A Re-consideration of the Doctrine of International Servitude

D. P. O'CONNELL*
Auckland, N.Z.

During the decade immediately following the first World War much discussion was devoted to the question of the existence or otherwise of international servitudes. The controversy was stimulated by attempts during those years to impose on a number of international waterways a status designated to be in perpetuity and to be independent of changes of sovereignty over the contiguous nations. After an eclipse of some years the doctrine of international servitude has once more been rendered topical by two recent events, firstly, the advisory opinion of the International Court of Justice on the status of South West Africa and, secondly, the present controversy between Great Britain and Egypt over the status of the Suez Canal. In view of the importance of these two issues it is appropriate to devote some consideration to the history and character of the doctrine of international servitude and to a summing up of the controversy over it that occasioned interest in the early thirties.

The concept of international servitude is not new. At least since the seventeenth century it has been recognized that states are competent to create by convention over a defined territory a status that is independent of the personality of the administering power. Sovereignty as it was first formulated was a relative notion, and there was no difficulty in conceiving of a self-limitation of sovereign power over a territory, or of a permanent and indefeasible restriction on the administrative competence of an independent state. It was only with the invention of the myth of absolute sovereignty in the nineteenth century, and the assertion of the unrestricted capacity of the omnicompetent state, that the concept of a delimited territorial status came to be challenged.

The distinction between a convention which merely creates

* D. P. O'Connell, LL.M. (N.Z.), Ph.D. (Cantab.); lecturer at Auckland University College in Jurisprudence and Roman Law; and a member of the New Zealand Bar.
rights and obligations *in personam* and one which impresses on a territory rights and obligations *in rem* was explicitly drawn by Vattel. He wrote:

We must not confound those treaties or alliances which, since they impose the obligation of repeated acts on both sides, can not remain in force except through the continued existence of the contracting powers, with those contracts by which a right is once for all acquired, independently of any subsequent acts of either party. If, for example, a Nation has granted in perpetuity to a neighbouring prince the right to fish in a river or to keep a garrison in one of its fortresses, the prince does not lose his rights even though the Nation from which it has received them should happen to be conquered by, or in any other way subjected to the control of, a foreign Power. His rights do not depend upon the continued existence of the State from which he received them, for the latter alienated them, and its conqueror could only take over what it actually possessed.\(^1\)

To treaties which are intended to impress upon a territory a permanent status, Westlake applied the term "dispositive".\(^2\) It is a term which has gained considerable currency. "Dispositive treaties", asserted the Swiss Government in its counter-memorial in the case of the Free Zones of Upper Savoy, "transfer or create a real right. And real rights in international law are those which are attached to a territory, and which essentially *valent erga omnes.*"\(^3\) The classical examples of such treaties are those which provide for demilitarization or neutralization of defined territories, or create rights over water. It is not surprising that the concept of servitude was imported to designate the status created by such a treaty. There appeared indeed to be a clear analogy with the praedial servitude of Roman law.\(^4\) There was a dominant power in whose interest the status was created, a servient power whose sovereignty over the territory was restricted. The beneficiary was considered to possess equitable property in the relationship established between it and the servient state. A status of this character was usually constituted in the instrument of transfer of territory from one sovereign state to another. The instrument was conceived to be a conveyance rather than a contract, and the transferee accepting the dispositive obligations was regarded as possessing for the future no more than the conveyance assigned to it. The covenant was furthermore alleged to "run with the land" so as to bind any successor in sovereignty. The essence of the "regime" was *sui generis* and independent of the existence or will of the contracting parties.

---

4. Lauterpacht, Private Law Sources and Analogies of International Law (1927) p. 121.
It was natural that the term "servitude" should be employed to define a dispositive status in countries whose legal systems are based on Roman law, or at least in which Roman law plays an important part in legal education. It was equally to be expected that the term should invoke criticism in common law countries and especially from the school of thought that attributes absolute competence to a sovereign state. The granting of a dispositive status, it has been contended, is a concession of national sovereignty dictated by the state's own interest and sustained by its own will. Remove the interest and the will and the regime loses its rationale. The link between the parties to a dispositive treaty is essentially contractual, and Professor Cavagliieri sums up the argument in the assertion that "the personal character of the relationship is decisive".

This positivistic theory derived some comfort from the celebrated discussion in the North Atlantic Fisheries Arbitration in 1910. An Anglo-American treaty in 1818 had confirmed the "liberty" of United States citizens to fish on the coast of Newfoundland. By the beginning of the twentieth century "regulation" of these rights had become essential, and since no agreement as to the method of this regulation was possible between Great Britain and the United States, the matter was referred to a tribunal. The United States alleged that the rights in question constituted a servitude identical in construction with that of Roman law, and the tribunal was thus forced to consider the validity of the analogy. It found that the doctrine of servitude had originated in the "obsolete conditions" prevailing in earlier times, and that a partition of sovereignty had not been admitted in modern practice. The rights of the United States did not, therefore, constitute an international servitude.

Too much has been claimed for this decision by the "absolute
sovereignty” school of thought. The tribunal did not deny that “real rights” can exist in international law. It merely decided that no rights exactly analogous to praedial servitudes had been recognized in modern international law, and that in any one case the creation of a real right would have to be proved by “express evidence of international contract”. In the case of fishery concessions, since their rationale is always a variable economic environment, it is very doubtful indeed if real rights are ever intended to be created, and the tribunal was probably right in rejecting the argument of the United States on that ground.\textsuperscript{8}

A more careful analysis of the real character of international organization and solidarity is believed to disclose that dispositive rights in the traditional sense can and are created over territory.\textsuperscript{9}

Nor is it necessary to attempt a reconciliation between such rights and the concept of absolute sovereignty. Sovereignty is not absolute, and there is no reason why a territory should not be impressed with a regime that is essentially a limitation of sovereignty. A state which, for example, depends on the co-operation of its neighbour in the maintenance of a hydro-electric dam on a bound-

\textsuperscript{8} (1914), 8 Am. J. Int'l L. at pp. 859-860. There are, however, many examples of such rights. See, for instance, those accorded to France in Newfoundland in article 13 of the Treaty of Utrecht, 1713. Similar rights were created over the Columbia River by the Treaty of Washington, 1871: Malloy, Treaties etc., (1910) vol. I, p. 710. See also the boundary treaty relative to the Gold Coast between Great Britain and France in 1893: Hertslet, The Map of Africa by Treaty (1894) vol. II, pp. 229-230.

ary river would be in constant uncertainty about its economic future if the neighbour or its successor in title were not obliged in perpetuity to refrain from interfering with the dam. International order demands that territories at times serve the essential interests of neighbouring states. There are many examples of the creation of such correlative rights and obligations. There is the right of way which Germany acquired over the Polish Corridor in the Treaty of Versailles. There are also the irrigation provisions in the same treaty giving France the right to draw water from the Rhine, and imposing on Germany an obligation which was the essential corollary of this right, the obligation not to construct canals on the German side of the river so as to reduce the level of the Rhine and render the French works inoperative. There are, in addition, the historical cases of neutralization and demilitarization of territory, and the status of international waterways which will be discussed later.

It must be admitted, however, that the term "servitude" is ambiguous when applied to a status created under international law. It implies too rigid an adherence to the technical principles of Roman law, and it must be recognized that the analogy between the servitude of international law and of Roman law cannot be pushed too far. Multilateral conventions have designated a territorial status in the interest not of one power but of several powers or of regional organization and security. The territory so defined cannot be said to be servient to these several powers or to the international community in the same way as the land of one man can be servient to that of another. The status is rather a restriction of sovereignty in the interests of international order. Because the analogy with Roman law breaks down, however, it does not follow that a dispositive status fails to survive changes of sovereignty. Let it be understood that the status is an indefeasible

10 British Treaty Series, 1919, No. 4 (Com. 152), Art. 388.
11 Oppenheim is not in favour of treating neutralization as a real right, op. cit., vol. I, p. 492, n. 1.
13 See on the question of military servitudes created in the interest of the community of nations: Lauterpacht, op. cit., pp. 123-124; Fernand de Visscher in Revue de droit international et de législation comparée, 3rd Ser., vol. II (1921) p. 251.
14 Miss Reid in her admirable book betrays too great an adherence to an outmoded view of sovereignty when she tries to avoid the conclusion that real rights are a limitation of sovereignty: International Servitudes in Law and Practice (1932) pp. 29-30. See the same author in Recueil des cours de l'Academie de droit international, vol. 45 (1933) pp. 15 et seq. See also Fernand de Visscher, loc. cit., p. 252; Potter, loc. cit., p. 628. On the other hand see Vali, op cit., p. 18.
one, the essence of which is neither the wills of the contracting parties nor the subservience of the one to the other, but the higher norm of the solidarity of international society. In the sense defined, and provided that the analogy with Roman law be recognized to be incomplete, the term “servitude” will suffice to define this status as well as any.

There are many examples of regimes created in the interests of one state only. In the Treaty of Paris, 1763, France accorded to British subjects in perpetuity the free navigation of the Mississippi. The United States claimed to have inherited British rights and pressed them against Spain as the successor of France. Customs advantages accorded to the United States by Hanover were similarly alleged to bind Prussia as the successor of Hanover. An even more explicit pronouncement in favour of the concept of international servitude was made by the United States in 1903 when it was asserted that a right of way granted over the Isthmus of Panama by New Granada in 1846 was “a burden on the territory in the nature of a covenant running with the land, to which the rights and benefits of which the new State of Panama succeeded”. Furthermore, Finland, in 1920, in an exchange of notes with Sweden and Norway recognized that she was obliged by treaties of Russia relating to the floatage of timber. Had these various conventions been nothing more than contracts they would have lapsed under the ordinary law of state succession upon substitution of the one sovereignty for the other.

Recent research in the Foreign Office archives has brought to light an opinion of the Law Officers of the Crown which makes explicit this distinction between personal conventions and dispositive ones. A treaty of 1825 between Great Britain and Russia accorded to British subjects the right in perpetuity of navigating the rivers which flow from Canada through Alaska to the Pacific. Alaska was ceded by Russia to the United States in 1867, and subsequently the question arose whether or not the British rights had been abrogated by article 26 of the Treaty of Washington of 1871, which accorded to British subjects the right of free navigation over only three of these rivers. The Government of Canada referred the matter to the British Foreign Office, which took opinion of the Law Officers, inquiring whether the Government of

16 Reid, op cit., pp. 157 et seq.
17 Crandall, op cit., p. 481.
18 Foreign Relations of the United States, 1903, p. xxxiii. See also Reid, op. cit., p. 126.
19 Udina, loc. cit., p. 738.
Canada could "still claim from the United States the right of navigating freely without any hindrance whatever all the rivers and streams which, in their course towards the Pacific, may cross the line of demarcation established in the Treaty of 1825". The Law Officers replied that "the rights conferred by the Treaty of 1825 were not, in our view, affected by the cession to the United States, inasmuch as Russia could cede only what she had".20

The classical examples of servitudes created in the interests of one state only are those designated on the borders of Switzerland in the treaties restoring the status quo of that nation at the end of the Napoleonic Wars. The Treaty of Paris, 1815, embodying article 92 of the Act of the Congress of Vienna, neutralized areas in the Province of Savoy known as the Zones of Chablais and Faucigny.21 No fortifications were to be erected there, and the zones were not to be garrisoned in the event of war. The Treaty of Turin, 1860, by which matters arising out of the transfer of Savoy to France were disposed of, recognized that "Sardinia could transfer the neutralized parts of Savoy only on the conditions under which she possessed them".22 French jurists have regarded the obligations in question as being imposed on France independently of the provisions of the treaty of 1860.23 The fortress of Hüningen and its adjacent territory was also demilitarized in the same treaty, and when Alsace was ceded to Germany in 1871 the status of Hüningen was regarded as being unaffected by the change.24 The Treaty of Turin of 1816, which fixed the political frontier between Switzerland and Sardinia after the Vienna settlement, also restricted the levying of customs duties within the Zone of St. Gindolph separating Geneva from the defined frontier.25 A dispute developed between Switzerland and Sardinia over the interpretation of this treaty, and a settlement was arrived at which was promulgated by a manifesto of the Royal Sardinian Court of Accounts in 1829, which abolished the customs office in the village of St. Gindolph.26

20 Opinion of 4th April, 1898, Foreign Office Confidential Papers (7199) No. 37.
24 Udina, loc. cit., pp. 377 et seq.
26 P.C.I.J. Ser./A/B, No. 46, p. 145.
The Zone of St. Gindolph was included in the territory which was transferred by Sardinia to France in 1859. As a customs free zone it was assimilated to the Zone of Gex, which France had agreed in the Treaty of Paris to be forever free in the interests of the Canton of Geneva. Both the districts of Gex and St. Gindolph continued until 1919 to be exempt from French customs regulations, but in that year France suggested to Switzerland that an agreement be arrived at that the status of these zones had lapsed. The correspondence with Switzerland was included in article 435 of the Treaty of Versailles in which the restrictions on the zones were described as being no longer consistent with existing conditions. Switzerland subsequently objected that the article was ineffective without the consent to abrogate the regime, and eventually the matter was referred to the Permanent Court of International Justice. The latter discussed at length the exact character of the obligations imposed upon the administration of the districts. It was clearly in favour of the view that rights in rem in relation to Switzerland had been created and attached in perpetuity to the land. The Manifesto of 1829 was considered to have settled with binding effect the objective law that was to determine the conduct of the parties, and this was independent of their will or interest. The concord of wills expressed in the treaties "confers on the delimitation of the Zone of St. Gindolph the character of a treaty stipulation which France must respect as Sardinia’s successor in sovereignty over the territory". As to the Zone of Gex the court was of opinion that an "actual right" has been created, meaning thereby a territorial right, or right in rem.

This view of the legal effect of the Manifesto of 1829 provides an interesting precedent for Great Britain in her present dispute with Iran over the nationalization of the Persian oil industry. The concession of the Anglo-Iranian Oil company was negotiated in 1932 as settlement of a dispute between Great Britain and Iran. Iran had indicated her intention of abrogating the existing concession, and Great Britain had placed the matter on the agenda of the Council of the League of Nations, which appointed Dr. Benes as rapporteur to arbitrate a settlement. The settlement was actually arrived at independently of his ministrations, but while the dispute was still sub judice. Great Britain now alleges that the concession of 1932, constituting in effect a memorandum of settle-

29 Ibid., p. 145.
30 Ibid., p. 147.
ment, impresses on Iranian territory a dispositive obligation. In asserting this contention she relies on the decision of the Permanent Court of International Justice on the character of the Manifesto of 1829, which was also in effect a memorandum of settlement and which was held to be of dispositive effect.

It is not only in the interests of one state that servitudes in the sense defined can be created. Real duties have not infrequently been constituted in the interests of world or regional security or solidarity. The most important example of such a status is that created over the Aaland Islands by a convention of 1856 between France and Great Britain, on the one hand, and Russia, on the other, whereby the latter agreed to the demilitarization of the islands. The islands occupy a strategic position in relation to Stockholm, and Sweden had an interest in the status created independently of her contract. In 1919 sovereignty over the Aaland Islands passed to Finland, and Sweden sought to hold Finland to the obligations contracted by Russia. A dispute having developed, the Council of the League appointed a Committee of Jurists to report on the validity of the Swedish claim.

It is true that the committee questioned the existence of the notion of servitude in international law. It seems, however, to have intended no more than to doubt if the praedial servitude of Roman law in the "true technical sense of the term" had been imported into international law without modification. It was in fact clearly in favour of the existence in international law of rights in rem, whether or not they be defined as servitudes. The stipulations of the convention of 1856, it was reported, "constituted a special international status, relating to military considerations, for the Aaland Islands. It follows that until those provisions are duly replaced by others, every state interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarization established by these provisions. The recognition of any State [it went on] must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or by definite international settlements relating to territory."

The Report of the Committee is thus important, not only for its explicit pronouncement in favour of the existence in international law of the concept of dispositive obligations, but also for

---

its insistence that a territorial settlement created in the general interest of nations implies a right to its recognition on the part of every "interested State". This right is a natural corollary of the fact that "Powers have, on many occasions since 1815, especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties".32

A new interest has been stimulated in the concept of a servitude created in the interests of international co-operation by the remarkable dissenting opinion of Sir Arnold McNair delivered to the International Court of Justice in 1950 on the status of South West Africa. The court was concerned to analyze the obligations which South Africa had undertaken with regard to this territory under the mandate system of the League of Nations. Because the League had disappeared, it was necessary to determine whether or not the rationale of the mandate system had likewise disappeared, and whether or not South Africa was still obliged to conduct her relationships with the territory on the basis of the mandate agreement. Sir Arnold was of the opinion that sovereignty over the territory was limited, and that a special status has been stamped on the territory which was independent of the existence or otherwise of the instrument by which it was created, or of the organization towards which the mandatory's obligations were contracted. South Africa could assume over the territory no more rights than she had been given. "From time to time", he said, "it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international regime or status, which soon extends beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war." In his opinion, he stated, the new regime established in the mandated territories, "in pursuance of this 'principle' has more than a purely contractual basis, and the territories subjected to it are impressed with a special legal status, designed to last".33

The question also arises whether or not the status of the Suez

32 Ibid., p. 17. The Committee objected to the term "servitude" as distinguishing dispositive status only because "the existence of international servitudes in the true technical sense of the term is not generally admitted". See de Visscher, loc. cit., pp. 249 et seq., Gregory in (1923), 17 Am. J. Int'l L. pp. 63-76; McNair, loc. cit., pp. 114 et seq.; Waultrin in Revue Générale de droit international public, vol. 14 (1906), pp. 517 et seq.

Canal is dispositive so as to oblige Egypt independently of her conventions with Great Britain and the other Powers. If it is so dispositive then no act of Egypt can alter the status of the Canal or interfere with the free passage of shipping, and any such interference is a breach of objective international law. It further follows that Great Britain, in maintaining contrary to Egyptian opposition the free passage of shipping, is acting as an agent of the international community.

There is no doubt that in principle a dispositive status can be created over waterways. The view of the law officers on the rights of Canadians over the waterways of Alaska has already been considered. In addition, reference might be made to the status of the Elbe under article 331 of the Treaty of Versailles, and to the Barcelona Convention on Waterways, which attempted to create objective law having the same effect as a dispositive convention. The most important statement on the status of international waterways, however, is that of the Permanent Court of International Justice in the S. S. Wimbledon case, the first case brought before it. Germany in the Treaty of Versailles had guaranteed the free passage of the Kiel Canal to all nations. Subsequently, and with reason, she alleged, she had denied passage to a British ship carrying munitions to Poland. A claim was instituted for damages, and the court was compelled to consider the nature of the status accorded the canal. It stated in its decision that the canal had "become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world". Despite the view of Judge Schütting that the Treaty of Versailles has constituted a servitude over the canal, the majority of the court hesitated to describe the status in question as a servitude. They did not hesitate, however, to say that an objective regime had been created over the canal in the interest of the community of nations, independent of the abrogations or otherwise of the instrument of creation. If it is true to say that the Kiel Canal regime was an international servitude it is equally true to say that the status accorded the Suez Canal by the Convention of Constantinople of 1888 is equally a servitude, with the consequences suggested. In fact the Permanent Court arrived at its decision on the status of the Kiel Canal partly on a consideration of the analogous status of the Suez Canal.

The concept of a servitude seems to be a necessary one in any

---

35 Ibid., p. 43.
36 Ibid., pp. 24-25.
international legal system if an attempt is to be made to reconcile the concept of imperium with the concept of the common good. It is customary in the post war world to speak of the limitations of sovereignty, and indeed limitations there must be if any organized international society is to exist. An objective rule of law in the international sphere must contain objective territorial settlements which are in essence limitations of sovereignty. It is suggested that the concept of servitude, provided that the term be understood to import no direct analogy from Roman law, is not only a useful but an essential medium for the equitable adjustment of the economic relations of states whose territory is contiguous.

Some Judicial Reflections

I have never been able to understand why in this day and generation any Canadian citizen should have an adjective attached to his citizenship. Whether a man is of English, French or other descent, whether in religion he is a Roman Catholic, a Jew, an Anglican or member of the United Church, or holds to some other creed, whatever be his original mother tongue, to me he is a fellow-citizen to be valued according to his personal merit and not otherwise. He is a Canadian, without any adjective, and that should be enough for any man....

And nowhere more than on the judicial bench must a man cease to be a member of any group. In the exercise of his office a judge is not a Jew, a Roman Catholic, an Anglican, or a member of the United or any other church, he is not a Canadian of French or English or any other descent, he is the impartial and fearless Speaker of the Law. It is this high duty, in my opinion the highest duty any man can be asked to undertake, because even the Queen is under the law, that Samuel Freedman has recently been called upon to perform.

The responsibility of a judge being so great, the responsibility of the authorities who appoint him is correspondingly great. The decision is often a matter of difficulty. Some men whose appointments to the bench were hailed with anticipation and high hopes have not fulfilled those hopes: while others, whose appointments were received with resignation and even public disapproval have rendered good service on the bench. The value of any judge's work cannot, and indeed should not, be assessed until his judicial career ends. Every man fit to be a judge must undertake judicial office in unaffected humility, knowing that he is devoting himself to a life of unremitting work and study, and knowing also that every new year should find him better qualified than the year before. .... (Hon. E. K. Williams at a dinner to honour the appointment of Mr. Samuel Freedman, Q.C., to the Court of Queen's Bench of Manitoba)