Power after the United States had once taken title.[27] The title and possession, he said, were to be taken, according to the langauge of the bill, "for such use or disposition as he [the President] shall direct." The debate was on the proposition that this action if taken would be provocative and would amount to an act of war.[28] In opposition, it was argued that most of the belligerent vessels were arrested originally because of sabotage,[29] and further, that once seized and title taken, the United States was free to dispose of them as it pleased, even to the extent of transferring them to a belligerent or to belligerent uses. As to this question, it may be said that, although the seizure under the Act may be regarded as unneutral in Germany's view that our shortage of tonnage was due to our aid to Britain, nevertheless there are no degrees of unneutrality, and that the subsequent transfer of these vessels to Britain is no more unneutral than other acts of the United States in aid of Britain. It was pointed out in the debates, however, that a series of unneutral acts was a growing aggravation that might eventually amount to a challenge. The only other bases of justification would be the principles above mentioned, of self-defense and support to a victim state.

L. H. WOOLSEY

THE VALIDITY OF THE GREENLAND AGREEMENT

On April 9, 1941, an agreement [1] relating to the defense of Greenland was signed in Washington by Secretary of State Cordell Hull "acting on behalf of the Government of the United States of America," and Mr. Henrik de Kauffmann, the Danish Minister in Washington, "acting on behalf of His Majesty the King of Denmark in His capacity as sovereign of Greenland, whose authorities in Greenland have concurred herein." The preamble to the agreement recites "the invasion and occupation of Denmark on April 9, 1940 by foreign military forces" and concludes that "although the sovereignty of Denmark over Greenland is fully recognized, the present circumstances for the time being prevent the Government in Denmark from exer-

[27] Cong. Record, May 14, 1941, p. 4116.

[28] For a discussion of what is an act of war see Clyde Eagleton, "Acts of War," this JOURNAL, Vol. 35 (1941), p. 321. He concludes that an act of war involves the employment of force, but that it does not create a state of war. "The act of war can be nothing less than an act of force—seizure of territory, blockade, landing of an armed force; but even such uses of force do not establish a state of war, nor do they lead in legal consequence to war." Other factors must be added. The state affected "is free to make its own decision as to whether it will reply by war, and that decision does not in the least depend upon international law or etiquette." He thinks "none of the measures thus far taken by the United States could be regarded as an act of war. . . . They do not measure up even to the stature of reprisals." See J. B. Moore, Proceedings of American Philosophical Society, 1921, Vol. 60.

[29] The Act of 1917, however, apparently did not make them forfeitable in the circumstances.

[1] For the text of the agreement, see Supplement to this JOURNAL, p. 129, and Department of State Bulletin (hereafter cited as Bulletin), Vol. IV, No. 94 (April 12, 1941), pp. 445–447. For relevant documents, see *ibid.*, pp. 443–448, and *ibid.*, No. 95, pp. 469–471.

cising its powers in respect of Greenland." The preamble further recites that "the United Greenland Councils at their meeting at Godhavn on May 3, 1940, adopted in the name of the people of Greenland a resolution reiterating their oath of allegiance to King Christian X of Denmark and expressing the hope that, for as long as Greenland remains cut off from the mother country, the Government of the United States of America will continue to hold in mind the exposed position of the Danish flag in Greenland, of the native Greenland and Danish population, and of established public order;" mentions the agreement of the American Republics "that the status of regions in the Western Hemisphere belonging to European powers is a subject of deep concern to the American Nations;" refers to the "grave danger that European territorial possessions in America may be converted into strategic centers of aggression against nations of the American Continent;" and adds that the "defense of Greenland against attack by a non-American power is essential to the preservation of the peace and security of the American Continent and is a subject of vital concern" to the United States "and also" to Denmark.

In Article I of the agreement the Government of the United States "reiterates its recognition of and respect for the sovereignty of the Kingdom of Denmark over Greenland," recognizes "that as a result of the present European war there is a danger that Greenland may be converted into a point of aggression against nations of the American Continent," recalls "its obligations under the Act of Habana signed on July 30, 1940" by the American Republics, and "accepts the responsibility of assisting Greenland in the maintenance of its present status."

Other articles provide that the United States shall have the right to construct, maintain, operate, and protect defense facilities "for the accomplishment of the purposes set forth in Article I;" that such defense facilities "will be made available to the airplanes and vessels of all the American Nations for purposes connected with the common defense of the Western Hemisphere;" that the United States "shall have the right to lease for such period of time as this Agreement may be in force such areas of land and water as may be necessary" to fulfil the purposes of the agreement; and that the United States shall have "exclusive jurisdiction" over such defense areas, but that Denmark "retains sovereignty" over them.

It is with the form and validity of this agreement, rather than with its substance or purpose, that this comment is primarily concerned. Mr. de Kauffmann was apparently without competence to conclude the agreement, and there is some doubt as to the legal capacity of Denmark.

On August 26, 1939, Henrik de Kauffmann presented to President Roosevelt his letters of credence as Envoy Extraordinary and Minister Plenipotentiary of Denmark and Iceland to the United States,[2] and "he has since been recognized in that capacity as the official representative of the King-

[2] Bulletin, Vol. I, No. 9 (Aug. 26, 1939), pp. 163–164.

dom of Denmark."[3] When the Germans occupied Denmark on April 9, 1940, they did not displace the Danish Government but permitted it to function as a government under enemy occupation. No attempt appears to have been made at that time, or at any time prior to the agreement of April 9, 1941, to recall Mr. de Kauffmann, even though, on April 10, 1940, he issued a public statement declaring that he "would work for one thing, the reëstablishment of a free and independent Denmark."[4] On April 13, 1940, President Roosevelt expressed his "disapprobation" of the "military aggression" against Denmark and Norway as an "unlawful exercise of force,"[5] but the United States Government recognized no Danish government-in-exile (as there was none in fact) and continued its existing diplomatic staff in Denmark. On May 1, 1940, the Department of State announced "the provisional establishment of an American consulate at Godthaab, Greenland," stating that "since communication between Copenhagen and Greenland has been interrupted, direct consular representation has been deemed advisable by the United States and by the Greenland authorities;"[6] and on July 9, 1940, the Department announced that the Governor of North Greenland and "a group of Danish officials connected with the administration of Greenland" were arriving in the United States "for the purpose of discussing economic matters pertaining to the trade and commerce of Greenland."[7] On April 7, 1941, Secretary of State Hull wrote to Mr. de Kauffmann, enclosing "a draft of the proposed agreement relating to the defense of Greenland, which I believe embodies the ideas agreed upon in the course of our various conversations."[8]

In the light of circumstances which Mr. de Kauffmann admitted were "singularly unusual,"[9] it is not surprising that the agreement was cast in the form of what is known in the United States as an "executive agreement," rather than as a "treaty." A treaty would ordinarily have recited that the

[3] Department of State press release, April 14, 1941. Bulletin, Vol. IV, No. 95 (April 19, 1941), p. 469.

[4] Bulletin, Vol. IV, No. 95, p. 471. The N. Y. Times quoted de Kauffmann as saying: "I am not prepared to take orders from the German Government. I represent Denmark and the King of Denmark here and nobody else. Denmark cannot be considered free as long as she is under the military control of a foreign power." N. Y. Times, April 10, 1940, 12:4. The following day, after a conference with President Roosevelt at which (reported the N. Y. Times), problems relating to the military occupation of Denmark and the status of Greenland were discussed, Mr. de Kauffmann was reported as saying: "We agreed, of course, that Greenland belonged to the American continent"; and: "I gathered from the President's words that he would continue to recognize me as the representative of my country. I came here to represent my King and a free and independent people." N. Y. Times, April 11, 1940, 1:3 and 7:1.

[5] Bulletin, Vol. II, No. 42 (April 13, 1940), p. 373.

[6] *Ibid.*, Vol. II, No. 45 (May 4, 1940), p. 473.

[7] *Ibid.*, Vol. III, No. 55 (July 13, 1940), p. 25.

[8] The Secretary of State to the Minister of Denmark, April 7, 1941. *Ibid.*, Vol. IV, No. 94 (April 12, 1941), p. 448.

[9] *Ibid.*, p. 448. The Minister of Denmark to the Secretary of State, April 9, 1941.

Danish Minister had "full powers" to conclude it.[10] A treaty would likewise have required the consent of the United States Senate, and possibly of the Danish Rigsdag, a procedure which might have involved inconvenience of a sort. However, executive agreements are international engagements, and even in executive agreements it has been customary to indicate that the diplomatic representative who concluded the agreement on behalf of a foreign government was "duly authorized" or "duly empowered" thereto by his government.[11] The Greenland agreement contains no stipulation to that effect, but states merely that de Kauffmann was "acting on behalf of His Majesty the King of Denmark in His capacity as sovereign of Greenland, whose authorities in Greenland have concurred herein."

On April 12, 1941, the Danish Foreign Office informed de Kauffmann: "The Government strongly disapproves the fact that you, without authorization from here, and contrary to the constitution, have concluded an agreement with the Government of the United States regarding the defense of Greenland." To this should be added de Kauffmann's own admission to Secretary Hull that "in accordance with our understanding I informed the Government in Denmark of the agreement only when it was made public at noon on April 10th."[12] Unless the Department of State has information not available to the public that the Danish Government secretly authorized the agreement, while pretending publicly (for understandable reasons) that it was unauthorized, the conclusion is irresistible that Mr. de Kauffmann lacked the competence to bind Denmark.[13] He was so informed by the

[10] *Cf.* Jules Basdevant, *La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités* in 15 Hague *Recueil des Cours* (1926), pp. 548 ff., 608 ff. See also Raoul Genet, *Traité de Diplomatie et de Droit Diplomatique*, Vol. III (1932), p. 413.

[11] See, for example, Department of State, Executive Agreement Series, Nos. 161, 165, 169, 173, 175, 177, 178, 183, 184, 188, 189, 201. This is in no sense an exhaustive list, but is offered as an indication of current practice. In those executive agreements which are "effected by exchange of notes" nothing is ordinarily said about the diplomatic representative being "duly authorized" to conclude an agreement, as there is no instrument to be signed jointly. It is only rarely that an executive agreement makes any reference to the full powers of those who sign it. For examples, see Executive Agreements, Nos. 163, 164, and 180. In these cases, however, the agreement was ratified in each case by the parties other than the United States.

[12] The Minister of Denmark to the Secretary of State, April 13, 1941. Department of State Bulletin, Vol. IV, No. 95 (April 19, 1941), pp. 470–471. The statement of the Danish Foreign Office is translated in de Kauffmann's note to Hull.

[13] For an excellent treatment of the question of competence to bind a state to an international engagement, see Harvard Research in International Law, Draft Convention on the Law of Treaties, this JOURNAL, Supplement, Vol. 29 (1935), pp. 992–1009. The Research concludes that "a state is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty." See also Charles Fairman, "Competence to Bind the State to an International Engagement," this JOURNAL, Vol. 30 (1936), pp. 439–462. Professor Fairman writes: "We may take it as our guiding principle that treaties are to be concluded by the competent authorities of the states or by their representatives, according to their internal law." *Loc. cit.*, p. 443. As to agreements by diplomatic representatives, he writes: "In principle, international law leaves it to each state to fix the

Government of which the United States regarded him as the official representative.

In his note of April 13 to Secretary Hull, Mr. de Kauffmann stated that he had been officially recalled as Danish Minister in Washington and that he had learned unofficially from press reports "that the Government in Denmark yesterday also declared the agreement of April 9, 1941, relating to the defense of Greenland to be considered as void," but that he believed both actions "to have been taken under duress," and added: "Consequently I consider it to be invalid both from the point of view of Danish and of generally recognized common law."[14] Mr. Hull replied that the United States Government agreed that the Government in Denmark was acting under duress in purporting to recall Mr. de Kauffmann and that "in consequence I have the honor to advise you that it continues to recognize you as the duly authorized Minister of Denmark in Washington."[15] In a press release issued the same day the Department of State stated that "no act of the Danish Government" since the German occupation of Denmark commenced "has been taken or can be taken save with the consent of the occupying power or as a result of its dictation. In view of the foregoing . . . the Government of Denmark can only be regarded as a government which is patently acting under duress and which is in no sense a free agent."[16]

This argument based on duress does not appear to the writer to be well founded. There is no evidence that the Danish Government was repudiating a validly binding international agreement; their position (as soon as they learned of it) was that the agreement was void *ab initio* because it was made by their acknowledged representative in Washington "without authorization" and "contrary to the constitution."[17] The Danish Government may

competence of these representatives. An undertaking given in disregard of limitations disclosed or otherwise known does not bind. Limitations found to have been notorious might be deemed to have been known." *Loc. cit.*, p. 459.

[14] Bulletin, *ibid.*, p. 471.

[15] *Ibid.* The Secretary of State to the Minister of Denmark, April 14, 1941.

[16] *Ibid.*, p. 470.

[17] Whether (aside from Mr. de Kauffmann's lack of authorization) the conclusion of the Greenland agreement was contrary to the Danish constitution the writer is not competent to judge. Article 18 of the present Danish Constitution (which was adopted June 5, 1915, and amended Sept. 10, 1920) is translated in Dareste, *Les Constitutions Modernes*, Vol. I (1928), p. 400, as follows: "*Le roi ne peut, sans le consentement du Rigsdag, déclarer la guerre ni conclure la paix, contracter ni rompre des alliances et des traités de commerce, céder aucune portion de territoire, ni contracter aucune obligation qui modifie les conditions actuelles du droit public.*" Ralph Arnold, in his Treaty-Making Procedure—A Comparative Study of the Methods Obtaining in Different States (Oxford, 1933), p. 31, comments as follows on Danish practice: "Such treaties as do not, under Article 18, require the consent of the Rigsdag, do not as a rule come into force until after the King's ratification, and this applies equally to those which, under this same Article, require the consent of the National Legislature. Many conventions and minor agreements, however (and this applies particularly to agreements concluded by a simple Exchange of Notes), are frequently concluded without subsequent ratification."

very well have been acting under duress in pointing out that the agreement was invalid *ab initio*, but this duress would not make an invalid agreement valid. Even if we assume that the agreement was a valid one, it is not clear that duress has the legal consequences attributed to it by the Danish Minister and apparently by the State Department. International law does not regard as invalid all acts made under duress. Treaties made under duress are valid.[18] And there is no question of the right of a belligerent occupant to govern the territory under occupation, to retain or replace the officials of the occupied state, and, as Professor Hyde says, "to regulate all intercourse between the territory under his control and the outside world."[19] The State Department was therefore right when it stated that no act of the Danish Government can be taken save with the consent of the occupying power; but the legal consequence is—not that the reported voidance of the agreement under duress was invalid—but that Denmark lacked the capacity to make the agreement in the first place.[20]

Is it possible that the Kingdom of Denmark, although under enemy occupation, retained the capacity to make an international agreement without the consent of the occupying Power, with reference to the Danish colony of Greenland, which was not under enemy occupation? The position of the United States Government on this question contains elements of contradiction. Mr. Hull wrote to Mr. de Kauffmann that "although the Government of the United States fully recognizes the sovereignty of the Kingdom of Denmark over Greenland, it is unhappily clear that the Government in Denmark is not in a position to exercise sovereign power over Greenland so long as the present military occupation continues,"[21] and permitted the Danish Minister to make the agreement "acting on behalf of His Majesty the King of Denmark in His capacity as sovereign of Greenland, whose authorities in Greenland have concurred herein," and to sign it as "Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Denmark at Washington." Against this must be placed the statements of the Department of State that "no act of the Danish Government . . . can be taken save with the consent of the occupying power" and that Mr. de Kauffmann is "the

[18] *Cf.* H. Lauterpacht, Private Law Sources and Analogies of International Law (1927), p. 161, that "there are few questions in international law in which there is such a measure of common agreement as this, that duress, so far as States are concerned, does not invalidate a contract." *Cf.* also Harvard Research, *loc. cit.*, pp. 1151–3; remarks of Charles Henry Butler and Edgar Turlington, Proceedings of American Society of International Law (1932), p. 45 ff.; A. D. McNair, The Law of Treaties (1938), pp. 129–130.

[19] C. C. Hyde, International Law Chiefly as Interpreted and Applied by the United States (1922), Vol. II, Secs. 690, 701, citing U. S. War Department, Rules of Land Warfare (1917), No. 304.

[20] *Cf.* the discussion of the distinction between capacity and competence in Fairman, *loc. cit.*, p. 440.

[21] Bulletin, Vol. IV, No. 94 (April 12, 1941), p. 447. The Secretary of State to the Minister of Denmark, April 7, 1941.

official representative of the Kingdom of Denmark."[22] Now if we assume that, despite the fact that it was under German occupation, the Kingdom of Denmark retained capacity to make or not to make the agreement relative to Greenland, we are faced with the fact that the only Government of Denmark which we recognize has denied that it authorized or concluded such an agreement.

If the agreement is a valid international engagement, the parties bound by it must be the United States and Denmark. Mr. de Kauffmann does not own Greenland. It is admitted by all concerned that Greenland is not an independent or autonomous unit of international law. Neither the King, nor de Kauffmann, nor the Greenland Councils has the capacity in international law to make an international agreement. Whether the King of Denmark as sovereign of Greenland has the competence to make the agreement is a matter, not of international law, but of Danish constitutional law. Similarly, the ability of the Greenland authorities to confer competence on de Kauffmann is a matter of Danish constitutional law. It would seem that these matters can only be settled by the Danish Government, and that, whether or not it is under enemy control, the competence of its official representatives abroad can only be derived from that Government.

However, the United States Government, while maintaining official relations both in Washington and in Copenhagen with the Kingdom of Denmark; while recognizing no Danish government-in-exile; while recognizing the sovereignty of Denmark over Greenland; and while denying that the Government of Denmark is a free agent, nevertheless purports to make an international agreement with an unauthorized representative of that Government and apparently considers it binding on the Kingdom of Denmark despite the denial of the Danish Government to whom our diplomatic representatives in Copenhagen are accredited. Perhaps some one will discover that the agreement can be upheld on the basis of one of those mysterious emanations from the Kellogg Pact which are currently in favor, but in the appreciation of these the writer is unskilled.

There remains the question whether the Act of Habana, signed on July 30, 1940, by the representatives of the twenty-one American Republics, conferred any rights on the United States with reference to Greenland as against Denmark. An elaborate attempt was made in the Greenland agreement to fit it into the plan of the Act of Habana. Phrases from the latter were repeated almost verbatim in the agreement, and in Article I the agreement refers to the "obligations" of the United States under the Act of Habana as an apparent justification for "assisting Greenland in the maintenance of its present status." However, it should be clear—on the principle *pacta tertiis nec nocent nec prosunt*—that no Pan American treaty can confer rights on one of the signatories as against a non-signatory.

Similarly, the policy of the United States known as the Monroe Doctrine

[22] *Ibid.*, No. 95 (April 19, 1941), pp. 469–470. Press release of April 14.

probably confers no legal rights on the United States in Greenland as against Denmark. However, if the alleged necessity for establishing defense bases in Greenland is real, it would seem preferable to base our action frankly on the Monroe Doctrine than on the speciousness of a pretended agreement with the Kingdom of Denmark.

HERBERT W. BRIGGS

JUS INTER GENTES

The term "international law," as suggested by Bentham as the equivalent of *jus inter gentes*, is restrictive in meaning and misleading. The *jus gentium* advocated by Grotius was much more comprehensive. It embraced all the customs and the principles applicable to the members of the various *gens* who were under the *jus gentium*. Grotius was inspired to write his great treatise *De jure Belli ac Pacis* by his desire to mitigate the horrors of war. He was thinking primarily of the suffering *peoples*—"populos"—and not sovereigns. Kings, states, and nations were only the instrumentalities authorized to speak and act for their peoples.

The restrictive use of the term international law is an error having most unfortunate results. There is no sound justification for the repeated assertion that only states are subjects of the law of nations. That law had its origins in the rights of human beings. These rights did not flow from their allegiance to any sovereign. The means of protecting these rights were greatly limited, to be sure, but received increasing recognition in the slow development of international intercourse. Private international law, which the Anglo-American jurists have rather arrogantly termed conflict of laws, is a great body of jurisprudence dealing with personal, individual rights. These are governed by established principles and procedure. The law of prize has long acknowledged the rights of individuals to press their claims for damages on account of violations of international law. The rights of slaves and the punishment due to pirates have been the concern of the law of nations.

The international rights of individuals have been too long subject to the arbitrary pretensions of sovereign states. In some glaring instances questionable international claims in behalf of individuals have been exploited for diplomatic and aggressive purposes. In many cases the aggrieved individuals have been left without effective redress because it did not suit the foreign policy of their governments. It is nothing short of iniquitous to assert that an individual has no rights whatever unless some nation is willing to support his claim. This certainly is not true within the state: why should it be true between states? Such an academic theory would leave the many thousands of *heimatlos* refugees in a most degraded condition.

This theory that only states are the subjects of international law ignores a very simple and basic fact, namely, that whatever the nature of the claim or the means available for enforcing it by an individual, its foundation