Communicated to the Council and Members of the League.

CLAIM MADE BY THE FINNISH GOVERNMENT WITH REGARD TO FINNISH VESSELS USED DURING THE WAR BY THE GOVERNMENT OF THE UNITED KINGDOM.

Communication from the Finnish Government.

To the Secretary-General.

(Translation)

Acting upon instructions from my Government, I have the honour to request you to be good enough to circulate to the Members of the Council the document entitled "Memorandum on the Nature of the Anglo-Finnish Dispute with regard to Finnish Vessels", by Professor H. Friedmann, Legal Adviser to the Finnish Government.

I have the honour to be etc.,

(Signed) Rudolf HOLSTI.

MEMORANDUM ON THE NATURE OF THE ANGLO-FINNISH DISPUTE WITH REGARD TO FINNISH VESSELS

by

H. Friedmann, Dr. Juris.

Legal and political disputes.

The representative of the United Kingdom Government endeavoured to establish a precise distinction between legal disputes and political disputes, being of opinion that the task of the Council of the League of Nations was not to deal with legal disputes without political bearing. According to him, for a purely legal dispute, a solution must be sought by the method of legal procedure and arbitration. It is true, he added, that in that case the United Kingdom Government is not bound to agree to any judicial or arbitral procedure, more particularly procedure before the Hague Permanent Court, by reason of the fact that the United Kingdom Government made an explicit reservation regarding the Optional Clause. The representative of the United Kingdom Government
accordingly regards the appeal to the Council as a roundabout means of arriving at a procedure of the kind that the United Kingdom Government had wished to exclude.

It is not without interest, in this connection, to recall a declaration made by the United Kingdom Government a few years ago, with reference to this very optional clause of the Statute of the Permanent Court, at a moment when the United Kingdom Government was not yet prepared to accept it. At that time the United Kingdom Government repeatedly expressed through the Foreign Secretary the view that not all legal matters are suitable for submission to judicial settlement, and on that ground the United Kingdom Government has declined to accept the optional clause (see also the declaration of Lord Cushendun at Geneva on February 23rd, 1923).

In other words, the United Kingdom Government at that time, quite contrary to the above-mentioned view, did not distinguish in any absolute manner between legal and political disputes between States. Moreover, it considered that the means which are applicable to settling political issues are often best adapted to dealing with legal issues. An authoritative book on the subject, "Wheaton's Elements of International Law" (sixth edition, revised by A. Berriedale Keith, 1929, Volume 1, page 550), states clearly that that was then the attitude of the United Kingdom Government.

Consequently when, if one may say so, the United Kingdom Government made a reservation regarding the whole of the optional clause, it was not of opinion that a settlement of legal questions by political methods, that is to say, by the intervention of the Council, would constitute a roundabout means. On the contrary, in expressing the view that the means applicable to settling political issues are often best adapted to dealing with legal issues, the United Kingdom Government itself suggested the political method, although it was unwilling to follow the legal method.

Private claims and international claims.

While recalling this argument of the United Kingdom Government, which retorts against the latter, we do not admit in any sense that the conciliatory action of the Council should be restricted to political disputes, to the exclusion of legal disputes. At the same time, the author of this opinion having already adequately developed his views in his "Observations", which were submitted by the Finnish Government to the Council of the League of Nations at its last session, it is not necessary to go further into the subject here.

We desire, however, to explain here that as regards legal disputes there might be an inclination to establish another distinction. There might be a tendency to describe as "private legal cases" those resulting from a claim by private individuals, even if such claim is supported by their Government, whereas by "international legal cases" would be meant disputes which, from the origin, have been between Governments. Such a distinction would, we believe, be untenable. The practice of States shows that the State of
which the injured parties are subjects sometimes takes up the defence of their cause, even going as far as armed intervention. Examples of intervention of this kind may be found in that of the United Kingdom Government in Mexico, Venezuela and Egypt, and that of the United States of America at San Domingo and in Central America. In this connection jurists have had to take into consideration a very remarkable doctrine of the famous Argentine jurist, Dr. Drago, according to which one of the qualities inherent in the sovereignty of the State is the impossibility for any party to bring an action against the State with a view to the execution of a judgment. The Anglo-Saxon authors have protested against this doctrine, however, being of opinion "that it was a quite unsound ground". It is impossible then to contend that disputes originating in private claims belong ipso facto to the category of "private disputes" of no international bearing.

It appears far more logical to define the character of a dispute according to the actual nature of such dispute, that is to say, by enquiring whether it contains the elements which constitute an international legal dispute, irrespective of whether it originates in the claim of the State or in that of the nationals of a State.

International character of the Anglo-Finnish dispute.

It will be seen that, from the outset, the Finnish Government has stressed the international character of its claim. It is only necessary, in this connection, to quote the grounds for the arbitral Decision of May 9th, 1934. On page 5 will be found the following sentence: "The Finnish Government before the Arbitrator, at the oral hearing, contended that, though there is a recognised right for a State in time of war, in certain cases of emergency, to take property belonging to foreigners found in the State, it becomes a wrong in international law if the original act of taking is not accompanied by payment. The British Government had committed breach of international law in not paying the shipowners. The claim of the Finnish Government is based on this initial breach of international law."

The Finnish Government also put forward before the Council of the League of Nations an alternative claim, formulated as follows by the Arbitrator (pages 6 et seq): "The representative of the Finnish Government, before the Council of the League of Nations, said that, assuming that there was a contract between the British and the Russian Governments ... the Finnish Government was of the opinion that it would be entitled to claim, under international law, at least the sums due for the Finnish vessels in respect of the contracts ex hypothesi made between the British Government and the Russian Government."

Further, the United Kingdom Government, which, in the London Agreement of May 10th, 1932 called the dispute in question a dispute "between our Governments", once more reminded us of the international character of this dispute.
when it was describing the relations between Finland and the former Russian Empire as it understood them, and declared that in that connection the United Kingdom Government could regard the Finnish Government as responsible for part of the war debts of the former Russian Empire due to Great Britain.

Breach of international law.

We are of opinion that the alleged breach of international law is constituted by the following facts:

1. The Russian Government was not entitled to requisition Finnish ships registered in Finland. A statement of all the facts concerning the relations between Finland and the former Russian Empire will be found in the memorandum of M. Lars Krogius of June 13th, 1934. Mention is also made there of the very important Imperial Decree of July 10th, 1914: "This law embodied the right of the Russian Imperial Government, in time of war, to requisition ships belonging to Russian subjects and registered in ports of Russia, also ships owned by Finnish subjects, provided they were registered in Russian ports, yet distinctly stipulating that the law was not valid for ships registered in Finnish ports and belonging to Finnish subjects, and, therefore, until a special agreement could be reached with the Finnish Government concerning requisitioning of Finnish ships, no Russian shipowner, in order to evade requisition, was allowed to have his ships registered in a Finnish port."

We are now in a position to add the following details. There was at Petrograd a Russian Special Conference which had the power under certain conditions to requisition Russian vessels, but naturally not Finnish vessels registered in Finland. Moreover, even this conditional power of requisitioning, which, as we have shown, was limited to Russian ships, was not in any sense transferred to the Russian Government Committee in London. Furthermore, the body which "requisitioned" the Finnish ships in London was not even that Committee of the Russian Government, depending on the special Conference of Petrograd but not possessing any right of requisitioning; it was the Transport Section of the Russian Government Committee, which had very special functions. The so-called requisition letters were signed by the Head of the Transport Section, M. Ostrogradsky, not even by the Chairman of the Russian Government Committee. This circumstance does not appear to have been brought to the knowledge of the Admiralty Transport Arbitration Board when the case was referred to it.

It is true that in the decision given by the Admiralty Transport Arbitration Board on January 29th, 1925 the following argument may be found: "Though there was a Finnish register, there was no Finnish flag and those steamers sailed the sea under the mercantile marine flag of Imperial Russia and not otherwise". It is to be regretted that the Finnish case was not examined in Great Britain by a Tribunal more competent to settle so important a question of principle. In saying this, we are merely repeating what the Admiralty Transport Arbitration Board itself felt in connection with one of its judgments, namely, the judgment given on June 11th, 1925
concerning the claim relating to the Russian Volunteer Fleet. The Admiralty Transport Arbitration Board having been invited by the Court of Appeal to settle questions of principle, declared textually: "It is surprising that the questions of principle were not dealt with in the Court of Appeal and the question of figures left to us, which is the proper province of this Board". Undoubtedly a Court more competent to give a ruling on questions of principle would have hesitated very much to adopt, in the particular case with which we are concerned, the sole criterion of the flag. It is true that the London Declaration of 1909 (the outcome of a Conference of the leading maritime Powers) adopted the flag as the criterion of the nationality of ships. War policy, however, led the belligerents, between 1914 and 1919, to substitute for this criterion that of the nationality of the shipowner, which was regarded as conclusive. Naturally, the purpose of this regulation was to enable neutral vessels belonging to enemy nationals to be regarded as enemy ships. At the same time a regular reversal of the previous rule had taken place, and it is significant that much earlier, in 1872, a French prize court had held that the flag did not constitute conclusive evidence of the nationality of the vessel. This was in the famous case of the "Palme", a vessel belonging in reality to Swiss owners but flying the German flag, and captured in consequence by a French cruiser in 1871. The Swiss ownership of the vessel having been proved, the French prize court ruled that the "Palme" was not a German vessel and ordered the vessel to be returned to her owners. This shows that the new regulation adopted during the war was actually based on a rational principle, although it was the outcome of war policy.

It may be noted that authors, when they speak of the flag, often refer in reality to the "documents". This is the case, for example, with Keith (op. cit., Vol.II, page 694) when he says: "... if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails ... for ships have a peculiar character impressed upon them by the special nature of their documents". When one asks then what are the documents in question, the reply is that: "According to the English practice, these documents ought generally to be: 1. the register, specifying the owner, name of ship, size, and other particulars necessary for identification and to vouch the nationality of the vessel; 2. the passport (sea letter) issued by the neutral State, etc." (See William Edward Hall, A Treatise on International Law, Sixth Edition, edited by G.B. Atlay, 1909, page 738).

Thus it is clear that the argument of the Admiralty Transport Arbitration Board was based on a very weak ground. Undoubtedly the flag constitutes an element which must be taken into account in determining the nationality of the vessel, in addition to the other more important elements such as, in the first place, registration and the nationality of the owner. The only conclusion we feel justified in drawing from this circumstance is that vessels, even if they belong to private individuals, are not "private property" in the same sense as other property, a conclusion which once more emphasises the international character of the Finnish case.
2. The United Kingdom Government considers that it was not bound to have cognisance of the internal relations which existed between Finland and the former Russian Empire, more particularly from the standpoint of the right of requisitioning. We venture to doubt whether such an attitude is defensible, since the facts in question were absolutely public and must have been known to the responsible officials of a State. In any case, we can never agree that it was permissible for the British officials to neglect to investigate the powers of attorney of the Russian Committee in London and of the person who signed the so-called requisitioning letters.

Further, we are now in a position to declare that the British authorities who ordered the vessels to be handed over to them (or more exactly, seized them) in so acting were not at all ignorant of the true position. In this connection we may point out that, by a letter addressed to Sir Basil Kemball-Cook, Director of Naval Sea Transport, M. Ostrogradsky said, on March 26th, 1917: "I should like to point out that the employment of Finnish steamers by the British Admiralty involves considerable expenditure by the Russian Government and does not, strictly speaking, arise from existing Agreement between the letter and the British Government of April 25th, 1916 (old style). Paragraph 4 of this Agreement provides that the Russian Government shall requisition all the Russian steamers available, for the sole purpose of carrying government cargoes to Russian ports. This paragraph is obviously intended to cover only steamers subjected to the law of requisition. As it was clear that this law was not applicable to Finnish vessels, the latter were chartered at a much higher rate than requisitioned Russian vessels.* In his letter of April 25th, 1918, which is a logical continuation of his first letter already mentioned, M. Ostrogradsky refers to an annexed memorandum, paragraph 11 of which reads as follows: "As Finnish steamers are not under the jurisdiction of the Russian Mercantile Marine Law, the question of the requisitioning by the British Government of these steamers must be settled by them direct with the Finnish owners or with the plenipotentiary representatives of Finland." We cannot then conceal our surprise that Sir Basil, when giving evidence before the Admiralty Transport Arbitration Board to the effect that "there were subsequent modifications and enlargements of the written Agreement under which these ships were taken over and used" (this is the form given to his evidence in the judgment of the Admiralty Transport Arbitration Board), should not have recalled the remarks contained in these letters, which had been addressed to him.

3. After having thus sought to evade the responsibility which devolved upon them by reason of having made use of these ships, the United Kingdom authorities, in addition, took measures which made it difficult and even impossible for the Russian Government Committee to discharge this debt.

* The statement in regard to chartering is devoid of all foundation and thus the only conclusion is that the vessels in question were not, as far as the Russian authorities were concerned, either chartered or requisitioned.
The United Kingdom Government contends that the loss undoubtedly suffered by the Finnish owners was not due to the requisitioning of the vessels, but to the collapse of the Imperial Russian Government in the revolution - a contention upheld by the Admiralty Transport Arbitration Board. We venture to doubt whether that Tribunal would have reached the same conclusion if the following facts had been known to them:

On the one hand, the United Kingdom authorities on various occasions declared that they had settled the debt through the Russian Government Committee. On the other hand, we have ascertained the fact that after the beginning of the Bolshevik Revolution, the Russian Government Committee was dissolved by the United Kingdom authorities and that, at the request of the Treasury, certain amounts in cash forming part of the funds of that Committee were paid over to the United Kingdom Departments, while other funds, also belonging to the Committee and to the Russian Government in general and amounting to about five and a half millions pounds sterling, were sequestrated by the Treasury. According to information that we have received, these funds are still deposited in various banks in England. Contrary to what has occurred in similar cases in France and the United States of America, no arrangement has been made to administer such funds, and in particular, no machinery has been set up for payment to be effected by means of the said funds to persons who may have claims on them. At the same time, the Chairman of the Russian Government Committee, General Hermonius, in his letter of May 25th, 1918 to the Secretary of His Majesty's Treasury, pointed out that "the responsibility for dealing with possible claims from private persons and firms against the Committee which are not satisfied, in view of my suspension of its work, must lie with the British Government."

But, notwithstanding all this, the United Kingdom Government went still further. In Article 10 of the Russian Trade Agreement signed in London on March 16th, 1921 by Mr. R.S. Horne on behalf of the United Kingdom and by M. Krassin on behalf of Soviet Russia, the following was stated regarding the Russian funds in the United Kingdom:

"The Russian Soviet Government undertakes to make no claim to dispose in any way of the funds or other property of the late Imperial and Provisional Russian Governments in the United Kingdom. The British Government gives a corresponding undertaking as regards British Government funds and property in Russia. This article is not to prejudice the inclusion in the general treaty referred to in the preamble of any provision dealing with the subject matter of this Article. Both parties agree to protect and not to transfer to any claimants pending the conclusion of the aforesaid treaty any of the above funds or property which may be subject to their control."

Consequently, the contention that the Russian revolution had deprived the Finnish owners of the funds due to them is untenable. The truth is that the United Kingdom authorities, after the outbreak of the Bolshevik revolution, took such measures as made the payment of those funds impossible, even if the Russian Government Committee had desired that payment should be made - a point which we do not doubt for a moment. The wrong that was thus done to the
Finnish owners by the United Kingdom authorities is all the greater since the latter knew perfectly well what they were doing, for in the letter of March 22nd, 1918, the Treasury, speaking of the extent of His Majesty's Government's liability in respect of claims, said: "From a legal standpoint it does not appear that we have any liability. It may be, however, that some of these contracts were entered into on the distinct understanding that funds would be provided out of British credits, and a refusal to pay on our part would be difficult to defend."

4. In the circumstances, the United Kingdom Government's contention that it has already paid or intends to pay, under a clearing system by way of a set-off against the Russian Government's debt to Great Britain, appears somewhat strange at first sight. The United Kingdom Government had already abandoned this objection before the Council. It reverted to it subsequently, however, when arbitration would have gone against it, but in a general manner, referring to the war debts of the former Russian Empire and more particularly to the claims for maritime transport that it has, or alleges that it has, on the Russian Government Committee. This objection was waived for the first time, and very definitely, in paragraph 28 of the memorandum submitted to the Council on August 28th, 1931, in the following terms: "The last contention of the Finnish Government is that put forward in paragraphs 13, 23 and 35 of the Finnish memorandum that His Majesty's Government 'is not entitled to set off the alleged pecuniary rights of the Russian Government in respect of these ships against the debts due from that Government to the Government of the United Kingdom'. The answer to this contention is that His Majesty's Government have never relied upon such a right." Since, however, this argument has been taken up again, though in a slightly modified form, we wish to make the situation perfectly clear by submitting a few remarks.

We would not hesitate to affirm, in the first place, that in no case can Finland be held responsible in international law for any part of the debts of the former Russian Empire. It is unnecessary to recall in this connection the explicit declaration made by Sir Austen Chamberlain in Parliament, as Secretary of State for Foreign Affairs, concerning the special situation of Finland. As regards international practice in this respect, Keith, who is probably the highest authority on the subject of State succession, gives the following particulars:

"... Thus Germany declined to take over the debt of France in respect of Alsace-Lorraine in 1871, and needless to say France did the same in 1919. Estonia, Latvia, Lithuania and Finland have not sought to bear the burden of the Russian debt. The United States flatly refused to assume any of the Cuban or the Philippine debt, and did not permit Cuba to do so, a fact which American jurists who hold to the theory of State succession have vainly attempted to explain away or to excuse. The Spanish-American colonies assumed their local debts, as Magoon very truly remarks, as the price paid for independence and recognition of sovereignty, but the Baltic States secured recognition without that price,
and even the Spanish-American States took over only absolutely clear local debts, charged on local revenues. When in 1878 the Balkan States were forced to bear portions of the Turkish debt, as part of the price of attaining sovereign or quasi-sovereign status, Russia refused for herself to assume a penny of the Turkish debt in respect of her new possessions. The United States took over no part of the British debt, and in all her accessions has never taken over any debt, and the British Government frankly admitted that the annexation of Texas did not transfer the debt to the United States.

"... The British Government, on its annexations of the Transvaal, Orange Free State and Burma in 1886, was careful to make it clear that it accepted no legal obligations at all, and that what it paid was paid ex gratia; moreover, it varied the terms of such indebtedness as it took over, and cut down the amounts when it saw fit; it had, of course, most potent reasons of policy to recognise a moral claim.

"... The British Empire, Belgium, France and Japan, as mandatories, obtained vested ownership of important territories absolutely free from debt under Article 257 of the Treaty of Versailles."

We wish also to advance another argument, for the following reason:

When, for the purposes of our alternative claim, we formulated the terms of a special limited succession of Finland under the terms of the Agreement supposed to have been concluded between Great Britain and Russia on May 4th, 1916, the representative of the United Kingdom Government replied, not without irony, that international law took no account of succession applying to rights only without succession duties also. The same above-mentioned author lays down, however, that:

"The opinion adopted that succession, save where regulated by treaty, is to rights, not obligations, has the support of the few English dicta on the subject. English Courts are precluded from adjudicating on the effects of an act of State such as is involved in an annexation. This was declared early in Nabob of the Carnatic v. East India Co., repeated in many other Indian cases, and confirmed in West Rand Central Gold Mining Co. v. The King. The principle was very clearly expressed in a series of cases in the Transvaal, in which it was laid down that the Crown had the right to recover any debts owed by the citizens of the annexed territory to its government, but that it could not be sued for debts due by the former government."

We have no intention of defending this argument in the abstract. At the same time, the limited succession which Finland formulated for the purposes of her alternative claim is obviously very reasonable and is entirely confirmed by a doctrine of international law which we fully endorse, namely: "... From the moment of independence all trace of the joint life is gone. Apart from special agreement no survival of it is possible and the two States are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law.
And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property and advantages secured to it by Treaty, which are enjoyed by it as a personal whole or by its subjects in virtue of their being the members of that whole, continue to belong to it. On the other hand, rights possessed in respect of the lost territory including rights under Treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and has therefore a local character, or which, though not within it, belongs to State institutions localised there, transfer themselves to the new state person." (Hall, loc. cit. page 91-92).

Moreover, apart from all these theories of succession, the standpoint of the United Kingdom Government is untenable, because - and we would stress this third argument - it is impossible, in international law, to set off claims between States against debts due by a State to private persons as compensation for requisitioned property. Moreover, we can quote in support of this opinion the Admiralty Transport Arbitration Board itself. In point of fact, that Tribunal - not in our case, but in that of the Russian Volunteer Fleet - decided as follows on June 11th, 1925: "The substantial question we have to determine is that left undetermined by the Court of Appeal, that is, whether any sum due as the result of the British Government's use of the ships can be set off against the debt said to be due by the Russian to the British Government. The answer to this question involves an examination of the status of the Russian Volunteer Fleet... The Volunteer Fleet was a sub-agent, created, appointed, controlled and annulled by the Russian Government." We do not know if this finding is correct as regards the nature of the Russian Volunteer Fleet, but we have no doubt whatsoever as to the correctness of the principle applied to the question of set off.

Since, in any case, the Finnish shipowners were not "appointed and controlled by the Russian Government" the Admiralty Transport Arbitration Board would be obliged, in conformity with its own principle, to deny the possibility of the set off in question in our case.

General Conclusion.

We feel bound in conclusion to make one general remark:

In the grounds for its decision that the requisition in question was Russian and not British, the Admiralty Transport Arbitration Board inserted a reason which we should describe as an "argumentum ad hominem": "It is not in accordance with the comity of allies for the one to requisition the property of the other when it happens to be within its dominions". Nevertheless, in actual fact the treatment undergone by the Finnish vessels in British ports has led to a result which, happily, in international law, neither neutrals nor enemies have any reason to fear. In a similar case, neutrals would be absolutely protected - ("Supplies in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible". Hague Regulation concerning the Laws and Customs of War on Land, Article 52) - quite apart from the fact that the Finnish owners have been worse treated than the owners whose vessels were requisitioned in Russia by the Russian authorities.