BOOK REVIEW

RIVERS IN INTERNATIONAL LAW. By F. J. Berber. [1959, London. Stevens & Sons Ltd., £2 5s., pp. 296 incl. index.]

Research in international law is ostensibly directed towards the object of formulating legal concepts which will serve as a guide (some would say as the determining factor) in subsequent legal disputes. There is, however, some disagreement as to the method by which this objective can best be achieved. Without excluding other approaches or different versions of the same approach, two main methods may be discerned in contemporary legal research. The first of these, which tends to be influenced by a desire for analytical simplicity and completeness, involves the construction of concepts, either *a priori* or in an undisciplined and eclectic manner and has the dubious advantages of apparent simplicity and the offering of a firm basis of criticism of subsequent legal events. The dubiety (and also the merit) of these advantages can be progressively removed by constant readjustment of the original concept in the light of subsequent developments. The second method is *a posteriori* and strictly disciplined and involves the gradual construction of legal concepts by a painstaking extraction of common elements from past legal events. The resulting concept can never be even apparently defined but is more truly representative of actual international legal development.

There tends to be an obvious contrast between the results generally yielded by these two methods in most cases. The former method, which is more liberal, will usually (though not necessarily) result in a more general statement of principles. The latter method, especially in the present stage of legal development where the products of the law-creating agencies tend to be spasmodic, will rarely yield results which can accurately be couched in general terms. These differences are inherent in the methods employed. Other differences, however, are not. Here, two other matters must be mentioned: —

1. Because of the fact that the *a posteriori* method rarely yields results of a general nature, there may be a tendency to suspect *all* results of a general nature, in other words, to make the method become subservient to the desired end. If this tendency is allowed to prevail, the method ceases to be *a posteriori* and becomes an *a priori* method at the other end of the scale from the one mentioned above.

2. (and by the way, so far as this book is concerned) the above tendency may be strengthened by the presence of personal sympathies and antipathies.

If it were the case that the actual techniques of the *a posteriori* method did not permit this tendency, the above two matters would be of little importance. Unfortunately, this is not guaranteed. The *a posteriori* method can be made to yield different results according as to what initial assumptions are made as to the nature of international law and as to what attitude is adopted with regard to the nature and use of the sources of international law. It is regrettable, but understandable, that genuine academic differences should occupy so much of the contemporary scene in international law for far too many difficulties exist without them. It is, however, inexcusable that further complications should be introduced by allowing the tendency above mentioned to prevail, and it is imperative that such introduction should be firmly resisted.

These, or similar thoughts, must have struck anybody who has read many of the publications which have recently appeared. Their presentation here is occasioned, but by no means solely attributable to the publication of Berber's "Rivers in International Law." It is not the case that this book evidences all or even most of the evils above outlined. It is, on the contrary, a book whose usefulness is undeniable.

It presents an up-to-date summary of the materials relating to rivers and law and much of the discussion of these materials is very useful in pinpointing the main issues which today present themselves. Further, and this is no mean achievement, the book is written and the argument presented in a lucid and readily comprehensible manner, a fact upon which Mr. Batstone, who handled the translation from the German, is surely to be congratulated. What follows is designed to illustrate not so much what is wrong with a particular book, but rather what cause for lament there is in the fact that the method and techniques of international law are so sadly indeterminate and unsettled.

Berber derives certain conclusions by the application of his method to certain materials. What criticisms are considered apposite to his selection of materials appear below in relation to specific cases. Two objections are taken to his conclusions. The first of these is that, for reasons given below, one is logically compelled to none of them by the reasons given. The second is that one is in some instances persuaded in favour of the opposite conclusion to that stated by Berber. There are three main reasons why these objections are made:—

1. The unacceptability of Berber's assumptions as to the nature of international law.

2. Disagreement with his attitude with regard to the nature and use of the sources of international law.

3. Dissatisfaction with technique.

It is proposed to discuss these matters individually.

MATERIALS AND CONCLUSIONS

Materials

The book is based upon an examination of international water treaties; the awards of international tribunals and work of other international organisations; municipal legislation and decisions of municipal courts particularly within Federal states; and juristic opinion. A notable omission from his materials is any adequate consideration of actual state practice as evidenced in diplomatic statements and relations, or international incidents. He devotes no consideration at all to other concepts of international law which might be relevant, such as blockade and reprisal. But scant attention is given to such import as the provisions contained in the Charter of the United Nations might have.

The following conclusions are drawn from these materials:—

1. Juristic opinion is divided on the fundamental question of the principle governing international river law.

2. Treaty practice yields no rules of customary law of universal validity. There is regional international law in Scandinavia; perhaps also in central Europe and even in Western Europe (pp. 149-150). Even in regard to these regional arrangements, however, such rules as can be extracted are so vague and general as to be useless (p. 156).

3. The two cases before the P.C.I.J. yield no general principles, each being peculiar to the situation then before the Court (pp. 160-161).

4. International arbitral awards (pp. 161-167), insofar as they evidence "far-reaching rules of customary law" do so as a result of the employment of 'uncritical theory.'

5. Municipal decision and legislation yield only negative results.

6. "A rule of the abuse of rights does not exist as a general principle of law recognised by civilised nations," but, "The only rule . . . would be that no one may exercise his rights in such a manner as to damage another when the causing of this damage is the purpose, the motive, perhaps the only motive, for the exercise of such rights." (p. 210). "The principle of good faith is ... beyond doubt recognised in international law" but it cannot "serve to provide a solution of a concrete problem of international riparian rights" and hence "does not help us any further in our search for specific legal sources of international riparian rights." (p. 211). No workable principle of good neighbourship relations is to be found (pp. 222-223); similarly, although there seems to be a general principle of water law "according to which the user must in some way take into consideration the use of water by other users," nevertheless, it is only "vaguely formulated."

In general, the prevailing customary law is inadequate. This is to be considered in the light of the fact that water disputes are not satisfactorily justiciable (p. 263). Jurisdiction *ex aequo et bono* offers better possibilities (pp. 266-267). Treaty-making remains the only really satisfactory method of resolving the difficulties of river law (pp. 270-274).

It now remains to consider the assumptions from which Berber starts and the method by which he arrives at these conclusions.

BERBER'S VIEW OF THE NATURE OF INTERNATIONAL LAW

There is ample room for different views of the nature of international law. One man's view is not 'right' or 'wrong' but simply more or less useful for a particular purpose. Berber states the purpose of his book as being "to submit the widely scattered material ... to critical analysis and, on this basis, to examine the more important methodical problems which have arisen at this important juncture in the development of international water rights (p. vi). If this were all, more than one view of international law might suffice. That Berber is concerned to do more than an academic exercise is, however, plain from the cognizance which he takes of the contemporary social context of the subject. Thus, he refers (p. 2) to the increased development of hydro-electric power and systematic irrigation, observing "This problem still contains many uncertainties and unsolved questions and is, in view of the ever-increasing shortage of water throughout the world, one of the most important fields of research in international law at the present time.

"It is the tragedy of the present development of international relations that what is technically possible cannot be brought to fruition on the legal plane because inhibitions of a traditional nature prevent the carrying out of what is both possible and reasonable."

Here, Berber ties down his purpose to the actual conduct of relations between states. From hereon, he is no longer free to adopt any view. That view of international law will be most useful which most truly represents the regulative process in international relations in all its aspects. One must therefore join issue with Berber (and others) apropos the assumption that the dicta of Max Huber in the *Island of Palmas* case (United Nations Reports of International Arbitral Awards, Vol. II, p. 838) and of the P.C.I.J. in the *Lotus* case (P.C.I.J. Reports, Ser. A, No. 10) taken out of context, are truly representative in this way. Berber's understanding of the "governing principle" which they illustrate is that:

"Restrictions upon the sovereignty of a member of the international community can neither be presumed nor created at will. They must have a basis which can be proved with certainty either in treaties or in rules of customary international law or in general principles of law recognised by civilised nations; all three must be strictly interpreted." (p. 257).

Now Huber expressly confines his dictum to the "independence" of states "in regard to a portion of the globe," and speaks only of rights "therein." The same expression is not made in the dictum of the P.C.I.J. cited by Berber, but it is to be remembered that it was made with respect to the actual competence discussed by the Court, i.e. the right to exercise jurisdiction in respect of acts committed on the high seas. It follows that on the authority of neither of these two dicta does the rule of non-presumption of restrictions on sovereignty extend to acts affecting the territory of another state. Argument otherwise is self-contradictory, and although Berber does not state it in so many words, he does constantly use his rule of non-presumption in respect of acts producing effects in the territory of another state. It leads him first of all to an extensive view of the concept of "domestic jurisdiction."

TERRITORIAL SOVEREIGNTY AND DOMESTIC JURISDICTION

Berber's understanding of the concept of "domestic jurisdiction" may be summarised as follows:

1. The statement of the P.C.I.J. in its Advisory Opinion in *Nationality Decrees in Tunis and Morocco* that "the question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations," can refer either to:

a) "An advance towards an ideal and final stage of development" which "would involve the complete replacement of domestic jurisdiction,"

or to:

b) an advance limited, however, by the fact that "there must be a minimum of subjects which, by virtue of their intrinsic nature, are matters of domestic jurisdiction, unless it is desired to strike at the concept of decentralisation itself which has received such clear expression in Article 2 of the Charter of the United Nations."

Berber does not tell us what he means by "the intrinsic nature" of the matters to which he refers. We are apparently to take it on trust, as we are to take it on trust that the first possibility cannot be sustained a) because the second possibility cannot be doubted and *b)* because "the realities of international life stand out against it in sharp contrast," although again, we are not told what these realities are. Whatever, they are, those realities must, *ex hypothesi,* be present, and hence cannot stand out in contrast against developments which are, *ex hypothesi,* future. And if we are to seek a judgment from history, it surely bears out the thesis of development. Further, merely to deny "this totalitarian conception" (the ideal and final stage of development) is not to establish Berber's alternative. There may be other possibilities. There may be, for example, matters which, although not by their "intrinsic nature" such, are, in practice, left to the domestic jurisdiction by an international law which could, but does not, develop in a totalitarian manner. Such matters need not be constant. Finally, did the "concept of decentralisation" receive such clear expression in Article 2? Before one can answer that question one must interpret Article 2, which is where we came in. And in any case, Article 2 contains two further concepts, intervention and threat to the peace, which are both capable of restriction or extension. It is not far-fetched these days to suggest that gross maltreatment of one's own nationals may, in certain contexts, amount to a threat to the peace. A fortiori an attempt to bring pressure to bear on a neighbouring state by cutting off its water.

Yet how one uses water flowing through one's own state is, for Berber, a matter which "belongs by definition to the domestic jurisdiction of the territorial sovereign." (p. 5). Berber reaches this position via two propositions. First of all, legal questions concerning state territory are essentially domestic matters. Secondly, rivers are undoubtedly "territory." Neither of these two propositions is acceptable. In what is

probably the widest statement ever of the concept of "domestic jurisdiction" (that of Judge Lauterpacht in the *French-Norwegian Loans Case)* only one matter was regarded as exclusively OUTSIDE the domestic jurisdiction — territorial disputes. Secondly, the assumption that "state territory . . . undoubtedly includes those waters flowing within it" (p. 4) is either what we set out to prove, or (if we regard "within it" as ambiguous) begs the question. The source of difficulty of problems posed by international rivers is that -they give rise to conflicts of national interests. An analysis which proceeds on the assumption that they are part of state territory, as such "essentially within the domestic jurisdiction," and consequently outside the scope of regulation by international law in that no restrictions upon a state's right to act as it pleases in respect of them may be presumed renders the conclusion foregone. Without such a presumption, the matter assumes a totally different aspect. It is no longer a case of stating established restrictions and concluding that the residue of acts are licit. The task is rather that of stating established restrictions (duties not) and established privileges and rights. Between these two will appear an area of doubts or genuine lacunae, as opposed to presumptive privileges. This is a distinction of which Berber seems not to be aware, if his characterization of municipal law privileges as lacunae (p. 258) is any indication. It turns upon the distinction between an avowedly developed legal system and one which admits itself to be otherwise. In the former, the legal system embodies a social philosophy which positively dictates certain areas of privilege. In the latter, the philosophical flux renders uncertain or undecided the question of privileges.

Berber frequently emphasises the primitive development of international law. Yet he does not seem at all aware of the corollaries which are two-fold:—

1. The likelihood of genuine erstwhile lacunae.

2. The significance of change.

This unawareness is made nowhere more clear than in his attempted rigid severance of *lex lata* and *lex ferenda.*

LEX LATA AND LEX FERENDA

Berber cites with approval (p. 40) H. A. Smith's words: —

" In the literature of international law there is no mistake which is more prevalent, no mistake which has brought more discredit on our science than the old rooted tendency of all too many publicists to confuse the law as it really is with the law as they think it should be."

He later takes the same author to task for saying (p. 41):

" It must be readily admitted that the general principles put forward here can make no claim to be considered as legal rules in the strict sense. They are far removed from being a legal system and the word 'obligation' has a political or moral rather than a legal significance."

There is a difference between statements of what publicists think the law should be and attempts by them to estimate the actual trend of legal development, whether they like it or not. No-one would disagree that the former are of paltry significance on the international scene. Not so, however, the latter. With one exception, any statement of what the law "is" is an estimate of the trend of development. That exception is actual legal decision, whether judicial or not. This is the only difference in substance and one could not, from the point of view of the efficient use of words, do better than to describe this difference in substance by the terms *lex ferenda* and *lex lata. Lex* is only ever *lata* as exemplified in a particular concrete case. All other statements of what the law "is" involve higher levels of abstraction, hence greater uncertainty. There are, of course, differences in degree. There is, for

example, a greater degree of certainty about the proposition "The I.C.J. will regard treaties as a source of law" than there is about the proposition "Nuclear bomb tests on the high seas are licit"; the *Anglo-Iranian Oil Co.* case, however, illustrates that the scope of the former statement is far from settled.

If the above is true, then we have three types of would-be "law" to contend with:

1. Law as publicists think it should be.
2. Law in the sense of abstract legal propositions more or less established.
3. Law in the sense of concrete events.

A rigid recognition of 3. as *lex lata* and a proscription of 1. and 2. is absence of law in a normative sense. It is clear, in any case, that this is not the distinction that Berber draws. Nor, however, is the distinction between 1. and 2., as witness his chastisement of H. A. Smith. It is difficult to see exactly what distinction he does draw. The terms *lex lata* and *lex ferenda* are commonly used to describe a difference in degree — between more established principles and less established ones. If this is the case, then we shall more accurately represent all aspects of the regulative process in inter-state relations if we accredit to each and every tendency its due weight, rather than observing a simple two-fold distinction between the valid and the invalid. It will be seen below, when we come to consider Berber's treatment of the sources of international law, that he is only too ready to treat as of no value at all any "rule" which is not firmly established.

Even if this is not the generally accepted distinction between *lex lata* and *lex ferenda* the point remains valid as being capable of independent demonstration. It is never enough to state what the law "is," for it becomes history as soon as it is determined. Any writer who is concerned with the aggravations threatened in river law by hydro-electric and irrigational problems is concerned with a prognosis of what law-abiding states, or international institutions or, (rarely) courts and tribunals will do. It is very strongly to be doubted whether the rule that in the case of coast-lines with a certain type of configuration the "general direction of the coast" can be followed in drawing baselines could be considered *lex lata* (i.e. a proposition which would not be seriously contested) in 1950. Yet, as it turned out, it certainly merited consideration as a possibility. It has similarly been recognised as unrealistic to-day (in the sense of detached from the actual present-day attitude of states) to disregard all other tendencies in favour of a 3-mile limit.

One can, of course, claim that decisions such as that of the I.C.J. in the *Anglo-Norwegian Fisheries* case are "wrong," and that the international lawyer is not concerned with the attitudes recently demonstrated at Geneva. To do so, one has to tie him down to the judicial and prohibit trespass into the realms of the legislative. In so far as one does so, one departs from a true reflection of the regulative process in inter-state relations, for legislation is part of it. However, it is doubtful how far it is possible to do so at all.

LAW, EQUITY AND AEQUUM ET BONUM

" It is generally recognised that in the first place there are disputes between states which are not suitable for decision by a court, *e.g.* political as opposed to legal disputes, that in the second place there are disputes which are pre-eminently suitable for decision by a court, and that finally there are disputes which are little suited for judicial decision as this could only settle general aspects of the dispute and not the concrete difficulties involved." (p. 262).

There are many ways of skinning our particular cat, but some require co-operation. It is understandable that Berber's "ideal stage of international water

law" should be "when treaties have been concluded for all waterways of international importance." (p. 272). As long, however, as parties are unable to settle differences by agreement, something other than this must suffice. The choice may be and frequently is, a legal settlement or none, and given such a choice, the suitability or otherwise of other means is irrelevant. This is not to say that any legal solution will do. It is true that a political solution may be preferable to a legal solution (it is, surely, its solution and not the "dispute" which is "political as opposed to legal"). It may be politically expedient to forego one's rights in one quarter to secure an advantage in another. Or it may be that the Law is lacking and the legal solution out of touch with the times. Similarly, some disputes which involve highly technical elements or which form part of larger problems not in issue, might be better understood by experts or in context respectively. In such cases, a legal solution may well fall short of an abstract ideal, but is not without merit if it alone carries some way in that direction.

Some decisions pose serious difficulties for reasons other than these — they involve the application of standards and hence require evaluative judgments. Berber does not refer specifically to this difficulty when he described it as "noteworthy that water disputes are generally agreed to constitute a classical example of disputes which cannot be satisfactorily solved by judicial decisions" (p. 263) but one suspects from his frequent rejection of wide principles that this difficulty plays its part in his thinking. This would seem to be affirmed by his assumption (p. 258) that in municipal law systems "it is not the judge but the legislator who establishes principles" for the filling of lacunae. More than this, Berber seems to assume that a decision is only judicial if it is totally non-creative, hence his statement (p. 260) that:

" The doubts uttered here about the suitability of the judicial process for the settlement of water disputes on the basis of prevailing international law would, of course, be substantially lessened if the court having jurisdiction in a particular case under the legal arrangements between the states concerned were empowered by a special agreement between the parties to give a decision *ex aequo et bono* . . . That would mean that the Court would have to decide according to the non-legal principles of justice, of morality, of usefulness, political prudence and of common sense."

So also at p. 176:

" In municipal disputes the judge has to give a solution according to law and equity of the problem disturbing internal order. In international law the legal question only is to be answered; a solution *ex aequo et bono* is only to be undertaken when the parties have expressly agreed to this, in other words, when they have assigned to the judge a quasi-legislative function going beyond the legal question."

The judicial process, both in theory and practice, involves frequent reference to principles of so-conceived justice, morality, usefulness, political prudence and common sense, for the reason that the law is often meaningless apart from evaluation in the light of such "non-legal" principles. This is not surprising. Law serves a number of interests, which may conflict and which may not be capable of being accurately compared on any scale of arithmetical values, let alone a legal one. Yet in several places, Berber seems to suggest that legal action is completely severed from interests, so that in serving an interest, one cannot be acting in a legal manner. Merely by serving a legally-recognised interest, one is not necessarily acting in a legally-required manner. This, however, is totally different from the mutual exclusion apparent to Berber who says, of a treaty concluded "on grounds of humanity" that for this reason "no recognition of rules of customary international law can be seen in (it)"; and of the Nile Statute, that it can have no significance for customary law purposes since it "is a classical example of what the International Court in the *Asylum* case called considerations of political expediency." He does not, as he claims, have the I.C.J. as an authority for his severance of law and interests for that body's

reference to "political expediency" was for purposes of explaining a diversity in treaty practice and in no way affects the possibility that a state may express *opinio juris* when inspired by political expediency. In fact, most actual expressions of *opinio juris* will have such an inspiration.

The *Anglo-Norwegian Fisheries* case was a highly-creative decision. Yet it can hardly be ignored as a significant international legal event. It had an immediate and final effect on the parties, but it must also have coloured, to some extent no matter how small, the attitude of all states towards the question of base-lines.

Given a creative function such as that which all courts discharge, and which also manifests itself elsewhere *(e.g.* the Uniting for Peace Resolution and action thereunder) and but two courses are open — either to take cognizance of it and thus accurately to reflect the inter-state regulative process, or to ignore it and embark upon a frolic of one's own. To take cognizance of it is far from warranting Berber's scourge:

" That legislation on the international place, in contrast to municipal systems, still proceeds to-day in truly democratic forms, i.e. only with the consent of all parties concerned, will doubtless not please those impatient lovers of regimentation who in reality betray totalitarian and dictatorial desires. But this in no way entitles them to introduce self-created principles in place of the slow democratic process of concluding treaties." (p. 259).

A freudian critique of juristic writings might well yield results but needs to be based on sufficient and accurate data.

Thus, Berber sees sovereignty as being the point of departure in all international legal research. States can do anything anywhere which is not positively forbidden. Particularly, they cannot be positively forbidden to do anything within the domestic jurisdiction in its "intrinsic nature," including any use of rivers. His view of *lex lata* and *lex ferenda* whilst not consistent, at least indicates that anyone seeking to establish a prohibition on state conduct has a very heavy onus indeed to carry, for only those prohibitions which are already clearly established need be taken heed of. The attempt may in any case be predestined to fail for legal settlement is unsuitable for river disputes. On these principles little can be achieved. This becomes more clear when one considers that they colour Berber's view of the nature and use of sources.

THE SOURCES OF INTERNATIONAL LAW

It is possible, in principle, to take as one's exclusive source of international law what Grotius or even Adolf Hitler said. Such a standpoint would be unsatisfactory only in that it would not accord as accurately as it might with the actual attitudes which govern the relations of states via diplomatic channels, international institutions and other agencies. To a much lesser extent, but similarly so, it is considered that Berber's view of sources leads to disparity. Whether his view is sufficiently representative to be useful is something which, to a large extent, the reader must judge for himself. In some respect, however, queries may be raised.

1. *Treaties*

There are many treaties establishing regimes for certain rivers and basins and in his exhaustive enumeration of them lies one of the chief values of Berber's book. Berber's ideal stage is when such treaties cover the field (p. 272). Not any treaty, however, will suffice. Berber refers expressly to one common type of treaty, (which refers the settlement of a statute to a technical commission, favoured by Berber) which does not of itself offer any solution (pp. 268-270). He points out, (pp. 155-156) that many treaties do little more than leave to the parties the resolution of problems

by agreement; yet he does not comment that such treaties are no solution, doing nothing more than to rephrase the question. Yet other treaties contain built-in standards of "reasonableness," "justice," "fairness," "equitableness," etc., which do nothing to solve the problem, of which Berber is so acutely aware, of judicial grappling with standards. Finally, assuming that the ideal stage is one day reached, what about the day after and the *clausula rebus sic stantibus?* Is hydro-electric power no more important now than it was in 1900? Can anyone confidently predict that it will retain its present comparative importance in face of the development of nuclear power?

2. *Customary Law*

It is in his techniques for discovering customary law and in his view of its essential elements that the most serious criticism of the author is to be found. Continually, one has to reappraise his judgments. For example, in searching for evidence of customary law, he seems to do less than justice to the German *Staatsgerichtshof* in respect of its statement in the *Donauversinkung* case that:

" No state may take measures on its own territory concerning an international watercourse which will affect the flow of water in the territory of another state to the disadvantage of the latter. This is an already generally recognised rule of international law . . . "

Berber considers that "the whole formulation, and especially the words "principle" and "generally recognised" used elsewhere in the judgment, make it probable that the *Staatsgerichtshof* was thinking not of rules of customary law, but rather of "general principles of law recognised by civilised nations." The full phrase actually used by the Court was "general principles of international law." The Court undertook no detailed survey of municipal law such as one would have expected if they were concerned as Berber suggests. Finally, if Berber is right, why does he not consider this decision in his section on "General Principles of Municipal Water Laws?" It is surely as important as water-shortage in Morocco.

Particular attention will be directed towards Berber's view of the elements of customary law.

Berber seems to take a view of practice which is narrower in some respects, yet broader in one, than some usually taken. It is broader only in the sense that he is prepared to examine municipal court decisions, municipal legislation, etc., as sources of customary law. It is narrower in that he devotes no consideration at all to manifestations of state practice in acts actually done, or claims made via diplomatic channels. We are given very little discussion of the course of dispute and negotiation in relation to some of the more important river controversies. To mention but a minor point, it might have repaid examination had some attempt been made to analyse actual state control in river areas. Where, for example, are boundaries marked? Where are customs posts established? How is navigation in fact carried on on rivers not subjected to a treaty-regime? What about fisheries? Treaties, municipal legislation, municipal decisions and diplomatic correspondence are usually only express in the area of dispute or potential dispute. They are likely to yield nothing where practice is stable and harmonious, in which case it is anything but insignificant.

His search for concordant practice amongst the sources which he does examine is also questionable. The concept "river law" is compounded from fragments such as "river navigation law" and "water extraction law," in the same way that the concept "drink" may be fragmented into "tea," "coffee" and other liquids. The fact that a certain Englishman drinks coffee whilst a certain American drinks tea does not entitle me to conclude that no concordant practice is to be found in drinking habits

amongst humans. It may be that they all drink, it may be that they all drink coffee *or* tea; it may be that they all drink coffee *and* tea. Analogously, it is difficult to be convinced of the validity of Berber's approach which seeks to regard as "regional" international law a concordant practice when it is found, and which seeks to regard a concordant practice as absent where two treaties, dealing with different aspects of "river law," fail to correspond. An examination of treaties, with a view to discovering concordant practice should not be carried on, as Berber does, in isolation from other sources. A practice which appears spasmodic in treaties, may be supplemented by municipal legislation. Further, a true search can only be carried on if the materials are divided into their lowest common denominators which may then usefully be examined. Only at this atomised level will *concordant* and *discordant* practice be discovered. We are not given such detailed treatment, and hence many conclusions, provided that they are not negatived by the single practice of one state, remain open and possible.

Berber's understanding of the requirement of *opinio juris* will not be acceptable to all. A state may form the necessary animus with extreme reluctance and for a variety of motives, simply by being forced by the tide of events to the conclusion that a particular practice must be regarded as binding. For this reason, it is confusing to regard *opinio juris* as a species of free choice. The United Kingdom could hardly be said to have chosen the criterion of the general direction of the coast for determining Norway's baselines, but it is manifest that since the judgment in the *Fisheries* case she has the requisite *opinio* apropos them. In that same case, dicta as regards half-hearted French protests in the 19th century suggest that there may be a presumption of *opinio juris,* given all the other requirements of custom, in the absence of strenuous and continuous protests. This is far from the positive and completely discretionary attitude which Berber seems to regard as the only form of *opinio juris.* Thus, speaking of the U.S. Mexican Treaty of 1944, (p. 147), he denies that it could have involved "recognising customary law obligations under international water law" not only on the grounds that the statements made concerned "reciprocal obligations" and not "legal obligations" or "international law obligations" but also on the ground that since in previous treaties such involvement had been expressly denied, clear words, and not mere silence, would be necessary for it. One may perhaps be forgiven for wondering if the omission of an express denial of general effect might not be significant.

At pages 141-2, we are presented with a similar argument. The failure of Germany and Poland to implement the general terms of the post 1919 Peace Treaty by means of progressive regulations is attributed to the "less satisfactory political relations between the two countries." Criticism is then levelled against the German *Staatsgerichtshof's* decision in the *Donauversinkung* case in the form of the question: "But how is it possible to speak of binding rules of international law, as did the *Staatsgerichtshof,* if they can be pushed aside by political considerations?" This is either a confusion of the normative with the causative (murder remains prohibited although committed) or a misunderstanding of the effect upon customary law of failure to treat. There is, further, the assumption recurring throughout the book that not only practice but also *opinio juris* is required to be continuous. In his discussion of the U.S. - Mexico treaty of 1944 (pp. 146-148) Berber confines himself to an examination of the intention of the U.S.A. in concluding it. He is not concerned with the examination of such practices as it might evidence because he deals with none of its operative provisions. He then states: "It would in any case be difficult to decide upon the existence of rules of customary law on the basis of a single treaty." One could not infer a practice from a single treaty, but one could surely infer *opinio juris* from any single statement. Finally, the attempt to negative *opinio juris* by reference to the motives of the state apparently demonstrating it is futile as well as unconvincing, in the absence of any doctrine requiring a certain motive as integral in *opinio juris.* The suggestion that *opinio juris* can only be manifested where it is politically inexpedient is the logical extension of this type of argument.

One is also entitled to dissent from Berber's view of Municipal law as a source of the law (pp. 168-184). The chapter opens with a misunderstanding of the characterisation of municipal law as fact, by the P.C.I.J. in the *Case of Certain German Interests in Polish Upper Silesia.* Berber says: "The existence of rules of municipal law as such is no proof of the existence (or, admittedly, of the non-existence) of rules of customary law, having an identical content." This may be so, but it in no way follows from the above characterisation. A practice is a fact. *Opinio juris* is a fact. Lauterpatcht was not suggesting, in the statement quoted by Berber at pp. 169-170, that municipal law was relevant as law. On the contrary, his express words are that "uniform municipal legislation constitutes in a substantial sense *evidence* of international custom," and Berber's attack was therefore misdirected. He also relies upon the differences in the judicial function and purpose of legal regulation on the international and municipal plan as rendering municipal law inapplicable on the international level, (pp. 173 and 176). These points also become irrelevant if one views municipal law as evidence rather than as law.

GENERAL PRINCIPLES OF LAW

Apart from the technique of Berber's study, which is considered separately below, attention will be focussed on two attitudes of considerable importance, and one minor preliminary matter.

At p. 191, Berber considers whether the "general principles" of law can mean general principles of international law as well as of municipal law. One may sympathise with his conclusion that they cannot, but one is not compelled to it by him. He says:

" The normal sources of international law are either treaties or customary law. When principles may logically be drawn from treaties, then they are rules of customary international law based upon international treaty practice. If principles can logically be drawn from state practice other than treaty practice, then they are once again rules of customary international law. If Article 38(l)(c) is to have any meaning in practice, then it can only mean additional principles, which must be inferred from other sources than treaties or customary law, that is from municipal law." The error consists in the assumption that one requires nothing more than that a principle can be extracted in order to establish customary law. This is not so; one requires *opinio juris,* the attitude which regards the principle as binding as international law. Supposing that in a number of bilateral treaties, all civilised nations subscribed to the same principle as regards one only of their neighbours, what then?

The other two matters are of a different order entirely. The first of them is that "legal rules of municipal law cannot as such be taken over into international law, but only general principles derived from such rules of law." (p. 191). Berber cites in support of this proposition Ripert who, however, is seeking to establish the wholly different proposition that a discrepancy in the detailed rules does not necessarily mean a diversity in principle. The importance of this attitude becomes clear later when Berber rejects most of the principles which he can find as being too vague to be workable on the level of actual dispute. The second of the two main points of criticism is Berber's emphasis that "Not all general principles which are consistently found in the main legal systems are helpful for international law, but only those which provide a solution for a problem analogous to the international law problem requiring solution." At face value, this is a proposition which would be readily subscribed to. However, at pp. 172-176, Berber has listed what he considers to be vital differences between municipal law and international law when analogy is being considered. He says:

" It is true that the federal constitutional law valid in the relations between the federated states has a certain skeleton similarity with international law which governs the legal relations between sovereign states; the underlying principles in international law are, however, quite different from those in constitutional law. In municipal law, and thus in federal law also, the sanctions of international law such as self-help, retortion, reprisal, intervention, the breaking off of diplomatic relations, economic war, traffic war, cold war, even actual war, which are an intrinsic part of sovereignty, do not exist. The primary purpose of municipal law, on the other hand, whether in a unitary or in a federal state, is to ensure the peace and order of the state as a whole."

We are thus forewarned of what turns out to be the most important criticism of the alleged general principle of good neighbourship (p. 222):—

" It is, however, certain that neighbourship relations between states are something fundamentally and essentially different from neighbourship relations between private law persons in municipal law. The restrictions imposed by municipal neighbourship law on property exist because the municipal neighbours are not sovereign. Sovereignty is an attribute of a sovereign, while property is not an attribute of the property owner, but an institution, a creation of the state, to which a large number of restrictions are attached. Property implies a legal power of disposal which is accorded by municipal law within a particular legal framework. It is never absolute; its restrictions, of which neighbourship law restrictions are only a small part, are inherent in its concept."

and also of the flaw in the alleged principle of municipal water laws:—

" This principle cannot be taken over into international law, not only because the criteria of division remain completely indeterminate, but above all because the application of these criteria presupposes a right to divide the water, and no third person can have this right under international law, apart from the parties themselves." (p. 255).

Leaving aside the question whether these distinctions are more than verbal, there is surely a difference between identity and analogy. If there is a difference, it lies in the relevance of certain facts. Identity requires that all the facts be the same. Analogy requires only that those facts regarded as material for purposes of the point under discussion be the same. Is it really material to consider the absence of compulsory jurisdiction in international law? Is the analogy destroyed for all purposes because it can only apply in some? Finally, of course, these differences are always present. If they are considered as destroying any analogy, then Article 38(l)(c) stands nullified, the principle of effectiveness notwithstanding.

One gathers, from his chastisement of the carelessness of others (p. 205) that Berber is aware of the importance of detailed analysis when attempting, as he does, a comparison of juristic writings (pp. 11-44), and a comparative study of various municipal law systems in order to isolate general principles. (pp. 185-255). His work in these two fields nevertheless appears to be somewhat uncritical.

He approaches "The Teachings of Publicists" from the point of criteria which are possible in principle. These are, he says, logically fourfold: 1) The principle of absolute territorial sovereignty; 2) The principle of absolute territorial integrity; 3) The principle of community; 4) The principle of restricted territorial sovereignty and integrity. Berber purports to find protagonists of all four principles amongst the writers. In support of the principle of absolute territorial sovereignty, he cites statements of ten authors. Of these, that of American Attorney-General Harmon is a statement made by a state representative in the context of a particular dispute, a brief rather than a judgment, and as such, of importance as evidencing state practice for purposes of customary law, rather than as the teaching of a publicist; that of

Kluber, as quoted, begs the question in that he accredits to states "free and exclusive use of prerogative water *rights* to their full extent"; that of Heffter, as quoted, is simply a statement of what "supreme territorial power" in respect of land and waters is, and not a claim that states enjoy it; those of Bousek (p. 15), Schade (p. 16), Mackay (p. 16), Simsarian (pp. 16-17) and Briggs (p. 19) accede to an absolute principle only in respect of certain aspects of water law, and not water law as a whole. Bousek excludes drainage. Schade excludes navigation and is somewhat unfairly taken to task in that he is "not aware of the far-reaching implications of his assertions for other uses of water." Mackay excludes navigation. Simsarian excludes boundary streams. Briggs does not concern himself with them. That leaves only Hyde and Fenwick. Part of the quotation from Hyde is the following:

" The situation may, however, be otherwise, and point to no actual advantage derived from diversion which is comparable in degree to the damage inflicted upon another riparian state. Whether in such case the continued taking of water, regardless of the obvious result of so doing, amounts to abuse of power, may still be in fact regarded as a moot question."

Fenwick, who is alleged to "underline the aspect of independence even more strongly" (p. 19) states: "It is doubtful whether international law can be said to have recognised any servitude corresponding to that existing in civil and common law in the form of a right to the uninterrupted flow of streams and rivers."

Similar results are yielded by an examination of the authors cited in support of the other principles, excepting the one of relative territorial sovereignty and integrity, under which rubric most seem to belong in one degree or another, *e.g.* those of Schenkel (p. 20) and Fleishmann (pp. 21-22). As an illustration, it is interesting to compare Kluber, the exponent of absolute sovereignty, who says: "The independence of states shows itself above all in the free and exclusive use of prerogative water rights to their full extent," with Huber, listed under territorial integrity, whose statement is that "every state must allow rivers, over which it does not exercise unrestricted territorial sovereignty ... to follow their natural course." These seem to me to be able to stand together quite harmoniously. There are differences among the people cited by Berber, but they are mainly differences as to where the line should be drawn in framing a principle of restricted territorial sovereignty and integrity. An enquiry directed along these lines would have yielded more fruitful results.

Those results might have been even more useful if they had been combined with a detailed analysis of water law into sub-compartments, *e.g.* navigation, drainage, riparian rights; boundary streams and trans-boundary streams. This is noticeably absent in his treatment of the principle of community in property where he also seems to draw no distinction between communal property (as witness his adoption of Ovid's "*usus communis aqiiarum est*") and joint property vested in two riparians (pp. 22-24).

More serious, because he is dealing with a more important source of law, is Berber's mishandling of "The General Principles of Law." There are important defects here. The first is that Berber's surveys are not carried out in sufficient detail; the second is that there is again a failure to break down material in order to render possible a detailed comparative survey. The sum total of the material on which Berber concludes that "the very existence of the concept of the abuse of rights in common law is denied" (p. 202) is the following quotation from *Halsbury:*

" If a man erects a wall on his own property and thereby destroys the view from the house of the plaintiff, he may damage him to an enormous extend. He may destroy ¾ of the value of the house; but still, if he has a right to erect the wall, the mere fact of thereby causing damage to the plaintiff does not give to the plaintiff a right of action."

Surely, other aspects of nuisance *(Christie* v. *Davey; Emmett* v. *Silver Fox Farm);* qualified privilege and fair comment in defamation; and conspiracy, should have been considered, even leaving aside the meaning of "right" in the statement quoted from *Halsbury.* The semantic hurdle is one which Berber does not seem able to cross. His discussion of Italian law opposes Article 7 of the Civil Code ("No one may exercise a right in a manner contrary to the purpose for which that right has been granted to him") with a statement by Barassi that the concept of abuse of rights is an absurd concept since a person either acts within the limits of his right, in which case there can be no talk of abuse of rights, or he acts contrary to the right, in which case the concept is superfluous. The very essence of the doctrine is that it operates pre-conditionally to the existence of the "right" (as used by Barassi) and such facile reasoning as Barassi's is not to be relied upon. If it were, then his own statement cited on p. 213 would be absurd by his own criterion.

Nothing in Berber's inadequate treatment of abuse of rights affects Lauterpacht's conclusion that "the difference between the different systems of law exists as such mainly in the differing ways of handling the factor of malicious intention." One does not require unanimity on all aspects, as Berber suggests (p. 207). One requires a common denominator. The reason for Berber's difficulty appears in his conclusion on p. 208, that "It is simply not true that in municipal law a rule or principle exists which prevents me from exercising my rights when this exercise would result in damage to another." It was foregone. Had he phrased a minimal question in these terms: "Does the legal system in question allow all acts which are otherwise licit to be perpetrated regardless of motive and regardless of the fact that injury is caused to another although no benefit accrues to another" he would have reached a different conclusion, for he cited no system which would have answered "Yes." He admits this in the last paragraph of the section on abuse of rights (p. 210) almost as an afterthought. Development of this paragraph by means of a consideration of its actual application to water law occurs nowhere in the book. One is tempted to the conclusion that Berber is reluctant to be constructive.

It takes Berber less than one page to admit the general principle of "good faith." There is again, however, no consideration of its applicability to water disputes. We are merely told that "No-one has yet asserted that this principle can serve to provide a solution of a concrete problem of international riparian rights, and in view of its vagueness this is not at all to be assumed." (p. 211). First of all, the vagueness of the principle can be dispelled at least to some extent by examining its working in fact in the municipal law systems from which it is drawn. This is not attempted. Secondly, if no-one has yet asserted that this principle can serve to provide a solution of a concrete problem of international riparian rights, the reason probably is that the principle is one of good faith in all legal acts, concrete problems of international riparian rights included, where bad faith is possible. An express assertion in relation to a particular branch of the law would be unnecessarily repetitive. Whether the principle will provide a solution is, of course, a different question, and depends upon the particular situation, as does the question whether self-defence will provide a solution.

The principle of good faith can be attacked on grounds of utility. It poses severe evidentiary problems. Berber seems unaware of Judge Lauterpacht's attack in the *French Norwegian Loans Case* and does not take this line.

It is in his failure to break down his materials that the chief fault of Berber's search for general principles lies. His comparative survey of the municipal laws of various countries includes the following statements:

" In Baden, property in water means property in the river bed and in appropriated water, but not in flowing water." (p. 229).

" In Morocco the Director-General of Public Works can, in the case of water shortage, temporarily regulate the distribution of water in order to supply the population and its cattle with drinking water. The Government can also establish water reservoirs on the upper parts of water courses in order to obtain water for power, irrigation or drinking water." (p. 236).

It is not surprising that there should appear to Berber to be "a confusing abundance of rules" and that it should seem "impossible to deduce from this material 'general principles of law recognised by civilised nations'." (p. 253). One requires to know the meaning of "property in water" according to the law of Morocco and the scope of powers of public control in Baden before any comparison can he made.

It is not enough merely to provide a little information about a lot of laws. This can yield neither positive results nor negative ones. The method which Berber so frequently and rightly criticises, that of basing conclusions on a lot of information about a few laws, at least has the merit of being able to yield negative results.

SUMMARY

In writing this book, Berber took a tremendous lot on himself. Any foray into "General Principles of Law" on any topic is an ambitious project for any one man for the materials are so vast. In the nature of the beast, anything less than a complete and thorough survey cannot yield reliable conclusions. It is work which needs desperately to be done, for the other sources of international law are, in our times, a poor fount. For this reason, one cannot but sympathise with the man of ability who makes the attempt.

The question which we should continue to ask ourselves is whether international legal research is, as yet, adequately organised to discharge the function which falls to it? Group research is no doubt less satisfying for the creative mind, but promises more.

This, however, is less than half the problem. What is more disturbing is that international lawyers should be so divided on questions of technique and criteria of legal character that it should be possible to doubt, almost in their entirety, the conclusions of a work such as Berber's. Questions of value pose problems enough for the social scientist as compared with his counterpart in the natural sciences. It cannot be assumed that his work is less important.

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