the Escaut as on the Meuse are directly opposed to the fundamental principles of natural law which all the French have sworn to maintain.

Art.2- That the course of the river is the common and inalienable property of all the country irrigated by its waters and that one nation shall not be able unjustly to pretend to the right of occupying exclusively the canal of a river and to prevent the neighboring people who live on its upper banks from enjoying the same advantage and that such a law has remained one of the futile servitudes or at least an odious monopoly which has not been able to be established except by force nor consented to except through lack of power which is consequently revokable at all times and in spite of all the conventions because nature does not recognize any more privileged people than it does privileged individuals and the laws of man are for all time imprescriptible."
It results from this famous document at first that the non-liberty of navigation of other river-bordering states is considered as opposed to natural law. In the second place that after this natural law and international river constitutes a common property between the river-bordering countries and in the third place that the force of natural law is greater than the international conventions themselves. Let us note that it was here a question after the manner of the convention the one at Westphalia by which one can compare the signification by quoting a contemporary example the Treaty of Versailles.

I resist the pleasure of comparing these judicial arguments of which the purpose was to legitimize American and French politics in the presence of a positive law of that time with the authors who expose the natural law, that is, the Grotius and Pufendorff, etc. but I can affirm that such a comparison is very interesting.

If then at the end of the 18th Century there commenced to introduce itself in the law of general people the principle of free international navigation upon certain navigable ways one cannot lose sight of two things. At first it is to be noted that free navigation exists already at this time upon certain international rivers, for example, if the Netherlands had a conventional right to keep the Escaut closed it was not so in the case of the Rhine; also it is a fact worthy of attention that the first great convention for the Rhine, the Convention known as the Octroi of 1804 upon the formation of which France had had a very great influence, it stipulates nothing as far as free navigation is concerned, in fact the latter existed already as we have seen, for example, in an implicit manner in Article 4.

And in the second place it must be noted that if the events cited at the end of the 18th Century and then the Congress of Vienna intended to introduce into this law of people the principle of free navigation upon certain international navigable ways this convention of liberty had been a long time considered rather as an example of positive law after which a river, even if it crosses several countries remains absolutely subject to the good will of each of its river-border countries. Under this report it is interesting to see how, for example, Great Britain affirms eagerly that the rules of Vienna do not connect only the contracting countries and
consequently the American thesis that the navigation upon the
St. Lawrence ought to be free in virtue of the rules of the
Vienna was void. It is equally very interesting to note what
the authors of manuals upon the right of people some years
after the Vienna wrote upon the fluvial navigation. Take for
example the book of 1819 by Klüber who knew very well the work
of the Congress of Vienna since he edited its proceedings. The
place where Klüber already treats of fluvial navigation is
characteristic. It is a part of his manual devoted to the
rights of states. I shall read that which follows:

"The importance of the states is particularly
noticeable in the free and exclusive use of the rights
of waters in all of its extent as much in the maritime
territory of the state as in that of the rivers, streams,
canals, lakes and ponds. This usage is not restricted
only when the state has renounced it by convention in
part or in whole. We quote here the 'conventions like
that of Vienna, for example, where it was considered to
allow some other state to compete therein. We could not
even accuse it of injustice if it forbade all passage
of foreign boats upon the rivers, canals and lakes of its
territory. (The Law of the Modern People of Europe, Art. 76).

If as a consequence free navigation existed in certain
cases already before the end of the 18th Century on the other
hand a study of the authors of the Epoch shows that it is slowly
the principles of Vienna which have succeeded in being considered
in the manner in which we are going to consider them now.

In literature, the evolution of ideas in regard to
our subject owes a great deal to the well known monograph of
Caratheodory of 1861. (Note: The Book of International Law
concerning the Great Water courses.) This monograph refers in
many instances to another monograph a little bit forgotten in
our days upon which I shall call your attention, "The historia
avarum legum de fluminum communium aviagione" by Cramer
Vandebergh, written in 1835. This little book is a thesis
defended at the university which I have the honor of representing
here, the University of Leyden, and it contains several very
judicial observations which one is supposed to contribute to
the eminent man who presided at the thesis, "Thorbecke" the
great jurist and Netherland statesman during the middle of the
19th Century, the same man who in 1850 commenced the work of the management of the Rhine and who in the same year was the first active minister in a river bordering state of the Rhine and who completely suppressed all the rights of Rhenish navigation in his own country. The man also who in 1863 rendered possible the repurchase of the bridge tolls of the Escaut.

I insist on calling to your minds the great role that this Dutch statesman played in the evolution of international law and that which under his influence has been written. This little book which in our day is forgotten has been nevertheless the origin of the monographs bearing on our subject.

I have reached the end of several preliminary observations that I have the intention of submitting to you even if it were possible it would not be interesting to give during the four lessons which are left us and observation of the completeness of the law of international rivers and canals. It is better it seems to me to take several important questions of this part of international law and to devote one lecture to each one of them. It is thus that I propose to entertain you tomorrow on the question of knowing which are the international rivers and canals and next we shall take up the question of knowing if states have the right of free navigation upon these international navigable ways and which navigation is a free one. The last two lectures will be devoted to the obstacles which free navigation may encounter and to the administration of the management of international navigable ways.

II.

The lecture today will then be devoted to the question of knowing which are the rivers and which are the international navigable ways. There enter in the first place in this category of rivers which separate or traverse the several states as the Final Act of Vienna says, rivers which one has called for more than a century international rivers and for which you will find a special chapter in each modern manual of public international law and as we have already seen, the first economic cause in virtue of which the navigation of international rivers has been declared free for other boats than those of the states traversed, it is that upon an international river the states up stream desire to be in communication with the sea by the river itself.

As it is a question in reference to a law of navigation and international river commenced to be international at a point where it becomes navigable; there commences the interests of navigation in descending the river and it ceases through the inverse movement which by reciprocity has also been considered free to it since the beginning. The point where a river becomes navigable can be easily fixed as much as the stated condition of the river remains as nature has made it but when hydrotechni-
utility is developed and when they begin to make canals the parts of the river not navigable, the question arises to know if the dredge part of the river open to navigation retains the quality of a river even if this part had not been navigable before or if this part having become a canal does not come under the case of the definition of Vienna. I do not believe that the conference at Barcelona has given this question the most favorable solution to the interests of the liberty of communications, Art. I of the statute. In reply to this the conference has by just right made its own the practice such as it had been realized, for example, for the Rhine and in the Act of the Congo, viz: that the lateral canal established with a view of supplying the imperfections of a natural water way that had been assimilated to the latter.

What is a judicial question of the tributaries of an international river? Here the most favorable system to the free navigation consisted in securing a tributary of a river international as a part of the river itself that which implies the free navigation upon a river is also extended to its tributaries. This is the system for example of the Act of the Congo and of the international law of the institute of 1887 but one can also consider tributaries as distinct water ways. This manner of seeing indicates that the tributaries are only international when they themselves traverse or separate several states. This is the system at Barcelona and between these two differences of international law there can be adopted another or entirely different solution.

At the other end of an international river the lateral finally ends where the sea commences. In almost all the cases this does not give occasion to any differences but that which concerns the principal international river, which is the Rhine, these complications have been produced after Vienna and which have not been solved excepting by the first act of Navigation of the Rhine. This latter of 1831 and in judging by the authors of manuals this question known as binding itself to the words "up to the sea" - which besides are not found in Article 108 to 117 in the Act of Vienna. This is the case of the most celebrated river right. The authors have a habit of judging and condemning the attitude of the Netherland government in this affair. Perhaps they are right. I do not say they are not but before passing judgment I should like as far as I am concerned to know every single document. In this respect I must observe that a good judicial documentation produced some defect notwithstanding the possibility of arriving at a good judgment in this celebrated but so badly understood case.
Now you see, ladies and gentlemen that for those who consider the caustic as the only matter of international river can give occasion to long commentaries which I besides have no intention whatever of making to you. I limit myself consequently to some observations which I have just submitted.

The rivers traversing or separating several states have not remained the only navigable ways open to free navigation and this is easily understood now. If it is clear that international interest desires that international rivers properly mentioned have a free navigation it is equally clear that this same desire can manifest itself insomuch as it is concerned with other navigable ways. We can even say that: a priori there do not exist any navigable ways at all upon which there cannot exist an international navigation. It is towards this ideal of a free navigation upon all these navigable ways that positive international law is slowly proceeding. When this ideal shall be reached some day perhaps the world shall have arrived then to the self-evident conception that a state cannot refuse to strangers the right of serving on its territory provided that this be in an unembarrassing manner, utilitas inoxia not (de jure belli ac pacis liber II coput 2).

Logic is for some other reason than the evolution of law and it militates with force for the assimilation of other navigable ways for international rivers in that which concerns free navigation and this especially at a time when as we shall see tomorrow the idea becomes more and more general that the navigation upon an international river ought not only to be free for the riverbordering states but still more for all the other nations. It is besides the consequence to which this leads us equally a liberal regime in the domain of conventions of commerce and construction: In the conventions a class that assimilates strangers to natives for all that which concerns their private life is very habitual. Therefore why consider a stranger in all of his private occupations as a native but make an exception for international navigation? One can equally demand of himself why a citizen of Chili having the right to go up the international Rhine for example as far as Cologne he has not the same right of penetrating in Germany by a non international German river and why does free navigation upon an international river cease to be a right from the moment in which by a modification of the frontiers of a state the river ceases to be international? And we know that such cases are produced. Is it that the navigation on the Thames river in view of reaching the great port of London has a lesser international interest than the navigation on the international Nijemen, for example?
In fact it is difficult to give a satisfactory reply to such questions as has already stated Carathéodory in his book of 1861 quoted yesterday and in the same order of ideas Article 314 of the quoted Code of the right of people of seven years later by Bluntschli (Note: The Modern Right of People of Civilized States as Presented to Law of People, 1861 page 183) and this book already claims that navigation is free upon all navigable ways with this single exception that they must be in connection with the sea. If this generalization of free navigation upon all the navigable ways is logical it does not apply to the state of positive law, neither 1868 nor of 1923; but the Article of the Code of Bluntschli shows us very well the direction in which international law is already proceeding and should continue to orient itself.

In fact, along with the international rivers a great number of navigable ways which do not traverse more than one country, but which are situate in a single country have already been opened to free international navigation. Besides this free navigation has often existed much before 1792. It is for example the case for all navigable ways which form in such countries the access to maritime ports often a good ways from the sea: an international navigation towards these ports is not conceived without a liberty of navigation upon the navigable ways of access; it is only when a port of the sea is found to be removed from the sea by another state that a free access can be refused as has been the case with the City of Anvers.

The situation of two or several countries can also be such that they have a reciprocal interest to navigate upon their own interior navigable ways other than international rivers. Such a condition exists for example in that which concerns the Netherlands and Germany in view of the treaty of Commerce in 1851 (Note: Lageman’s Collection of the Treaties and Conventions concluded by the Kingdom of the Netherlands, Art. 227). And that is not the only case. A similar provision conferring liberty to all the ship masts was found duly inserted in the Act of the Congo for all the rivers, streams, canals and lakes in the vast territories endorsed in Article one of the Act. A country full of navigable ways and of a position geographically remarkable like a country which has the honor of seeing reunited in its academic residence of international law offers again still other interesting examples of navigable ways which are not those international rivers, but which nevertheless are open to free international navigation. In our own country is found the delta of several large rivers which come to us from other countries and which consequently
are international - the Rhine, the Meuse and the Escaut - and at the same time our country possesses a great number of navigable ways which while giving access to these international rivers do not form a part of them: Canals and certain channels of the sea, etc. Well, there exists several conventional propositions which grant free navigation upon all the navigable ways which connect, for example, the Rhine to the sea and this is in fact a great number of Dutch water courses. I shall cite the canals that connect Lek via Amsterdam to the sea, canals which have a considerable Rhenish traffic.

Another example very interesting comes to us from "the intervening waters between the Escaut and the Rhine". Although the Escaut and the Rhine are two different rivers, there exists nevertheless a communication between them: the intervening waters situate completely in the Netherlands territory: These waters are formed by parts of rivers by a canal, etc., and are consequently neither rivers nor international in the sense of separating or traversing various countries; they do not come under the general rules of Vienna as free navigation upon these intervening waters as the vital importance for the relations between Anvers and the Rhenish German ports, this liberty of navigation has been conveniently stipulated both for Belgium and for the states up the Rhine. (Note: L.W. Wery concerning the Rhine in the tributary waters binding upon it.)

Another navigable way international in the opinion of Vienna having been given which traverses two countries but not by a river but by a canal dug and by locks consequently not coming under the rules of Vienna is, maritime canal from Ghent to the Escaut by which the special convention introduced free navigation. A great future canal finding itself completely in German territory, the canal with the great section of the Rhine-Danube has already been in advance submitted by Article 353 of the Treaty of Versailles to the free navigation of all powers.

But the most important navigable ways which while not coming under the formula of Vienna, are nevertheless open to navigation of all the people and these are the interoceanic canals, that of Suez, that of Panama. I resist the temptation to recall to you the judicial statute extremely interesting of these two little bands situate both of them upon the territory of little states but whose geographical and political position is such that notwithstanding the formulas of disinterestedness of the two great powers they have passed slowly but surely under the domination of these great powers. It is sufficient for this lecture to remind you that
navigation upon these two navigable ways of the highest international interest is conventionally free also and the same liberty exists by virtue of the Treaty of Versailles upon the Kiel canal situated in German territory and there is a difference in referring to the liberty of navigation upon this canal which constitutes the first difference of which the permanent court of international justice is considering at present in this same tribunal.

I have mentioned to you, ladies and gentlemen a certain number of navigable ways which while not coming entirely under the rules of Vienna are nevertheless free for international navigation; in fact, the international rivers of the Congress of Vienna have already lost for sometime their monopoly of free navigation; a great number of other navigable ways often even some of the great net work possess at the present time a free conventional navigation and have through that means the right to the ornamental epithet "international" as proves to us the compiling of the program of the curators of our academy. An epithet which the Final Act of Vienna reserves for the only rivers separating or traversing various states. In these conditions the question presents itself if the time has not come to synthesize all these diplomatic and scattered acts upon the free navigable ways other than those of Vienna and if the time has not come to realize this provision extremely liberal of the Code of Bluntscheli in this respect takes up in turn the ideas of Grotius. And in fact, the Peace Conference of Paris in itself gave emphasis for the liberty of communications in general in foreseeing in the largest terms a general convention concerning the international system of navigable ways has probably endorsed a general convention not only for the international rivers but for all the navigable ways other than those of the sea. And the commission of study which at the invitation of the French Government has taken upon itself this general convention which was inspired by this same idea which besides co-incided absolutely with Article 23 (a) of the Treaty of the League of Nations which I quoted to you yesterday; in its plan of convention of the contracting parties declated that "as far as the ways of communication on the water not defined as international by virtue of the general convention itself their intention to inspire themselves of the same principle of liberty in applying it as much as possible in each particular case" (Note: Documents Preparatory to the General Conference of Communications and of Transit Barcelona, page 122) The conference at Barcelona has not believed
it possible to insert such assimilation in principle in
convention itself or in the statute forming a part of the
convention. But in addition a protocol has been consecrated
to this chapter. According to my advice this assimilation
of principle for that which concerns the free navigation con-
stitutes the greatest step in advance by "par excellence"
that the conference at Barcelona has accomplished in the juris-
diction of the liberty of communication upon navigable ways.
It has underlined in this modest additional protocol the
truth that all the navigable ways have an interest eminently
international and not only those which separate or traverse
several counties.

This step forward constitutes at the same time an
exception to another very remarkable innovation which the
statute of Barcelona has brought to us, viz: the obligatory
jurisdiction in the disputes which might arise in connection
with the interpretations of the said statute. In fact this
obligatory jurisdiction is found to be limited to the only
international navigable ways of the formula of Vienna such as
the statute of Barcelona has modified, extracted and even
rechristened.

I cited awhile ago the affair of Wimbledon when
brought before the permanent court of international juris-
diction concerning free navigation upon the Kiel Canal. This
is the first judgment that the court pronounced and at the
same time it is a question of an obligatory judgment. In this
case obligation is nevertheless not based upon the Barcelona
statute but upon the Versailles treaty. At any rate the
Barcelona statute contains equally a clause of obligatory
jurisdiction for all the disputes in the application and
interpretation of the article excepting the additional protocol.
Here is another great step forward. I recall the number of
arbitrations in the differences of navigable ways is extremely
restricted; one could mention the arbitration between Germany
and Venezuela on the subject of the free navigation upon the
Zulia an important river for the traffic of Columbia to the
Venezuelan port of Maracibo. (Note: J.H. Rahlston, Book
Ven. Arb. 1903, Rev. 1904, page 600) Also the acts of navi-
gation do not contain habitually a single clause of arbitration.
In 1899 at the first Peace Conference the attempt was made to make
arbitration obligatory for disputes to which there might be occasion to consider them in the "convention relative to the navigation of international rivers". If this attempt has failed it is because arbitration for these questions enters into the highest political questions as Mr. de Lapradell has made us see it. (Note: General Review of Public International Law 1899 p. 787). Political questions by which the powers assembled at the Hague 24 years ago did not dare to adopt an obligatory jurisdiction. The meeting of the Barcelona conference has been of the opinion that the time was ripe for the introduction and obligatory jurisdiction in the right of international navigable ways. Let us accept this manner of regarding it as a good omen in that which concerns the anti-political character of this important part of the common law.

III.

I shall now enter upon the question of finding out who has a right to free navigation upon international navigable ways and what navigation is free there.

Again another evolution very interesting takes place but the culminating point of this evolution is not found in the Conventions of Versailles or Barcelona which on the contrary constitutes a slight set back.

The conception is very well known that if at the commencement the liberty of navigation upon international rivers had not been conceded except to river-bordering states along this liberty has already been extended to the ship masts of all the nations by article 5 of the Peace of Paris on the 30th of May, 1814, and by the general rules of Vienna which in whole only put in application this great principle of 1814. I am going to read you now Article 5 of the Treaty of Paris and Article 109 of the Final Act of Vienna. Article 5 of the Treaty of Paris is written as follows: The navigation on the Rhine from the time when it becomes navigable up to the sea and reciprocally shall be free in such a manner that it cannot be refused to anyone and it will be considered in the future Congress of the principles from which principles the rights to be drawn up by river bordering states shall be regulated after the most favorable and fair manner to the commerce of all nations.

It shall be expected and decided even that in the future Congress in such a manner to facilitate communications between peoples and to make them less strange one to the other, the following proposition will be equally extended to all the other rivers which
in their navigable course separate or traverse different states, Art. 109, of the Final Act of Vienna states.

"Navigation in all the courses of the rivers indicated in the preceding Article from the time when each one of them becomes navigable up to its mouth shall be entirely free and can not be refused to anyone in connection with commerce, it being understood that all regulations relating to the policing of this navigation shall be complied with which shall be drawn up in a uniform manner for all and as favorably as possible to the commerce of all the nations."

What is the origin of the Article 5 of the Peace of 1814? I don't know. But it seems to me very likely that the origin is British. At any rate in the instructions which Lord Castlereagh received before rejoining the allies in the beginning of 1814 the free fluvial navigation is not found to be mentioned. I have not yet had occasion to fathom this question but I hope to find for it some day a reply.

It results from that which preceded that the acts of navigation of certain international rivers which in the years after Vienna have been elaborated by virtue of the rules of 1815 without taking into consideration all the reference to free navigation to all the nations notably those of the Elbe and of the Rhine are very often considered as extremely unliberal and we accuse their authors of having acted contrary to the stipulations of Vienna. In this order of ideas it would only be the Treaty of Paris of 1856 which for the Danube "would have brought back the Articles of Vienna to their original and large sense". As said, the report of the river commission of the conference of Berlin in 1884 to 85 (Note de Martens & a New General Collection of Treaties, second series Vol. 10, page 274). This matter of seeing is as I have said very well known. I quote along with the report of Berlin only the decrees well known of the French author Englehardt, who underlines passionately the mistakes committed between 1815 and 1856 in his report for the institute of international law in 1883 in his report for the institution of International Law of 1893 de Martens shows himself equally a partisan in this manner of seeing and recently Mr. Adatci the excellent president of the River Commission of Barcelona whom we shall equally have the advantage of hearing here has written an article upon the river ways which if I am not mistaken contains the same criticism (Note: Work of Barcelona, page 411). Is it that this manner of procedure which plays a great roll in literature upon our subject in the same way as the severe criticisms which are the result of it are historically founded. I do not think so and I shall try to render plausible that the
evolution of liberty for the single river-border states has for a long time been the only liberty considered and that the liberty for all nations commences only later and that it is realized slowly and not even for all the navigable international ways. As far as the latter point is concerned it is known that even today a great number of international rivers, notably, in the continents outside of Europe, are only acquainted with the liberty for river-border states and this is especially the case for the non-international navigable ways according to the decree of Vienna. 

These are the reasons for which it seems to me that the evolution of which it is now a question commenced a sufficiently remote time after Vienna. It cannot be disputed and it has not been disputed so far as I know that the United States and Revolutionary France did not claim the liberty of the Mississippi and that of the Escaut and the Meuse excepting for the river-border states alone. The text of the resolution of 1792 of which I read to you day before yesterday several parts as well as the American diplomatic correspondence do not leave any doubt in this regard. Besides from the French point of view the administration of a free navigation of river border states alone is a logical consequence of the French conception which as we have seen it in an international river co-common property of river border states; it is of this co-possession which in a logical manner the revolutionary resolution removed free navigation from the co-river border states upon all the river courses. The Treaty of Peace between France and the United Provinces of the Netherlands of the 16th of May of 1795 is at hand to confirm that which I have just said although as we have already seen it, the France of the revolution was of the opinion that the natural has precedence even over the great international conventions and it intended even to incorporate the rule of the natural law of free navigation upon the Escaut in the Treaty of Peace which it could easily impose upon the Netherlands completely vanquished. The Treaty of the Hague is the first application of the Treaty cited of natural law. Also does it not prescribe in its 18th Article that free navigation for the river-border states alone. I shall add that this limitation to the river border states alone is already in the advance French project of the treaty and that it is much more remarkable than navigation upon the great ports of the Escaut, Anvers, is especially maritime and for that reason the free navigation of the river border state alone is not at all sufficient for this port. 

The French conception of co-possession - the conception in itself very interesting to pursue - is found again in four instances in the succinct project for the Rhine of the French dele-
gate to the fluvial commission of Vienna the project which has served for a basis for discussions. In these conditions I ask myself if it is probable that the Duke of Dalberg would have so insisted upon this co-proprietorship between river borders if he had wished something else than that which France had maintained since 1792? Besides, when the British delegate wanted to introduce in the Articles of the Rhine upon the basis of the Treaty of Paris as he said the liberty of navigation for the boats for the ship masts of all nations, the other delegates, the Duke of Dalberg included, had been unanimous in saying that the Treaty of Paris of 1814 existed only to dis-embarrass navigation from the obstacles which a conflict between the river border states might give origin to and not in giving to all the subjects of non-river border states a right of navigation equal to that of the subjects of the river border states and for which there should not be any reciprocity. Against this unanimous vote Lord Clancarty did not insist. If consequently I believed that the conference of Vienna has not wanted a free navigation upon the international rivers excepting for the river-border states it is at the same time not doubtful that already at this time Great Britain when it is a question of non-British international rivers in desiring free navigation for all the nations but precisely the manner in which this desire has been removed proves that one cannot consider this desire as realized in 1815.

At the time of the establishment of the Act of Navigation of the Elbe in 1821 an attempt was made by Hanover, Hambourg and Mecklembourg with a view of having inserted there "by virtue of the Final Act of Vienna" free navigation for all the nations but this manner of consideration was not shared by the majority of river border states.

It was only later for the Escaut that a new principle was accepted. The question here is of Article 9 of the Treaty of Peace between Belgium and the Netherlands concluded under the auspices of the great powers; the history of this article which dates back to 1831 gives at the same time an illustration of the fact that still at this time they were aware that the rules of Vienna did not confer free navigation excepting to river-border states alone. Here are the facts: From 1831 the two parties in the case as well as the great powers were agreed to recognize that the general articles of Vienna should be applied to international rivers that separate or traversed the two countries, notably, the Escaut. And what did they infer by this provision? That the liberty of navigation on the Escaut should be free to the commerce of the two river border countries.
This comes now clearly in the text of the Article 9 of the famous 24 articles which had become the treaty of the 15th of November 1831 between Belgium and the five powers. Therefore, in 1831 all the governments, that of Great Britain included, had agreed to recognize that the general articles of Vienna did not confer free navigation excepting to the river border states. At Article 9 of the Treaty of 1831 it is also all the more interesting because it is applied in the first place to a river with maritime navigation as we have already seen or as a natural consequence the free navigation has no practical sense if it is not conferred to non-river border states as well as to the river border ones. But nevertheless all these interested countries recognize that at this time the Articles of Vienna which had been declared applicable could not attain free navigation except for the river bordering states. You see nothing had been changed by the rules of Vienna in the system foreseen by the Treaty of Peace of 1795. The change commences only when Lord Palmerstone himself takes his pen and when his transactional proposition of Sept. 18, 1832, known as the "Theme Palmerstone" well known foresees not only for all the Netherland Belgium rivers but for the Escaut as well "free navigation for commerce and for the boats of all nations". Lord Palmerstone understands very well that it is a question here of a modification in bringing to the Convention of 1831 the modification which he justifies in a treatise and furthermore by an appeal, to some "of the general arrangements of the treaty of Vienna". In reply to the Palmerstone Theme the Netherland Government underlines consistently of what is the question not only of the application of the rules of Vienna but a derogation of these rules. At any rate he expects the denunciation of these rules which foresee equally a transactional Prussian proposition and which finally was incorporated in the Treaty of London of 1839.

If I had believed it a duty to insist upon these diplomatic details it is that they should prove to us the origin of the liberty of navigation for all the nations, the liberty which consequently is due to desire and a very comprehensible desire besides, and the greatest Maritime power of being able to penetrate freely in foreign countries by a fluvial passage. Great Britain is very fond of practical politics: Let us know that free navigation for all the masts is introduced on the Escaut by the Cabinet of St. James at the same time when on the St. Lawrence Great Britain refused this free navigation even to the co-river bordering states.

After the Escaut we find the new principle admitted in 1853 upon the Great South American rivers the Parana and the Uruguay, but is not considered as a rule of general international law, at least by the contracting powers of Vienna who since 1856-58
at the time of the regulation of the navigation of the Danube which it also is very maritime and demands consequently a liberty for all nations but Article 15 of the Peace of Paris contented itself unfortunately to declare as applicable to the Danube the principles of Vienna and when the Austrian Government deducted from it that consequently the Treaty of Peace had not wished a freedom for all the ship masts the other great powers arranged themselves to assume a British-like air with which we are all well acquainted. This was very fortunate for the evolution of law of navigable international ways, although I believe that Austria was perfectly right, but in all events after 1853 the liberty of navigation for all the nations was recognized more and more as a principle of common law, a revision of the Act of the Rhine in 1868 proves and as it was said emphatically in Berlin in 1885 in the Act of the Congo and when the arbitrary sentence in the Anglo-Venezuelan conflict fixed in 1899 the frontiers between British Guiana and Venezuela in such a manner that the Amakuru and Barima became international the Court of arbitration considered that it was self-evident that navigation upon the two rivers should be open to merchant boats of all nations.

It is useless to say that navigation upon the inter-oceanic canals navigation eminently maritime is itself also free for the boats of all nations. On the other hand, as I have already said, a great number of rivers especially outside of Europe maintain the liberty for river border states alone. The convention of Barcelona admits the principle of the liberty for all ship masts but only as far as the contracting countries of the general convention are concerned, that which to my mind constitutes a regrettable restriction. In all this evidence one must not lose sight of the fact that if liberty for all the ship masts is essential for one navigable way to maritime navigation the interest of this unlimited liberty is much greater when it is a question of a navigable way to international navigation, where consequently the penetration of non-river navigation is insignificant. On the other hand, there where numerous canals uniting international rivers as is the case in Europe, the interest of the non-river border states in free navigation upon navigable ways is added to international navigation.

After having sketched the evolutions of the classes of persons who have a right to free navigation upon the international navigable ways I should turn my attention to the question of finding out if free navigation is the right for all sorts of navigation. In fact, one can distinguish several kinds of navigation.
There is at first the fluvial navigation, properly speaking from one river port to another river port, coast trading, international navigation, and this coast trading is large or small according to whether it connects the ports of several river-bordering states or those of one river bordering state alone. Along with this coast trading there is the navigation on the river which is only the commencement or the end of a sea voyage and which commences in the sea ports situated upon the river. The international rivers which possess such sea ports have generally known all the time a free navigation towards these ports. Not because the fluvial right was prescribed to them but because the ports of the sea are open to the navigation of all vessels. The fact that the port of the sea was situated upon an international river was indeed irrelevant, with the exception that in rare cases where between the port of the sea and the sea itself there happened to be situated another state: the case of Anvers for example. Excepting these exceptional cases but which have, as we have already seen a great importance for the evolution of law, it is obvious that ports of the sea are open to maritime navigation of all the nations which in the case of these ports are found situated upon an international river the act of navigation does not always make mention of this fact.

The great powers which in 1856, as I had recalled it have supported the thesis that the general rules of Vienna should have already conferred to all the nations free navigation upon an international river, they have understood that this liberty embraces all sorts of navigation, navigation of the sea from one sea port situated upon a river as well as coast trading. This manner of regarding extremely liberal, such as is found by the example realized on the Rhine had been regarded by the states signing the Act of the Congo in 1858 "as forming hereafter a part of public international law." (Note: Art. 13) This was a notable set-back when the treaties of peace of 1919 limited the liberty of the Germans and their allies and under this connection. Note: for example, Art. 332 of the Peace Treaty of Versailles. The Convention of Barcelona Excluded Again in a Certain Measure Free Navigation of Coast Trade. (Art. 5).

The freedom of navigation upon international navigable ways has for its purpose that of facilitating the commerce of peoples; and it ensues that this freedom is accordingly only for commercial navigation and for the transportation of travelers but not for the navigation of war ships. At any rate there are international navigable ways which in a certain measure and in a certain case almost without any exception are equally open to war vessels. I quote the case of the law Danube and of the Congo where provision was made for war ships by employing the right bower of sovereign fluvial commissions. I quote in like manner
the interoceanic canals which the Acts of Navigation of these canals declare free to the access of war boats even in time of war. But these are exceptions and it is thus that the decree of Barcelona has understood it in like manner.

IV.

Today we shall pass in review the obstacles which free navigation can encounter upon a navigable way. The liberty of navigation, whether it be a liberty of riverbordering states alone or of all the nations does not exist when there is any kind of a monopoly of navigation, and has a clear title to all that which constituting such a monopoly has been excluded from modern international law as a serious obstacle. This monopoly can include different forms; on the Danube we have known the monopoly of a concessioned company of navigation (Note: Dr. H. Hajnal, The Danube 1920, page 69 and 120) There have existed on the Rhine as far back as 1831 associations of boatmen and naturally some trust with a tendency to a monopoly could be formed in international navigation as well as elsewhere.

The right to free navigation does not mean that every individual with or without nautical knowledge is to have the right to sail upon any kind of a boat and in any kind of manner; in like manner as far as that which concerns sea coast navigation or that which concerns autos or aeroplanes a certificate of skill can be prescribed for international navigation; it is self-evident that the conditions to be fulfilled in the obtaining of these certificates must be reasonable under all the conditions which implies that when once legally obtained they must be treated under a footing of perfect equality. And in all like manner certificates for boats can be prescribed in the same way as rules for policing of the navigation.

At any rate, the liberty of navigation such as I have sketched it does not always suffice. Some circumstances of all sorts can impede free exercise of navigation and in addition can assume all sorts of forms according to geographical situation of the water way following the development of the river border country but also following the development of technique in general etc. As soon as the new forms of obstacles make themselves felt, there is an attempt to remedy this at the first occasion offered, and in this manner the new editions of Acts of Navigation of an international river show us the result of new struggles against new impediments. The consecutive Rhenish acts far example, are very instructive in this connection.

I am going to give a few of the obstacles which free navigation can encounter.
Are the laws of navigation, the tolls of the bridges, compatible with the freedom of navigation? In a general thesis without any doubt: The Final Act of Vienna in proclaiming free navigation that this navigation shall be submitted to the rights of navigation. It is obvious that the laws should be reasonable and the criterion of this quality has been more and more sought out in the character of a counter-oath for services rendered. This idea which is found again in several acts of Navigation was expressed in the Statute of Barcelona in this manner which the rights of navigation and duties ought to have the character of retribution and ought to be exclusively destined to cover in an equitable manner the expense of carrying on the navigation or the improvement of the navigable way or its approaches or to support the expense made in the interests of navigation. At any rate, conditions can be such that even modern rights constitute of itself an impediment to free navigation notably when the competition with paralleled railroad lines become difficult for navigation; in the middle of the 19th Century this competition has even killed navigation on the part of the line between Strausberg and Basel and it is at this epoch that the rights of navigation have been suppressed on the Rhine in the interest even of navigation, at first among the Netherlands as we have already seen, a suppression which became conventional by the Act of Mannheim, in 1868.

The navigable way if it wants to be practical for free navigation ought to be kept in a good hydrotechnical condition. Likewise the matter of hydrotechnical works, the removal of obstacles, the maintenance and execution of works of improvement play a great role in the rights of international navigable ways, although as we have already seen there existed in a like manner navigable ways where this problem does not enter scarcely at all. The shallow delta of the Danube and the mountain passes of the Danube have given rise to some institutions and propositions which are characteristic of the Danubian right and we shall have occasion to state tomorrow the great roll which the matter workd both at Paris and Barcelona plays: No work, no liberty.

The right to free navigation is not sufficient in itself. When the economic development of river border countries renders necessary the construction of fixed bridges or barrages for example, for the passage of trains; as soon as free navigation is admitted the necessity imposes itself that the bridges and the barrages which have played a great roll in the Netherland delta are not of a nature to harrass navigation. Free navigation can be equally obstructed when it is desired to turn the water from one river with a view of irrigating the country or for any other purpose. Derivations of this kind are not always ever possible, but when they are some guarantees become necessary in order that free navigations will not suffer.
It results from that which has preceded that navigation upon international ways can meet with an entire series of opposing interests often very legitimate in themselves. It is not always easy to conciliate the two opposing interests and in certain cases the question can even be proposed to find out if the interests of navigation should always take precedence over another interest. Here is an example: During all ages man has always utilized the force of running water for other purposes than navigation; it is thus that the Rhine has its floating mills; When a part of these sources of energy are forced gradually to yield their places to steam machines, and from another part the traffic of the Rhine is developed gradually and it experienced more and more the annihilation of these machines, it has not been difficult in 1868 to forbid the concession of floating windmills; likewise the interests of navigation won out over those of industry. But is it that this will always be the case and upon all rivers? This question has all of its importance and when one thinks of the fact that each running river constitutes a reservoir of electrical force, the exploitation of which possibly since several decades is practiced more and more. For a certain number of rivers, the following problem unknown at the time Vienna presents itself: How to conciliate the interests of production of electrical force which at present is necessary or as the imperious necessity of barrages alone with those of navigation which cannot pass these barrages without the construction of lateral canals and locks. This problem is clearly placed concerning the part of the Rhine downstream from Basle by Article 358 of the Treaty of Versailles and it was resolved in 1922 in a manner which I consider satisfactory (Note: Orange Book of the Netherlands, the 8th of November, 1922, page 52) Article 10 of the Statute of Barcelona gives somewhat further and considers even the possibility of a disorder of international navigable ways. For example, in the interest of production of electrical energy:

A factor of the nature for influencing highly the liberty of the circulation upon navigable ways is that of the administration of custom houses. If it is true that on one hand the fact that a merchant boat enters in a country by a navigable international way does not support the charges to the legislative custom house of this state and that except in geographical cases of a very special kind, the state being traversed should retain the faculty of controlling in a custom-house-like manner the cargoes in transit, it is true also that
the administration of custom houses should be done in a manner less embarrassing for navigation. To this end the acts of Navigation contain often some dispositions very precious as in other respects the statute of Barcelona equally states it. I cite under the report of the Act of Navigation for the Rhine because during the recent events of occupation of the Ruhr some measures have been taken which have completely overturned the regime prescribed by the Act of 1868; these measures offer equal and interesting illustration of the diversity of the remarkable ways by which one can impede the liberty of navigation upon international navigable ways. The custom house clauses of the Act of 1868 assure for navigation the greatest liberty of movement and on the other hand the Act excludes clearly all differentiation between different ways: The Rhine in its quality as a great means of communication ought to enjoy the same advantage as the other ways which assure the same relations. We have wished that the Rhenish traffic should not be turned away by legislation of differentiation from its normal method of travel. In this respect Article 6 has in fact the following: "Merchandise will not be able in any case to be subjected on the Rhine to the rights of entry or of exit at any higher price than those to which they should be submitted on the entry or the exit to the frontier of a country". In Article 14 all the facilities which should be granted by the high contracting parties upon other ways of land or of water for importation, exportation or the transit of merchandise shall be equally conceded to the importation, exportation and the transit on the Rhine". It results that as much for the amount of the rights of the custom house as for the custom house formalities the traffic of the Rhine ought to be put on the same footing as that of any other means of transportation. I shall point out next the three great facilities which the Rhenish traffic has constantly enjoyed from the fact of the existence of depots or warehouses on the French ports as provided for by Article 8 and of which the list subjected besides to some additions figures in the protocole of the enslosure. The merchandise placed in the warehouse of these ports should not be freed from the rights of importation except at the time when they leave these warehouses and in proportion as they are delivered over to national commerce. Article 8 stipulates in fact that "merchandise deposited in French ports shall not be subject to any right of entry or of exit unless they shall be freely delivered to commerce in the river-bordering state itself or in the territory of the system of custom houses and warehouses of which this state forms a part". The clause contained in Article 27 shows equally the interest that has been attached in the Convention of Mannheim to that which the commerce of the Rhine can provide a good system of warehouses this article placed in the hands of the governments of river-bordering states the care of attending to it in the French ports as in all other ports of the Rhine "that all of the necessary arrangements shall be taken to facilitate the loading and the unloading and the depositing of merchandise in the warehouse".
Another point of view Article 6 which I have already mentioned should demand our attention. This article permits to levy rights of entry and of exit but once only, and no right should be drawn upon navigation. This is a general rule as contained in Article 3. I should like finally to draw your attention upon the regime of transit which up the Rhine has a considerable importance. The conventional provisions in force upon this point are contained in Articles 7 and 9 which assure the liberty of transit and they exclude all right of transit and determine with limitations, the formalities to which can be submitted the merchandise in transit in order to prevent smuggling.

I ask pardon for this enumeration which is entirely too custom-house like? But it is in a great part upon this custom house system that the liberty of navigation upon a great artery of river traffic like the Rhine depends. Also this liberty had disappeared when the so-called peaceful occupation of the Ruhr had been accompanied along with the occupancy of an entire series of measures of which I shall pass over the details in silence which have temporarily annihilated entirely or in great part the excellent clauses of the Act of 1868 already mentioned. It results that the future authors who shall write upon navigable ways should tell us that among the greatest obstacles to free navigation should be included the so-called peaceful mentioned occupations. The reprocusion on the liberty of navigation of a peaceful navigation leads us insensibly to the question of knowing if the liberty of navigation existed in time of war. This question places us in the presence of very interesting international law which shows us the beautiful evolution towards a liberty of navigation greater even than that of maritime navigation which has always maintained the right of capture; the idea that war should not be considered as an obstacle to free navigation.

The assimilation in times of war as compared to that which exists in times of peace is already found in the conventions of 1853 for the Parana river and the Uruguay river. The proposition in the same purpose had besides already been made in 1815 by Humboldt and has been taken up again by the Netherland government at the time the revision of the Act of the Rhine in 1868 (Note Parliamentary Documents of Netherland) But these propositions were not accepted; on the contrary, the Acts of Navigation for the Congo and for the international ocean canals prescribed the liberty of navigation even in times of war. But this beautiful spirit has been followed by a rejection and notably the statute of Barcelona carries in its 15th article the statement that free navigation does not hold in times of war, excepting in a compatible measure with the rights and duties of both
the belligerants and the neutrals. But what are these rights and these duties and notably, is it a fact that the right of war on land which ought to be applied to navigable ways other than those of the sea as the institution of international law so desired 1647, or is it intended to be maritime law? The practice of the great war shows us that there is a strong tendency to apply the maritime right, which has less of respect for law and private property than terrestrial law. The evolution in this part of law shows once more that the right of international law is not developed continually in the sense of a great internationalization, and that it knows its heights as well as its depths, and the latter in our time seems to be much too liberal.

V.

Our last lecture shall be devoted to the matter of administration upon international navigable ways. Certainly it is not the least important matter and it is here that law can be greatly influenced by politics.

In treating the obstacles of free navigation I have already had occasion yesterday to cite evidence of administrative right which are connected with free navigation. I shall enumerate some of these divisions of administrative law: The laws of navigation, custom house rights, piloting, the regime of ports, hydrotechnical works, sanitary propositions, Certificates of competency, tonnage dues, certificates, of Boats, Rules regulations for the policing of the navigation, jurisdictions etc. etc. In what manner are these divisions of administrative right applied and administered? The positive law recognizes here two forms: At first the regulation and the application simply by the river border states, each one for his own territory, and along with this resolution and application more or less internationalized and confided to common organs and even to those of super administration which may become little states and which do not leave anything or next to nothing to the river border states. Here again an evolution towards a very marked internationalization and evolution of which the culminating point is found at the time preceding a war.

Let us take as our point of departure for a jurisdictional analysis a navigable way upon which the international navigation is free in virtue of the one sided will of the river border state. It is evident that in such a case which is presented, for example, in the American rivers the collection of material of administrative laws which I have mentioned can be regulated and applied onesidedly by this same state if it so
sees fit to make a regulation in this respect. But as soon as one is given the conventional basis for international navigation and for joined matters the absolute freedom of the states if a river border state is limited in the same measure as the convention itself regulates the different matters contained therein of which it is a question. Such a convention can very well in its turn limit itself to regulate some matters of administrative law accruing upon the navigation, while at the same time allowing the river border state the care of applying these conventional rules. This is what a great number of conventions do. I cite the convention between my country and Great Britain in 1895 concerning the river, Fly, in New Guinea (Note: de Martens a General Collection of Treaties Second Series 23, p. 53) This is besides the same thing which so many of the conventions do regularly, for example: the conventions of commerce of navigation and of building. It is on the base of these conventions that in such countries strangers govern themselves and live and import merchandise or visit the ports upon their boats. Well, these conventions which are much more important for international life than the conventions concerning the single navigable ways give a basis sufficiently clear in detail as to the regime of strangers in such countries under all these connections but the application of these rules is with a few exceptions left to the condition of the territory to which the conventional rules apply, and one does not think of instituting international commissions for the application of these rules; when differences arise in reference to the application of these rules every means for settling these differences are at their disposal.

In the law of navigable ways internationalization has from the beginning made a step more by confiding at least in certain cases the application of some conventional rules to some common organisms which moreover finds itself placed more or less in the hands of a onesided action of river border states. In the same manner; as the liberty of navigation upon certain international rivers has already existed much before the end of the 18th Century, we have equally known before this time common organisms for these rivers. But after the American and French democracies commenced to introduce in the latter law of the people, free navigation upon navigable ways, the common organism of the conventions, I refer to one of Octroi of 1804 for the Rhine and the first which we find although this convention leaves a part of its fluvial administrative right to the river-border states; it confides in a manner extremely centralized, I should say almost napoleonic, a very great part of common organism, notably in that which concerns the most important substance of the truth: the establishment and the collection of the rights of navigation, or the toll. This
centralization of the bridge tolls in a certain common administration was necessary in order to realize a practical indebtedness of a great number of mediating princes. And after a few years, France will monopolize all international administration.

The articles of the Rhine and the general regulations of Vienna maintain the common organisms of river border states, but in the place where they are introduced they are less centralized than in the convention of the Octroi: they are not endowed with the power of all that which concerns navigation exceptis excipiundis, but there is conferred to them a certain number of attributes which seem useful for a system as uniform as necessary for a good navigation. The common organisms constitute in the lesser way a super administration which "an authority which can serve as a means of communication between river states in all that which concerns navigation" as specified in one of the articles of Vienna and as is repeated several acts of navigation. Let us note besides that it is upon a very limited number of international navigable ways that are introduced these common organisms and fluvial commissions. Now outside of Europe, the cases remain always extremely rare and will not present themselves until much later. Besides the comparisons that I have made with the conventions of commerce, conventions much more important than those upon navigable ways, it is perceived immediately following this that this is neither strange nor at all illogical to have international navigable ways without common organisms.

If I cite here among the fluvial commissions the central commission for the navigation of the Rhine it is because this one has been, without contradiction, the most remarkable; for more than a century the governments represented in the commission agreed with a common agreement on the measures to be taken for the development of navigation, and it is under the always active control of the commission that the navigable way has been constantly improved and that the so liberal international regulation of the Rhine has been developed, and last but not least, this navigation even which in normal times is not surpassed by any other river.

The shallow mouths of the Danube bring us a new orientation of river commissions. When the Crimean war, lost by Russia, rejects this power of the mouths of the Danube and when Turkey becomes a river-border state, the sick man then is nevertheless neither financially nor technically able to even remove the great obstacle to the free navigation of the delta. That
is why the European syndicate - the great powers themselves - decides to take charge of the affair and in this manner begins for the mouths of the Danube the aforementioned European commission which in the differences of river border commissions of the Final Act of 1815 includes also some non-river border states, viz., along with Turkey, the great powers to which Romania attached itself in 1878 and which takes the place of Turkey as a river border state. This international commission where each state had a voice was not to be primatively but a temporary institution and supposed to last only until the mouth of the river should be improved. In reality it has during long years been the only institution for the Danube which seemed passable and which always kept itself up and still exists. The European Commission of the Danube of which the context has been modified after the great war possess numerous and extensive governmental powers; it forms a sort of a little state according to the very just expression of Renault and constitutes for the river border states, Romania, a very embarrassing servitude, all the more embarrassing since the commission "exercises its functions in a complete independence of territorial authority."

Let us note that if the great powers alone are represented in the commission along side that of the river-border states, these also are the great powers which undertake all management of the river; let us note also that all the great powers, the victors as well as the vanquished and the neutrals are represented in a European commission from 1856.

The role of the states represented in a fluvial commission was greatly enlarged when it was a question of endowing the Congo or when everything was to be done with a common organ "sovereign" in the absolute sense of the word, as was to be the international government of a country, which perhaps would remain still a neutral land. The convention on the river which offers to the masts of all the nations a regime of liberty greater than that of the sea, should be open to the entrance of all the nations, which by this fact would obtain the right to participate on the footing of a perfect equality in the works of the fluvial commission. In fact, the Act of Navigation constitutes the apex of internationalization insofar as it concerns the composition and the powers of a river commission and one understands the enthusiastic words with which the French delegate, Mr. Englehardt in his report to his government eulogizes the most extensive formula of contemporary river law which is found to be realized in the Act of Berlin, with one single exception, that of the fact that Great Britain had refused every international commission on
the Niger equally international but at the same time very English (Note: French Yellow Book Diplomatic Documents, the Affairs of the Congo River and Occidental Africa 1885, page 19). After the conference of Berlin the Act of Navigation of the Suez Canal in 1887 is a stumbling block. In fact, the commission of the surveillance of the canal is open only to the states signing in the convention. Besides we note that the commission of the Suez did not any more than that of the Congo enter in the formation. The victory of the allies in 1918 gives to the commission of navigable international ways a new orientation, that which is characteristic by the development which are the following traits. At first the international conventions are clearly limited to the rivers of Germany and of its allies in view of their eminently international interest but the great powers of the entente which dominate the navigable ways of which the international interest is still greater, viz.: the interoceanic canals has no idea of endowing these with the same institutions. In the second place, with a few exceptions, the non river-border element in the new international commissions belongs to the entente alone, which in this order of ideas is only competent to represent the general interest and this in much a manner that the majority of the votes is generally acquired for the entente. It is all the more important that the river commissions should not be uniquely considered as a means of communication between the states as the Congress of Vienna did, but as "a distinct moral being of river border states" as it was characterized by one of the best connaisseurs of international river law, the distinguished Secretary General of the Central Commission for the navigation of the Rhine, Mr. Histie (Note: The Review of International Law and Compared Legislation 1922 p. 563 ss). And in the last place, the super-administrations should have some very vast powers, for example, as far as that which concerns the hydrotechnical work in connection with which the technical service of the river border states shall be only the "organs" and the "legal mandates" of the fluvial commission.

In fact when one studies without malice and with zeal the text of 1919 and the following years one is forced to see there an attempt of the entente to retain by means of a combined internationalization under the high authority of rivers of which it is a question and the conference of Barcelona has not emancipated itself from this order of ideas. In my first lecture I said that the conference at Barcelona has not always rendered a sufficiently just account of the fact that a navigable way is an individuality with its own needs. I believe that the contents of the river commissions offers us an interesting illustration. Let us take the Rhine: for many years its hydrotechnical state has been developed in a remarkable manner as you know full well and this by the excellent services of the bridges and highways which the river border states possess and which the activity is co-ordinated by the supple and beneficial international control of which I have already spoken to you. And here it is that suddenly we have wanted to replace the state of things extremely satisfactory by the super-hydrotechnical administration borne of prejudice entirely too political.
You will understand easily after that which I have just said that the Netherlands have preferred not to accept the Rhenish clauses of Versailles except under certain alterations and that the government of my country experiences some very comprehensible scruples against the adherence to the statute of Barcelona.

I am now at the end of my lectures. I haven't time, I repeat, to give you a succinct perception of law of navigable international ways in its entirety: I have preferred to call your attention to some great questions of this law. The study of these questions has shown us that the right of international navigable ways is now in movement in constant evolution. Sometimes the culminating point of this evolution as far as we know it today is identical to the rules of Barcelona. But that is not always the case.

If I have permitted myself to bring upon myself some criticisms it was not to belittle anyone or anything whatever; but we are not here to make any panegyrics but to try to make "an impartial and profound examination of questions that deal with international judicial reports as Article 2 of the statute of our academy has so wished it."