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TRANSLATION: | Joachim v. Elbe [¥]
The English-Turkish Conflict of | Translated by:
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Abstract

This article is the English translation of Der englisch-türkische Mossulkonflikt by Dr. Joachim v. Elbe, a prominent German-American legal expert of the 20th century. The original article in German was published in 1929 in the first issue of *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law). The aim of translating this article is to present to the readers of *Kurdish Studies* the perspective of past publications documenting discussion on Kurds and statehood as well breaking language barriers and making such documents accessible to a wider audience. Moreover, this translation hopes to provide policymakers and scholars engaged in this topic with an overview of the legal history.

Keywords: Statehood; Nation-Building; Cession; Mosul Conflict; Treaty of Lausanne.

ABSTRACT IN KURMANJÎ

Dubendiya Îngilîz û Tirkana li ser Mûsilê

Ev babet wergerra îngilîzî ya babeteke bi nawnişana *Der englisch-türkische Mossulkonflikt* e û ji layê doktor Joachim v. Elbe ve hatiye nivîsîn, ku pêsporekî diyar yê yasaya emerîkî-elmanî yê sedsala bîstem e. Babeta eslî li sala 1929 bi elmanî li jimareya yekem a *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Kovara Heidelberg bo Yasaya Navdewletî) de hatiye belavkirin. Armanca

[±] Main sources used:

Bentwich, *Nationality in Mandated Territories Detached from Turkey*. (*British Year Book for International Law* 1926, p. 97)

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serekî ji wergêrana vê babetê ewe nêrina weşan û nivisarên demên borî ji bo belgekirina guftûgoyên li ser kurd û dewletdariyê bikevine ber bal û nezera xwînerên kovara *Kurdish Studies*, li gel şikandina rêgirîya zimanî û wisa bibe ku ev belge bikevine ber destê cemawerekî berfirehtir. Ji bilî van, ev werger hêvîdar e nezereke giştî li ser dîroka yasayî bo siyasetmedar û lêkolerên mijarê dabîn bike.

ABSTRACT IN SORANI

Milmilanêy inglîzî-turkî le Mûsill

Em babete wergêranî inglîzîy babetêke be nawnîşanî *Der englisch-türkische Mossulkonflikt* we le layen dîktor Joachim v. Elbe nûsrawe, ke pişporrêkî diyarî yasayî emrîkî-ellmanîy sedey bîsteme. Babete esllîyeke le sallî 1929 be ellmanî le yekem jîmarey *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Jornallî Heidelberg bo Yasay Nêwdewlletî) billaw kirayewe. Amancî serekî le wergêranî em babete eweye rwangey billawkirawekanî rabirdû bo dokumêntkirdinî guftugokan le ser kurd û dewlletdarî bixirête ber didî xwêneranî *Kurdish Studies*, legell şkandinî rêgirîye zimanewaniyekan we wa bikrêt ew dokumêntane bikevne berdest cemawerekî frawantir. Cige lewe, em wergêrane hîwaxwaze têrrwanîni giştî leser dîrokî yasayî bo siyasetmedaran û twêjêran dabîn bikat.

Introduction by Ethem Çoban

Der englisch-türkische Mossulkonflikt was written in 1929 by Dr. Joachim v. Elbe, a researcher at the Institute for Foreign Public Law and International Law, today the Max-Planck-Institute for Comparative Public Law and International Law, Germany's powerhouse of public international law. Entitled the English-Turkish Mosul Conflict, the original article in German was published in the first issue of *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*Heidelberg Journal of International Law*). The article has been translated in its entirety and, although *legalese* in nature, retains the original essence of the document. The article can be understood as a legal opinion of the Mosul Conflict between England and Turkey conducted before the League of Nations, and as such demonstrates the contested status of Mosul in the process of Iraqi state formation. In this context Turkey contested the effectiveness of Iraqi statehood, a newly created state under the protectorate of England, over the disputed Mosul region. Therefore, the successful consolidation of statehood via its most potent power-consolidating agent¹, namely recognition, heavily depended on the protectorate state, in this case via the British crown.

The element of recognition as laid out by Joachim v. Elbe, is particularly interesting when considering the recent Kurdish referendum for independence from Iraq which saw 92 % of the population voting in favour of independence. When the question of Kurdish statehood is raised, commentators often highlight the Kurds' apparent "lack of unity". It was indeed British colonial foreign policy which – as articulated

¹ Cf. Crawford, J (2012). *Brownlie's Principles of Public International Law*. 8th Ed. Oxford: Oxford University Press. Entire chapter 6 "Recognition of States and Governments".

in a raw orientalist line of argument England submitted before the League of Nations – divided the Kurds of Turkey from the Kurds of Iraq. The English argument was: “*The Mesopotamian Kurds lack any feeling of belonging to the Anatolian tribesmen living under Turkish rule. They tend towards the Arabic State of Iraq.*” At the same time, and maybe contrary to popular belief or Turkish state practice, Turkey argued, “*The Kurds are race-related to the Turks, both are of Turanian descent. Also, from the point of view of religion and custom, both tribes form solid national unity [sic]...Between the Mesopotamian Kurds and the Turks of Asia Minor [sic] there is a centuries-old sense of closest political togetherness, based on the commonality of race, religion and culture. Contemporary Turkey is a nation-state of Kurds and Turks [sic].*”

One legal concept found throughout the text needs particular elaboration, namely Turkey’s *Declaration of Cession*. Cession ought to be separated from secession, and indeed in literature of public international law falls within the category of modes of acquisition of state territory, whereas secession can be regarded as an entire category on its own.² Under cession of state territory, the transfer of sovereignty over state territory by the owner-state to another state is understood.³ According to *Oppenheim’s International Law*, a reference work of public international law, the only form in which a cession can be effected is an agreement normally in the form of a treaty between the ceding and the acquiring state; or indeed between several states including the ceding and the cessionary state.⁴ At a further note, Turkey’s *Declaration of Cession and Declaration of Cession* spelled out in Article (art.) 16 of the Treaty of Lausanne, are not two separate legal documents, but used synonymously.⁵ Another essential aspect of cession is that it refers to part of a territory rather its entirety. Thus, by always relating to part of a state’s territory, cession must be distinguished from incorporation, which refers to the whole of a state’s territory becoming part of the territory of another state. In the case of cession, the territory concerned becomes integrated in the territory of an existing state, and is therefore different from secession, where part of the territory itself becomes an independent state.⁶

² Cf. Thüser, D. & Burri, T. Secession. In: R. Wolfrum (ed). *The Max Planck Encyclopedia of Public International Law*, Vol. IX, 2012.

³ Cf. Jennings, R. & Watts (2008), A. *Oppenheim’s International Law*, 9th Ed Oxford: Oxford University Press. At 679.

⁴ *Ibid.*, at 670 et seq.

⁵ Art. 16 Treaty of Lausanne: Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned. The provisions of the present Article do not prejudice any special arrangement arising from the neighbourly relations which have been or may be concluded between Turkey and any limitrophe countries.

⁶ Cf. Dörr, O. Cession. In: Rüdiger Wolfrum (ed). *The Max Planck Encyclopedia of Public International Law*, Online edition, available at: <http://opil.ouplaw.com/abstract/10.1093/law/epil/9780199231690/law-9780199231690-e1377?rskey=zchGAH&result=1&prd=EPIL>.

Translation of the original manuscript:

The English-Turkish Conflict of Mosul

The reorganisation of Mesopotamia under state and international law, initiated by the Allied Powers immediately after its military victory over Turkey, has taken place in two closely-linked historical courses. Yet the course of events are to be sharply distinguished from each other under the scrutiny of international law.

On the one hand, the facts need to be regarded that in terms of international law it resulted in the establishment of an independent Arab Kingdom under an English protectorate and auspices of the League of Nations. On the other hand, the »Mosul Question« conducted before the Council of the League of Nations, is in the stricter sense is the battle over territorial sovereignty between England and Turkey over Mosul, the northern part of the Mesopotamian lowlands particularly valuable because of its oil sources.

While the doctrines of international law on the genesis of the Mesopotamian Kingdom pertain to questions on the creation of new states in general, in particular to problems of mandates in international law, the main issue the Mosul case fostered lies within the problem of procedure for a peaceful arbitration of territorial disputes.

The formation of the state of Iraq

The genesis of the Arab Kingdom of Iraq began with the military conquest of the country by Anglo-Indian troops during the war. The first measures taken by the occupying army indicate that the occupation of Mesopotamia was at first intended to be a purely military action, and that in accordance with the principles of the laws of land warfare in no way should affect the national affiliation of the occupied territory. Also, the occupation of the main part of Mosul Province with the city of Mosul following cessation of belligerency took place on the basis of military considerations. That is, on the basis of art. 7 of the Armistice of Mudros of October 30, 1918⁷, which gave the Allies the right “to occupy any strategic point in the event of a situation which threatened the security of the Allies” and art. 16, which committed the Turks “to surrender all garrisons ... in Mesopotamia to the nearest allied commander”. The administrative organisation with its system of military governors and political officers had a military character. The fact that this administration was already subordinated to a civilian commissar in July 1917 and was brought into direct contact with the London central government is indeed an interesting symptom of the preparatory change in its character⁸, but in no way violates the principles of international laws of land warfare. Only the extent of the administrative powers to be exercised by the occupying authorities is subject to certain

⁷ Text Materials concerning the Peace Negotiations. Part XII. Die 8 Treaties of Sèvres. Berlin 1921.

⁸ Review of the Civil Administration of Mesopotamia, Cmd. 161, 1920. p. 74.

restrictions under international law⁹, yet not to their organisation and procedure. The occupier may give his administrative organisation military or civilian character, or he may have it re-sorted by a military or civilian central office. Also, most of the English occupation activities in the field of welfare, education, land cultivation, and in the field of finance remained within the framework of the international administrative duties of the occupier.

However, the replacement of an existing Turkish criminal law and criminal procedure in 1918 already in the conquered parts of Mesopotamia by a law created by the Occupation Authority could not be justified by a need for urgency within the meaning of art. 43 Laws and Customs of War on Land, even though such was attempted by the English civilian commissioner.¹⁰ On the contrary, this measure indicated that England, by exploiting her military power without any regard to the legal situation of the area, was seeking to bring about a reorganisation of Mesopotamia under state and international law.

The Supreme Council Decision at the San Remo Conference of April 25, 1920¹¹, which, pursuant to art. 22 of the Covenant of the League of Nations conferred the »Mandate over Mesopotamia« to England, was the first attempt to legalise English annexation policy. After the so-called Secret Agreement on the Distribution of the Turkish Territories concluded by the Entente powers during the war, which provided for the territorial annexations and the creation of spheres of interest for the Allies in the event of a victory over Turkey, England was to receive the provinces of Basra and Baghdad, meaning the so-called Arabic Iraq with exclusion of the Mosul Province (Upper Mesopotamia) as an annexation zone.¹² However, the mandate encompassed the entire Mesopotamian territory subjugated to the sphere of influence of the occupying English army, that is, the three *Vilayets* of Baghdad, Basra, and Mosul extending until its northern administrative boundary. The Council Decision contains a disposition of the main powers of the Allies over parts of the Turkish Empire. However, did the Supreme Council possess general power of disposition over these territories and, in particular, the jurisdiction to make this decision in the form of a mandate award? Both questions relate to whether or not Turkey's territorial sovereignty has been transferred through valid legal titles to those powers represented in the Council.

Possible legal titles for the transfer of territorial sovereignty could be cession or annexation. The peace negotiations of the Allied Powers with Turkey, which amongst others, consisted of the cession of Mesopotamia to the Allies, were at

⁹ Art. 43-51, Laws and Customs of War on Land.

¹⁰ Review p. 95.

¹¹ Toynbee, p. 100.

¹² Constantinople Agreement of March 18, 1915 between England, France, and Russia (Temperley, Vol. VI, p. 4-9; Loder, p. 23). [Secret] London Pact [Treaty of London] of April 26, 1915 between England, France, Russia, and Italy (Text: Temperley V, p. 384.); Sykes Picot Agreement of May 16, 1916 between England, France, and Russia (Division of Turkey into annexation zones and spheres of interest. Excerpt of agreement: Temperley VI, p. 16; Text of Letters confirming the Sykes-Picot-Agreement of May 1916: Loder, p 161; Agreement of Saint-Jean-de-Maurienne of April 17, 1917 (Participation of Italy on the Sykes-Picot-Agreement: Temperley VI, p 18-22).

the time of the Council Decision in progress, but not yet concluded; hence it lacked a legally valid Declaration of Cession of Turkey. On the contrary, art. I of the so-called »National Pact«, passed on January 28, 1920 by the Chamber of Deputies in Constantinople under the influence of its national majority, expressly upheld Turkey's claim of sovereignty over Allied occupied territory with Ottoman populations.¹³ It was not until August 1920 that the Peace Treaty of Sèvres was signed with Turkey, whose art. 27 and 94 provided for the cession of Mesopotamia to the Allies, but in effect not ratified by any of the contracting parties, and hence not the case of Turkey waiving contractually her territorial sovereignty over Mesopotamia.

Nor has Turkey lost its territorial sovereignty by annexation on the basis of a *debellatio*.

Apart from the fact that under the influence of President Wilson the Peace Conference endeavoured to rule out occupations and annexations in the reorganisation of the world, it would hardly be compatible with the demand for the effectiveness of an annexation that the entirety of the Allied Powers would claim the territory conquered and occupied by England.¹⁴ But even if a conquest for the benefit of third parties was possible and permissible, and the Supreme Council Decision constituted a declaration of annexation on behalf of the Allied Powers, it lacked the indispensable condition of *debellatio* for legal effectiveness. One of the requirements of *debellatio* is the total annihilation of the enemy's resistance, which excludes a change in the existing position of power created by the defeat. At the time of the Council Decision on Mesopotamia, there was merely a truce between Turkey and the Allies. The outcome of the peace negotiations was still uncertain. Already at that time, the national movement in Angora had taken power over the state. On April 23, 1920, the »Grand National Assembly« convened in Angora, which henceforth represented the Turkish state internally and externally.¹⁵

The »National Pact« of January 1920 had made it clear that Turkey would oppose any territorial cession by force of arms. The refusal of ratification of the Treaty of Sèvres by the Angora government led to the resumption of hostilities. The English position in Mesopotamia was repeatedly successfully attacked by Turkish armies [sic], and the English were even forced to evacuate

¹³ Text: Temperley VI, p. 605 *et seq.*; Cmd. 1814 (1923), p. 370. Also cf. Kohn, *Geschichte der nationalen Bewegung im Orient [History of the National Movement in the Orient]* (Berlin 1928), p. 199; Toynbee, p. 46, 272, 490 *et seq.*

¹⁴ Cf. the negotiations between England and France over the French-Turkish Angora Agreement of October 20, 1921 (Correspondence between His Majesty's Government and the French Government Respecting the Angora Agreement of October 20, 1921, Cmd. 1570, Turkey Nr. [1922]). France had renounced in this agreement parts of the Syrian Mandate territory in favor of Turkey. To the English objection that the conquered Turkish territories were jointly owned by allied forces (p. 5), France counters, that the abandonment of these territories by France, which are French conquests, would suffice for the rest of the powers and that France alone is entitled to the interests of the Syrian Mandate (p. 12, 13).

¹⁵ Kohn, *Ibid* [sic], p. 199 *et seq.* On task, function, and assembly of the National Assembly cf.: Kemal-Pacha, *Die Neue Türkei [The New Turkey]* (Speech held in Angora from October 15 to 20, 1927 before representatives and delegates of the Republican Peoples' Party). Leipzig 1928. Volume I: *Der Weg zur Freiheit [The Path towards Freedom]*, p. 400, 409. Volume II: *Die nationale Revolution [The national Revolution]*, p. 5-7.

Sulaymaniyah, a landscape to the east of the Mosul Province.¹⁶ Thus, at the time of the Council Decision, the power relationship between Turkey and the Allies was lacking the degree of stability necessary required for the legal validity of an annexation declaration. Awarding the mandate over Mesopotamia to England therefore did not affect the continued existence of Turkish territorial sovereignty over those provinces.

At the same time, this resulted in the formal lack of jurisdiction of the Supreme Council awarding mandates. The question of controversy in the literature, whether over the distribution of mandates by the Supreme Council alone or in conjunction with the organs of the League of Nations, is compatible with the sovereignty of the League of Nations on the mandate territories as apparently required by art. 22 of the Covenant of the League of Nations, and therefore requires no decision here.¹⁷

Accordingly, the principles established by the Council of the League of Nations in response to a report of Hymans in August 1920¹⁸, the jurisdiction of the Supreme Council as the principal organ of the Allied and Associated major powers to distribute mandates, rests on the assumption that the mandates were first ceded to the major powers who, as a result, have as legal successors to determine the future political fate of these territories. In any case, the precondition of a cession does not apply to the Turkish territories. Even in the view of the Council of the League of Nations, the Supreme Council lacked formal jurisdiction over a mandate decision.

Although Turkish territorial sovereignty over Mesopotamia persisted under this legal situation and had to be respected by the occupying English army under Laws and Customs of War on Land, England initiated and carried out a detachment movement among the population of Mesopotamia, eventually leading to the establishment of an Arab state on Mesopotamian territory dependent on England. During the attempt to obtain approval by the Council of the League of Nations, England's draft treaty on the mandates, which in December 1920 resulted in failure¹⁹, England recalled, not least under the pressure of bloody insurrections, her promise to the Arab tribes given during the war to establish an independent Arab Kingdom as a reward for military aid.²⁰ On July 20, 1920, an English proclamation was published, auguring the population of Mesopotamia the establishment of an independent state.²¹ After

¹⁶ Iraq. Report on Iraq Administration. (Colonial No. 4), 1924, p. 3, 26 – Report by His Britannic Majesty's Government on the Administration of Iraq for the Period April 1923 – December 1924 (Reports of Mandatory Powers. Soc. d. Nations. Genève 1925. C 452 (c); M. 166 (c) 1925, p. 6.

¹⁷ Cf. composition and critique of the views at Gsell-Trümpi, *Zur rechtlichen Natur der Völkerbundmandate [The legal status of Mandates of the League of Nations]* (Glarus 1928), p. 56 *et seq.* Cf. also Schücking-Wehberg, *Satzung des Völkerbundes [The Covenant of the League of Nations]* (2nd Ed. 1924) p. 699 *et seq.*; Schneider, *Das völkerrechtliche Mandat [The Mandate under International Law]* (Stuttgart 1926), p. 46 *et seq.*

¹⁸ Société des nations, *Journal Officiel*, 1920 I p. 336.

¹⁹ Temperley VI, p. 609. Text of the draft: Cmd. 1176 (1921). A new draft treaty dating August 1921 suffered the same fate (Cmd. 1500). Cf. over this development: Iraq. Papers Relating to the Application to Iraq of the Principles of Article 22 of the Covenant 1925. Cmd. 2317.

²⁰ Loder, *ibid.* p. 19-23.

²¹ Text of the proclamation: Loder, Loder, *ibid.* p. 91.

a violent crackdown of a Kurdish rebellion, the fulfilment of this promise began in October 1920 under the energetic leadership of British High Commissioner Sir Percy Cox. Consisting of notables from the three provinces of Baghdad, Basra and Mosul, a Provisional Council of State was convened under the presidency of a native Najib of Baghdad and a provisional government of eight appointed ministers and British advisers. The local administration was based on the existing Turkish institutions staffed with Arab officials, assisted by British advisors. As carrier of state authority, a constitutionally restricted king, who was soon found in the person of the exiled King Faisal of Syria, expelled by the French, was elected head of state by the Provisional Council of State. A referendum held in his favour in the three Mesopotamian provinces confirmed the election by a majority of 96 %. On August 23, 1921 Faisal was officially proclaimed King of the State of Iraq, as Mesopotamia was henceforth called. His sovereignty powers were initially unrestricted constitutionally, although the election of a representative body of the people was expressly promised.

The first measures of the new state authority were in the realm of administrative organisation. The provincial administration was staffed with civil servants from the indigenous population. The British military administration »automatically« received the character of a civilian organisation with advisory powers.²²

The next and at the same time constitutionally most important act of the State of Iraq authority embodied in the person of the king was the decree of the Election Law of March 4, 1922 for a Constituent National Assembly.²³ This is the first time that the territorial and personal jurisdiction of the State of Iraq authority was circumscribed. The State of Iraq includes all Mesopotamian provinces of Turkey with Mosul, Sulaymaniyah etc. (section 1). Eligible to vote are all Iraqis, *i.e.* all males over 21 years of age who are Turkish subjects by descent and reside in the territory of the State of Iraq at the time the law is promulgated (section 18). With the granting of the right to vote, that is, the most important power to participate in the state decision-making, the core of a new, Iraqi citizenship excluding the previous Turkish citizenship was created. Although the implementation of the election, which due to political illiteracy and the constant fluctuation of the Mesopotamian population encountered considerable difficulties and had to be temporarily interrupted, England considered the organisation of the State of Iraq to such an extent that the international legal status of the new state entity could also be determined. On October 22, 1922, England entered into a so-called »Treaty of Alliance« with the State of Iraq, which, as its name implies, included the recognition by England of the State of Iraq as an international contracting party, yet on the other had established a far-fetched protectorate of England over the State of Iraq.²⁴ The entire state is under the »advice and assistance« of an English High

²² Report on Iraq Administration (Colonial Nr. 4), p. 66.

²³ »Electoral Law«, Appendix I, p. 171.

²⁴ Cmd. 1757 (1922). Soc. de Nations, Recueil des Traités 35, p. 13.

Commissioner (art. 1). More specifically, the treaty contains normative provisions for the constitutional document of the State of Iraq (constitutional system, cultural rights, equality of all citizens). The employment of foreign nationals as civil servants without English consent was prohibited. The international representation of the State of Iraq was formally bestowed to the rights of the king; however, the general advisory powers of the English High Commissioner and the king's obligation to seek English approval for the representative of a foreign state prior to issuing the exequatur also resulted in essential restrictions on Iraqi sovereignty in favour of the English protectorate. The state territory could not be ceded without the consent of the English High Commissioner or placed under any other form of foreign control. The contractual period of validity was set at 20 years. If before the end of the treaty the State of Iraq should be admitted to the League of Nations – what England promises to convey – the treaty terminates following approval. The protectorate relationship was established in 1924 by four supplementary treaties pertaining to the employment and powers of English civil servants, specifying in detail the status of the English forces in Iraq, regulations governing the strength and armament of the Iraqi army, constitution of the courts and proceedings of the courts, and the financial obligations of the State of Iraq.²⁵ Even if these agreements left little room for the sovereignty rights of the State of Iraq, the circle of duty of this young state entity vis-à-vis England had been pulled even further.

The expansion of the State of Iraq was prolonged on the basis of the Treaty of Alliance. The administrative organisation received its legal basis in the »Administrative Inspectorate Regulations« of January 1923²⁶, which demarcated the rights and responsibilities of English advisers and inspectors from the Iraqi civil servants. In the words of the English administrative report, this marked a remarkable step forward in the organisation of the State of Iraq.²⁷ The next measure was the conclusion of the elections to the Constituent National Assembly, to concur in January 1923²⁸ and ratify the Treaty of Alliance, and to pass a constitution with a supplementary electoral law. Due to political turmoil and technical difficulties and the implementation of the election, the Assembly concurred only until March 27, 1924.²⁹ After lengthy negotiations, which were ended by an ultimate threat by England, on June 11, 1924 the Treaty of Alliance was adopted by the Constituent National Assembly.³⁰ Following July 10, 1924 when the Constitution³¹, and August 2, 1924 when a new Electoral Law, was

²⁵ British Officials Agreement of March 25, 1924 (Soc. des Nations, Rec. d. Traités 35, 36); Military Agreement of March 25, 1924 (*ibid.*, p. 104); Judicial Agreement of March 25, 1924 (*ibid.*, p. 132); Financial Agreement of March 25, 1924 (*ibid.*, p. 146).

²⁶ Report on Iraq Administration (Colonial No. 4), p. 187.

²⁷ Report on Iraq Administration (Colonial No. 4), p. 66. *Cf.* also Report on the Administration of Iraq. (April 1923 – December 1924); Soc. d. Nations 1925 C 452 (c) M 166 (e) 1925 VI p. 5.

²⁸ Report Soc. d. Nat. 1925, p. 5.

²⁹ Report Soc. d. Nat. 1925, p. 13.

³⁰ Report Soc. d. Nat. 1925, p. 14.

³¹ Text: Journal Officiel. Soc. d. Nations 1924, p. 1759.

adopted, the National Assembly was dissolved. The organisation of the State of Iraq was completed in all essential respects. Almost at the same time, on August 6, 1924, the Treaty of Lausanne entered into force, ending belligerency between Turkey and the Allies, and Turkey formally proclaiming cession of the provinces of Baghdad and Basra (art. 16 in conjunction with art. 3).³² For Mosul, art. 3 sec. 2 had special provisions. The political fate of this province was to be decided in a special procedure. If the English and Turkish governments failed to reach an amicable settlement on this issue within 9 months of signing the treaty, the dispute was to be referred to the Council of the League of Nations. The situation of Mosul under international law, or as the treaty read, was such that the border between Turkey and Iraq, remained unresolved.

With the passing of the Iraq Nationality Law of October 9, 1924, the internal development of the State of Iraq reached its provisional conclusion.³³ Art. 3 of the law provided that all persons who were Turkish subjects on August 6, 1924 and ordinarily resident in Iraq, that is to say the three Mesopotamian provinces, by law lose Turkish citizenship and acquire Iraqi citizenship on the same day. A waiver in favour of Turkey was provided (art. 4).

The law is based on the legal position that all inhabitants of Iraq until August 6, 1924, *i.e.*, the day of the entry into force of the Treaty of Lausanne and thus the Turkish Declaration of Cession, remained Turkish citizens. This view seems in no way to take account of the fact that in the meantime in Mesopotamia a new state entity was born. It leads to the seemingly untenable conclusion that the king of Iraq, appointed by a referendum by the Iraqi population, had been governing Turks for many years and that the constitution of the State of Iraq was decided by Turkish citizens and applied to Turkish subjects--a constitution that expressly declared Iraq a free, sovereign and independent state and gave the people a special Iraqi nationality. However, it is questionable whether the State of Iraq authority that emerged under English protection since 1920 is really the supreme, exclusive force in Mesopotamia. Only under this condition, since a *debellatio* by England was out of the question, could territorial sovereignty over Mesopotamia pass to the new state and change the citizenship of the Mesopotamian population.

Against attempts by the predecessor state to assert its claim of power over the Mesopotamian Self-Determination movement, the latter was protected by the occupying English army. Also, her legal status was completed at the latest in July 1924, that is, with the adoption of the constitution. Even the absolute kingdom existing before this time, might have been a sufficiently concrete form of rule for the peoples of Mesopotamia. In any case, she relied on an administrative organisation and enacted laws such as the important Electoral

³² Martens, N. R., Série 3, Tome 13, p. 342: Day of the first protocol resignation of the instrument of ratification.

³³ Report by His Britannic Majesty's Government to the Council of the League of Nations on the Administration of Iraq for 1935, 1926 (Colonial No. 21), p. 162.

Law on the Constituent National Assembly. Therefore, even if the State of Iraq authority had been legally organised, it was bound to the will of a foreign power in its creation and continued existence. The English occupation authority had given her impulse and opportunity of development. Her effectiveness existed only vis-à-vis the state authority of the predecessor state, not against the occupying English army. The English ultimatum, through which the ratification of the Treaty of Alliance was enforced, contained the hidden threat that in the event of a refusal it would regard the State of Iraq to be no longer in existence. However, this constant dependence on a foreign will excluded the absolute character of the State of Iraq authority. The area was only so long and to the extent Iraqi territory, and the population subject to State of Iraq authority, as permitted by England. Mesopotamia was in fact under the guardianship of England. The State of Iraq had neither original nor derived ownership of its territory. She had neither conquered it, nor ceded it. Under international law Mesopotamia's possibility of existence, and with that, the State of Iraq authority, depended in other words on the development of the Anglo-Turkish power game. As it later turns out, during the establishment of the State of Iraq, England had assumed the premature conclusion of a complete *debellatio* of Turkey. In the Peace of Lausanne [sic], enforced by Turkey's newly awakened resistance, Turkey expressly waived only a part of Mesopotamia, while the fate of Mosul was to be decided in a special procedure. Therein lay the recognition of England that until the entry into force of the Declaration of Cession, Mesopotamia remained under the *de jure* power of Turkey. From this legal position, the Iraqi Nationality Law of October 1924 drew the right conclusion by recognising the Turkish citizenship of all residents of Iraq until August 6, 1924.

The establishment of a new state authority on Mesopotamian soil was therefore nothing less than a power of disposition of England chosen over allegedly conquered territory. Mesopotamia was not annexed but raised by the establishment of an independent state authority to the ranks of a new state. Since this type of disposition, as the annexation affected the legal situation of the conquered territory and its inhabitants, it could only be effective under international law if England had the power of disposal over the conquered territory. As already mentioned above, Mesopotamia was neither formally ceded until August 6, 1924, nor was the *debellatio* of Turkey and thus the conquest of Mesopotamia effectively completed under international law. Turkey's *de jure* territorial sovereignty over Mesopotamia continued until the Declaration of Cession of the Peace Treaty. Next to her was the *de facto* state authority of the Iraqi Kingdom. This peculiar legal situation reflects the fact that even before the *debellatio* of Turkey was completed, England sought to transform the military occupation into an annexation veiled by the establishment of the State of Iraq, and later recognised the continuing Turkish territorial sovereignty through Turkish victories. It was only after the Turkish

Declaration of Cession that the State of Iraq authority was able to emerge effectively under international law.

This view is supported by the League of Nations Resolution on the Iraqi Mandate of 27 September 1924.³⁴ With explicit reference to the cession article of the Peace Treaty of Lausanne, the agreement to the Anglo-Iraqi Treaty of Alliance was granted, thereby expressing the recognition of the State of Iraq. It was only after the Turkish Declaration of Cession that England's disposition over Mesopotamia, that is, the establishment of a new state in the conquered territory, became effective under international law. For the rest, the mandate decision regulated England's obligations to the League of Nations. Amendments to the Treaty of Alliance require approval of the Council of the League of Nations; the development of the State of Iraq is to be reported annually; England must pledge to all members of the League of Nations, as they formally join the Council Decision, to fulfil the Treaty of Alliance with the State of Iraq.

From the further history of the development of the State of Iraq it is to be emphasised that by treaty between England and Iraq of January 13, 1926³⁵ – in accordance with the Decision of the Council of the League of Nations over the Mosul region – the Treaty of Alliance was extended to 25 years. The English-Turkish Treaty of June 5, 1926³⁶ cedes the Mosul province from Turkey to the State of Iraq, and at the same time Turkey recognised it as an independent state. In the treaty of December 14, 1927³⁷, concluded between England and Iraq »on the foot of complete equality«, England expressly recognised the State of Iraq as »an independent sovereign state«. The most pressing provisions of the supplementary agreements on the financial obligations of the state and its military institutions are modified in favour of the State of Iraq.

The Mosul conflict

While the status of the State of Iraq in the southern part of Mesopotamia, *i.e.*, the provinces of Baghdad and Basra, was clarified after the Turkish Declaration of Cession of the Treaty of Lausanne, the political fate of Mosul remained uncertain. According to art. 16 of the Treaty of Lausanne, Turkey had renounced all areas beyond the border as laid down in the treaty. Such a borderline had not been drawn between Turkey and the State of Iraq. Already in the preliminary negotiations of the Lausanne Peace Conference Turkey's obstinate resistance to any voluntary renunciation of the valuable Mosul Province had come to light.³⁸ In order not to jeopardise the peace framework as a whole, a solution of the dispute in the context of the general settlement

³⁴ Journal officiel 1924, p. 1346.

³⁵ Cmd. 2662 (1926); Treaty Series 10 (1926)

³⁶ Cmd. 2679 Soc. d. Nat., Recueil des Traités 64, p. 380.

³⁷ Cmd. 2998; Times, December 21, 1927.

³⁸ Exchange of notes between Lord Curzon and Ismet Pasha November-December 1922. Cmd. 1814, p. 337 *et seq.*

had to be abandoned for the time being and the attempt of a separate treatment had to be made. According to art. 3 sec. 2 of the treaty, the border between Turkey and Iraq should be determined by a friendly agreement with Turkey, to be concluded within 9 months between Turkey and Great Britain [sic].

Sec. 2 further elaborates: »In the event of no agreement being reached between the two governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations. The Turkish and British governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision. «

After the attempt of both governments to establish the disputed borderline at a conference in Constantinople in June 1924 had failed due to Turkish obstinacy and new territorial claims of England,³⁹ the dispute was presented in August 1924 at the request of the English government to the Council of the League of Nations.⁴⁰ The questions of international law which have emerged in the course of the procedures, insofar as they have general significance beyond the Mosul case, concern the object, legal nature and effect of the Council Decision, the material basis of the Council Decision, and its implementation.

Object of the procedure

The procedure before the Council of the League of Nations had been initiated by a unilateral request by England. The English plenipotentiary's attempt to establish a common Anglo-Turkish formula as the basis for invoking the Council of the League of Nations at the Constantinople Conference after fruitlessly ending the direct border negotiations failed due to the objection of the Turkish chief negotiator that the conference lacked jurisdiction.⁴¹ The dispute therefore came in the English version of the request as »Frontière de l'Iraqe art. 3 (2) du traité signé à Lausanne le 24 Juillet 1924« on the agenda of the September session of the Council of the League of Nations. The unclear nature of the dispute in the Treaty of Lausanne and the lack of a jointly agreed formula led to a fundamental disagreement between England and Turkey over the subject of the procedures. According to the English view⁴², the Council of the League of Nations had merely the task of determining the course of the northern borderline of the Iraqi state, which at that time was designated only by a military demarcation line. It was tacitly assumed that the Mosul Province

³⁹ Cf. the negotiation minutes of the Constantinople Conference, Turkish Redbook Nr. 137-141 Publ. Cour. Perm. d. Just. Série C, Nr. 10, p. 166 *et seq.*

⁴⁰ Journal Officiel, 1924, p. 1465.

⁴¹ Cf. Protocol of June 5, 1924 (Publ. Cour. Perm. d. Just *ibid.*, p. 173 *et seq.*)

⁴² Memorandum of the English Government of August 14, 1924. Soc. d. N., Journal Officiel 1924, p. 1566, Declaration of Lord Parmoors during the session of the Council of the League of Nations of September 20, 1924, Journal Officiel 1924, p. 1318.

was already ceded as a geographical⁴³ entity in the Treaty of Lausanne and constituted an integral part of the State of Iraq. In contrast, the Turkish government⁴⁴ denied having ceded the Mosul Province in any statement. She referred to the preliminary negotiations between Lord Curzon and Ismet Pasha in Lausanne, which dealt with the political fate of the Mosul region as a definite geographical entity. The result of these negotiations was art. 3 sec. 2 of the Treaty of Lausanne, which excluded the dispute from the general peace settlement as it had become during the negotiations.

Based on the treaty wording neither one's thesis can be justified. The description of the dispute as a border issue between Turkey and Iraq is so general that it covers both views. For the purpose of art. 3 sec. 2, it is necessary, as has happened on the Turkish side, to go back to the motives of this special regulation. They arise clearly from the private exchange of notes between Lord Curzon and Ismet Pasha at the time of the Lausanne Peace Conference. In these negotiations, the political fate of the entire Mosul Province was contested. It was clear from the arguments of the two conflicting parties, that based on ethnographic, historical, economic, and strategic considerations, it was not the single borderline in northern Iraq that was in dispute but the possession of the whole province of Mosul with its rich oil wells scattered over the long stretches of Upper Mesopotamia. The ethnographic argument was based on the entire population of this province. In terms of economic considerations, the allocation of the whole territory to one state or the other has been referred. In the English view, the possession of all of Mosul was a vital necessity for the State of Iraq. It was precisely the extension of the dispute over the Mosul region as an economic, ethnographic, and territorial unit that made a common understanding between England and Turkey difficult, and finally impossible. Simple border adjustment [sic] issues would probably have been agreed upon soon. But because the »Mosul Question« in this form threatened to become an obstacle to the general peace agreement, it had, at the concurring wish of the party [sic], been detached from the agenda of the peace conference and reserved for a special regulation. Moreover, the Turkish draft treaty was given the identical legal status, which later became the final treaty text.⁴⁵ Turkey proposed to set the »border with Iraq« through a friendly settlement of the parties. Following the previous Turkish statement, it was clear that a waiver by Turkey of the Mosul region could not be included in this version. As the drafting history of art. 3 sec. 2 proves, the political fate of the Mosul Province as a geographical and economic unit was subject to the peace negotiations and with that also subject to the Decision of the League of Nations. At the Constantinople Conference both parties followed this interpretation

⁴³ Turkish Memorandum of September 5, 1924, *Journal Officiel* 1924, p. 1575, declaration of the Turkish representative Fethi Bey during the September 20, 1924 session. *J. O.* 1924, p. 1320 and during the session of September 25, 1924. *J. O.* 24, p. 1338.

⁴⁴ See *supra* 32.

⁴⁵ Publications Cour Perm. Just. C. Nr. 10, p. 158.

accordingly. The Council of the League of Nations, too, has practically joined the Turkish view, declaring that it is its task to determine the border it regarded good. That was because the Council's freedom of resolution was not even limited by a Turkish Declaration of Cession, if it had been made at all.⁴⁶

Legal nature and effect of the Council decision

A similar disagreement, linked to the ambiguity of the Treaty of Lausanne text and the lack of a joint request to the Council of the League of Nations, arose over the legal nature of the procedures and the effect of the Council Decision. According to the English view, the Council had arbitral functions. The parties were to be bound by the decision of the Council of the League of Nations from the outset. Turkey considered the task of the Council to be a simple conciliation within the meaning of art. 15 of the Covenant of the League of Nations. Accordingly, the Council had only proposals to resolve a dispute, the adoption of which was reserved for the parties. Turkey justified her view by stating that cession of territories, which might be required by Council Decision, required the consent of the state concerned.⁴⁷

Although the Turkish representative in later negotiations stated that he was willing to accept the Council Decision in advance, as did England⁴⁸, the Council of the League of Nations decided on September 19, 1925, to settle the dispute with an Advisory Opinion from the Permanent Court of International Justice determining the jurisdiction of the Council on the basis of the Treaty of Lausanne.⁴⁹ In its Advisory Opinion of November 21, 1925, the Court concluded from the intention of the parties expressed in the Treaty of Lausanne and from its concurring statement that the Council Decision was to be presumed in advance, that the Council should exercise its functions as an arbitrator, and that the parties were bound by its decision.⁵⁰

This view should correspond to the legal situation. The wording of the treaty gives no immediate indication. It is true that the French text of the Treaty uses the words »litige« to indicate dispute, and »decision« for the Decision of the Council of the League of Nations. The English text reads in the same place of »dispute« and »decision«. However, in this context it is impossible to draw any conclusion as to the legal nature of the procedure from the choice of such general procedural and judgmental phrases. The purpose of the special regulation is crucial. As the Hague Court [sic] has held in convincing and substantive evidence of the preliminary negotiations and the terms of the Treaty

⁴⁶ Brantings Report in the session of September 30, 1926 Journal Officiel, p. 1358.

⁴⁷ Cf. the declarations of Lord Parmoors and Fethi Bey before the Council of the League of Nations' session of September 20, 1924 (Journ. Off. 1924, p. 1318 *et seq.*) and of September 25, 1924 (Journ. Off. *ibid.*, p. 1337 *et seq.*).

⁴⁸ Cf. the declarations of the Rapporteur Branting during the Council of the League of Nations' session of September 30, 1924 (Journ. Off. 1924, p. 1358). Council Decision of September 30, 1924, stating that the parties agree on this point, Journal Officiel 1924, p. 1360.

⁴⁹ Journal Officiel 1925, p. 1382 (1377).

⁵⁰ Publ. Cour Perm. Just. Int. Série B. Avis Consultatif Nr. 12 (*cf.* especially p. 19, 28).

of Lausanne, the will of the parties was directed towards bringing about an irrevocable final decision over the border dispute. The invocation of the Council of the League of Nations was, according to the object of the treaty, the last resort for the peaceful settlement of the dispute, and in effect meant the final solution to the question, for the appeal to arms after the conclusion of the Lausanne Peace [sic] was no longer a legal resort of settling a question that formed an integral part of the peace treaty. The Turkish representative himself recognised the binding force of the Council Decision at the conclusion of the 30th council session. His explanation, however, consisted of no more than an interpretation of the treaty text. The decisive declaration was made by the Turkish side with the signing and ratification of the Treaty of Lausanne, art. 3 of which obliged Turkey, if direct negotiations with England were to remain fruitless, to submit the dispute to the Council of the League of Nations. There is no doubt that, in the event of a favourable decision, Turkey would have upheld the binding force of the Council Decision by all means. Their opposition to this interpretation of the treaty began only at the moment when the victory of the English thesis became more and more probable.

But if the will of the party was aimed at obtaining a final decision binding both parties, then the task of the Council was not limited to a simple »recommendation« or »mediation«, but to act as an arbitrator. Although the Covenant of the League of Nations does not provide for such a jurisdiction for the Council – the Council's dispute resolution mechanisms are recommendations and mediations – the parties were not prevented by mutual agreement from issuing jurisdiction to the Council of the League of Nations, as any other entity or individual arbitrator, for a particular dispute.⁵¹

With the determination of the borderline between Turkey and Iraq within the meaning of art. 3 sec. 2 of the Treaty of Lausanne, the Council Decision on this point had to supplement the incomplete Turkish Declaration of Cession of Art. 16. With its legal effectiveness, the territorial sovereignty of Turkey over the Turkish territories awarded to the State of Iraq ceased to exist. A special Declaration of Cession of Turkey for these territories after the arbitration was pronounced was neither required, nor admissible.

Investigation and voting procedure of the Council of the League of Nations

The arbitral task of the Council determined its procedure and at the same time the basis for its decision. Whilst recommendations or mediations without binding force may be politically expedient for the parties, the arbitration, in which the arbitration awards both parties are obliged to undertake, must be conducted in a manner which ensures impartial truth-finding and is based on objective principles of decision-making. In the absence of specific provisions in the Covenant of the League of Nations on the procedure to be applied in the

⁵¹ Cour. Perm. de Just. Int. Avis Consultatif Nr. 12, p. 27.

ruling, the Council had a free hand in choosing its method of investigation. Turkey demanded a referendum on the Mosul population as the most equitable means of resolving the territorial dispute. England considered that conducting a referendum was inappropriate for technical reasons, for the politically illiterate population could not gauge the extent of their decision. The means of referendum are not suitable for territorial disputes at all, since the large number of alternatives cannot formulate a simple question suitable for a mass vote.⁵² England therefore demanded that a commission of inquiry be set up to investigate the problem independently and submit proposals of decisions to the Council of the League of Nations. The Council decided the procedural issue in favour of the English proposal. A tripartite commission of inquiry, who had no direct interest in the dispute, was commissioned to collect and review all available material and to recommend to the Council the most appropriate solution.

The Commission could use all available evidence, conduct investigations on the spot, and hear the parties. For the rest, it had to regulate its own procedure.⁵³ From January 27 to March 18, 1925, the Commission visited the Mosul region and, while energetically maintaining its full independence from English interference attempts, undertook in-depth research into the country's ethnographic, economic, political and military situation. Its members heard witnesses from the population, travelled the area in all directions – in some cases even flew over it – and negotiated with the central governments of the parties and the local authorities. It would be difficult to criticise the Commission for having favoured one of the two parties by the nature of its action. It was much more concerned with objective truth-finding. The results of their investigation are set out in a detailed report submitted to the Council on July 16, 1925, which became the basis of the Council Decision.⁵⁴ As the procedure progressed, another disagreement arose among the parties over the voting mode of the Council of the League Nations voting procedure, and the parties' participation in the vote. For the Council Decision, was the majority principle applicable or was it decided unanimously? Because of its purely legal nature, this question – together with the legal nature of the Council Decision discussed above – was submitted to the Hague Court for an Advisory Opinion.⁵⁵ According to the English view, the Council had to decide by majority vote. From the arbitration character of the procedure and a number of practical arbitration cases, and according to the prejudice methods of English jurisprudence, it was held that arbitration awards had to be made by majority vote. This procedure had also to apply to the present case, since the Council had jurisdiction, not by virtue of a special provision of the pact, but by agreement of the parties. The provisions of the pact, which in principle

⁵² Lord Curzon's declaration during the Lausanne Conference Cmd. 1814, p. 361.

⁵³ Council Decision of September 30, 1924, *Journal Officiel* 1924, p. 1360.

⁵⁴ *Journal Officiel* 1925 Document C, 400, M. 147 1925 VII.

⁵⁵ Council Decision of September 1925. *Journ. Off.* 1925, p. 1382 (1377)

demanded unanimity of the Council Decision, were not to be applicable.⁵⁶ Turkey confined herself to emphasising to the Council of the League of Nations the necessity of Turkish approval of any change in its legal status in the Mosul region.⁵⁷ In its Advisory Opinion of November 21, 1925, the Hague Court decided the applicability of the unanimity principle. The representatives of the parties could vote, but their votes were not included in the unanimity rule pursuant to art. 15 sec. 6 of the Covenant of the League of Nations.⁵⁸ The Court's ruling was based on the consideration that the organisation and procedure of the Council of the League of Nations, irrespective of whether the Council fulfilled a statutory function or, as in this case, a task entrusted to it by party agreement. The principle of unanimity would correspond to the legal status of the Council as the representative body of an association of independent states that could not be bound by majority vote. Exceptions were only admissible as expressly stipulated by statute or by special agreement.

However, it is questionable whether art. 3 sec. 2 of the Treaty of Lausanne contains such a special party agreement. It is precisely this arbitration task, which here was delegated to the Council outside its legal jurisdiction that changes its character insofar as the states represented in the Council are to decide, not as representatives of their national interests, but as impartial arbitrators, on a dispute over which their state existence is in no way touched. Yet, this eliminates the main reason for the application of the unanimity principle. On the contrary, it must be concluded that if, by special treaty, the jurisdiction of the Council as arbitrator can be established outside the covenant, the special principle of majority applicable to the nature of arbitration must also be applied.

The decision-making principles

As has already been stated, the arbitration role of the Council of the League of Nations created the necessity to base the Council Decisions on objective principles. But is there a substantive realm of law that provides universally valid decision-making principles for disputes of this kind? Since the time of the authoritative regulation of the European territorial statutes by the powers of the Congress of Vienna until the outbreak of the World War [sic], contains a wealth of examples that show how territorial claims of old or newly emerged states were peacefully settled by discretionary interventions by the European Concert. Through this state practice, there is an unmistakable move towards a new legal order in the acquisition and loss of territory, which is no longer based solely on historical or legitimately acquired legal titles, but which considers territorial disputes as a complex of facts composed of the most diverse

⁵⁶ English Memorandum of October 20, 1925 (Publ. Cour. Perm. Just. Int. Série C, Nr. 10, p. 198 *et seq.* Plead of the English representative before the Court on October 26, 1925 (*ibid.* p. 18 *et seq.*).

⁵⁷ Tefvik Rushdy Bey's declaration during the Council of the League of Nations' session of September 19, 1925. Journ. Off. 1925, p. 1379 *et seq.*

⁵⁸ Avis Consultatif Nr. 12, p. 28 *et seq.*

elements. Economic, geographical, and national elements – to name only the most important ones – are intended, according to their relative value, to help determine the political fate of disputed territories. Corresponding to its nature as an order based on objective standards, this legal idea comes into its own applicability wherever a will superordinate to the individual state, be it in the form of an organised state association or an *ad hoc* state union, limits its struggle for power. A modern example of this kind of dispute resolution is the Mosul Conflict, which compelled the appointed Council of the League of Nations Council and the parties to seek a settlement of the dispute on the basis of objective justice.

This tendency was shown in the negotiations between the parties already. England and Turkey are trying to justify their claims over the disputed area through historical, ethnographic, geographical, economic, strategic and political considerations. The arguments are the same in all negotiations since the Lausanne Conference, repeated in writing and orally before the Lausanne Territorial Commission, at the Constantinople Conference, and before the Council of the League of Nations.

The English thesis is composed of the following reasons⁵⁹:

i) Ethnographic aspects:

The Mosul region is inhabited mainly by Kurds and Arabs. The Turks, who live in Mesopotamia, form a vanishing minority (1/12 of the total population) and are not race-related with the Anatolian Turks, proving their language and moral differences [sic]. The Turkish origin of numerous place names is explained by the centuries-old Turkish rule. The Greek designation of many Turkish cities gives the Turks no reason to return these cities to Greece. The non-Turkish majority of the population has a right to state existence, which is realised in the State of Iraq for parts of the Mesopotamian population. Ethnographic considerations therefore call for the incorporation of the Mosul region into the Iraqi state.

ii) Political aspects:

The majority of the population wants to separate from Turkey and to join the State of Iraq. This commitment has been unambiguously expressed in the referendum organised for the royal election of Faisal, in which the majority of the population of the Mosul region participated. The Mesopotamian Kurds lack any feeling of belonging to the Anatolian tribesmen living under Turkish rule. They tend towards the Arabic State of Iraq. The Turkish administration in

⁵⁹ Memorandum of the English Government of December 14, 1922 Cmd. 1814 p. 363; La Question de Mossoul de la Signature d'Armistice de Moudros (October 30, 1928) au 1er Mars 1925. Constantinople 1925 (Turkish Redbook) 79; English rebuttal of December 26, 1922 Cmd. 1814, p. 381; Redbook p. 93; Lord Curzon's speech before the Territorial Commission of the Lausanne Conference on January 23, 1923, Cmd. 1814, p. 352, p. 393; Declaration of the English representative Sir Percy Cox at the Constantinople Conference, Turkish Redbook Nr. 138, 139, 140, 141; English memorandum of August 14, 1924, Journal Officiel 1924, p. 1566; Speech of Lord Parmoor before the Council of the League of Nations of September 20, 1924, Journal Officiel 1924, p. 1318; Amery's speech before the Council of the League of Nations of September 3, 1925 Journal Officiel 1925, p. 297 and on September 4, 1925 Journal Officiel 1925, p. 1328.

Mesopotamia has had difficulties with the Kurdish population throughout its existence and has seldom been able to exercise effective control over these areas. The Kurds prefer a regime that guarantees them freedom of political development. Moreover, the allocation of the Mosul region to the State of Iraq is a vital necessity for it. In the interest of a lasting peace, the special situation of the State of Iraq has to be taken into account.

iii) Historical aspects:

During the centuries-long foreign domination by Turkey over Mesopotamia, she has not comprehended to merge the foreign national population with the Turkish. The failure of Turkish rule justifies the permanent separation of the territory from Turkey. Relying on long-standing historical ties, no territory can be reclaimed that has been separated from the old state by warlike events. Moreover, the Turkish government treated the Mosul region for a long time as part of the Baghdad Province, proving that it constitutes also administratively one of the southern provinces of Mesopotamia an entity.

iv) Economic aspects:

The import and export trade of the Mosul region tends to head south, downstream. There is only insignificant direct trade between Turkey and the Mosul region. On the other hand, Baghdad is dependent on the grain supply from the Mosul region. Similarly, the economic interests of neighbouring states (Syria, Persia) require state unity between Mosul and southern Mesopotamia. Traffic considerations also speak in favour of the creation of this political unity. The city of Mosul has secure connections with the cities in the south of Mesopotamia at all seasons, while in the winter it is completely cut-off from Anatolian Turkey.

v) Strategic aspects:

If Turkey possesses the Mosul region, it can at any time, by blocking the wheat supply to Baghdad, cause a famine in the capital of the State of Iraq. The Arab capital of Baghdad is only 70 miles from the Turkish border. The Mosul region as a location for a Turkish army corps means a permanent threat to the State of Iraq and other neighbouring states. The weak range of hills in the south of the Mosul region does not pose a serious obstacle to a Turkish invasion, and the independence of the Arab Kingdom cannot be sustained in such a difficult external situation. Conversely, the northern border of the Mosul region, with its high, inaccessible and difficult to pass mountains, forms a natural and easily monitored strategic border for the State of Iraq. The possession of the Mosul region is meaningless for the defence of Turkey, as the State of Iraq does not pose a threat, which is not the case in the reverse case. Incidentally, the hard-to-cross northern border offers every state the advantage of security against enemy invasions. Even if, for ethnographic, economic or other aspects, a different solution to the question of territorial question appeared justified, the strategic aspects would have to be the decisive factor for the annexation of the Mosul region to the Iraqi state.

vi) Legal aspects:

England has conquered the Mosul region and does not need to return it voluntarily [sic]. Moreover, by accepting the mandate for the whole of Mesopotamia, England is bound to the Council of the League of Nations and, by concluding the Treaty of Alliance with the Iraqi State, it is obliged to maintain the existing state. The Turkish National Pact, which maintains Turkey's sovereignty over these areas and demands a free referendum on its future political fate, cannot change this legal situation.

In contrast, Turkey argued the following thesis⁶⁰:

vii) Ethnographic aspects:

The English population statistics on Mosul are wrong. The vast majority of the Mosul population consists of Turks and Kurds (85%). The Kurds are race-related to the Turks; both are of Turanian descent. Also, from the point of view of religion and custom, both tribes form solid national unity [sic]. The low prevalence of the Turkish language in the Mosul region is no proof against the strength of the Turkish element, as most Turks because of their trade relations with Kurds and Arabs use their language. The Turkish origin of many place names proves the Turkish character of the country. The population of the Mosul region therefore has in its majority the same population elements as the Turkish-Kurdish nation state [sic].

viii) Political aspects:

The will of the population demands the annexation of the Mosul region to Turkey. The small minority that has declared itself in favour of joining the State of Iraq before the Commission of Inquiry of the Council of the League of Nations must submit to the majority's will. A referendum in the Mosul region will undoubtedly express this political will. Between the Mesopotamian Kurds and the Turks of Asia Minor [sic] there is a centuries-old sense of closest political togetherness, based on the commonality of race, religion and culture. Contemporary Turkey is a nation-state of Kurds and Turks [sic]. The nationality principle gives the Mesopotamian Turks and Kurds a right to join this state. The Arab part of Mesopotamia with its different language and civilisation only begins at the southern border of the Mosul region. Local revolts in Mesopotamia against British rule prove the aversion of the Mosul population to the Iraqi State. The separation of Mosul from Turkey must become a source of ongoing disputes. In the interest of peacekeeping, therefore, the maintenance of Turkish territorial sovereignty is required.

ix) Religious aspects:

The majority of Mosul's people profess the same religion as the majority of the Turkish population, and therefore stand in contrast to the rest of the

⁶⁰ Turkish memorandum of December 23, 1922, Cmd. 1814 p. 362; Turkish Redbook p. 86, Ismet Pashas letter of December 29, 1922, Cmd. 1814 p. 387; Redbook p. 98, Ismet Pashas speech before the Territorial Commission of the Lausanne Conference on January 23, 1923, Cmd. 1814 p. 337, 395, Redbook Nr. 138-141; Turkish memo of September 5, 1924, Journal Officiel 1924 p. 1574. Document C 494, 1924, p. 1318; Tefik Rushdy Bey's speech before the Council of the League of Nations on September 3, 1925, Journal Officiel 1925, p. 1317 *et seq.*

population of Iraq. For this reason, the Mosul population must remain united with Turkey.

x) Historical aspects:

For 1100 years, the Mosul Province is Turkish property [sic]. This long political affiliation of the territory with Turkey justifies and demands the maintenance of state unity. The administrative organisational consolidation of Mosul with Baghdad was only short-lived.

xi) Geopolitical aspects:

Mosul is not part of Arabic Iraq, but geographically forms part of Upper Mesopotamia. Mosul and southern Iraq are climatically diverse landscapes while conversely, the Mosul region has the same climatic conditions and geological formations as Anatolia. To the south, Mosul is closed by the hills of *Djebel Hamrin* against Arab Iraq. The political boundary must adapt to this natural geographical boundary.

xii) Economic aspects

The main trade relations of Mosul lead to South Anatolia. Conversely, Anatolia's export of goods goes to the Mosul region. The economic importance of the city of Mosul lies in its capacity as a transport hub for all trade routes between Anatolia, Syria, Iraq and Persia. Due to the Baghdad Railway, Mosul is most closely associated with Anatolia and the ports of the Mediterranean Sea. That Baghdad is economically dependent on the Mosul region is not denied. But if one wanted to proceed according to the principle of assigning to a country all the territories which are necessary for its economy, then all existing state boundaries would have to be redrawn. This alone leads to the inapplicability of this principle.

xiii) Military aspects:

Southern Anatolia is dependent on the transport routes, which lead via Mosul. For the safety of southern Turkey, therefore, the possession of Mosul is indispensable. It is not an argument that if Turkey maintained its rule, the main city of the State of Iraq Mosul, would be 70 miles away from the Turkish border. Other capitals (Constantinople) as well are close to the border. The Persian border runs at the same distance from Baghdad, so that the Iraqi capital is equally threatened by this side. Moreover, the presence of a foreign administration in the Mosul region means constant pressure on Turkey, which must be dealt with by considerable military means and as a result constitutes a constant endangerment of peace. The best military protection are borders that meet the just national demands.

xiv) Legal aspects:

Turkey has never renounced Mosul. Nor has it recognised the mandate system. Nor can England invoke the right of conquest as the military situation has changed since the refusal to ratify the Treaty of Sèvres in favour of Turkey. Moreover, by declarations by the Allies during the war, a right of conquest without the explicit consent of the population as title to the territorial acquisition has been rejected. The population of the Mosul region has a right

to self-determination. Unless a referendum complies with this right, the Mosul region forms an integral part of the Turkish territory.

In both theses, the fundamental equality of the chain of arguments is remarkable. Both parties agreed that all aspects were essential to the outcome of the dispute.⁶¹ Different are only the facts that underlie the individual arguments and the conclusions that both parties draw from these facts for the political fate of Mosul and their relative value for the final solution.⁶² Both parties agreed on the outstanding importance that had to be given to the will of the population. There was also unanimity about the importance of economic moments. England also paid tribute to the strategic aspects, while Turkey emphasised the ethnographic aspects.

The Council of the League of Nations had therefore first to decide whether it should take over the argumentation method used by the parties for its own inquiry procedure. If so, then its further task was to objectively determine the factual content of each argument, to appreciate the individual importance of each argument to Mosul's political fate, and finally to determine the relative value of each argument to the final solution. The Council of the League of Nations has left the Commission of Inquiry completely free rein on these questions. The Commission has in principle followed the line of arguments. Their report has become the basis of the Council Decision in every respect. This proves that the reasoning used here leads to objective points of view that can be used for the arbitration of territorial disputes. The Commission of Inquiry initially clarified the thesis of each opposing argument based on the facts, and then determined for each group of arguments their probable influence on the fate of the country. That led to different solutions. If one argued solely on ethnographic arguments, then one came to the demand of an

⁶¹ Turkish memorandum, Journal Officiel 1924, p. 1576; Lord Curzons speech Cmd. 1814, p. 361: "Ismet Passha has based his case upon quite a number of considerations. Economic, strategic and otherwise – about which it is impossible for ignorant people to vote, but which clearly ought to be carefully sifted and examined in order that it may be known where the truth lies"; Declaration of Lord Parmoors before the Council of the League of Nations of September 25, 1924, Journal Officiel 1924, p. 1338: «Quand on sera arrivé à une définition de la question et quand nous aurons une interprétation de cet article du Traité de Lausanne, le Conseil sera complètement libre de rectifier la frontière actuelle de la façon qu'il jugera équitable, après avoir examiné en détail les conditions locales, géographiques, ethniques, administratives, politiques ou stratégiques ainsi que les intérêts et aspirations des populations intéressées.»

⁶² Cf. Amerys statements before the Council of the League of Nations' session of September 4, 1925, Jour. Off. 1925, p. 1330: «L'exposé turc va jusqu' à dire, à propos des considérations topographico-géographiques, historiques, stratégiques, et économiques, que, d'après le rapport, elles sont pour la plupart en faveur de la Turquie. Or, pour le moment, l'exposé turc écarte ces arguments et suggère qu'ils ne devraient, en aucune manière, influencer sur la décision du Conseil, en déclarant que de telles considérations n'ont jamais déterminé, dans l'histoire, le transfert d'un territoire d'une souveraineté à une autre. Je ne voudrais pas infliger au Conseil une dissertation historique, mais je tiens tout au moins à émettre l'avis que toutes ces considérations, à des degrés divers, ont été soigneusement pesées et ont joué un rôle important dans le derniers règlements des frontières de l'Europe, et je me permettrai de suggérer, comme le fait Commission elle-même, qu'elles devraient entrer en ligne de compte dans le présente discussion. Le seul cas où des considérations de cette sorte pourraient être tenues comme n'exerçant pas une influence très déterminante, est celui où elles seraient en opposition avec l'expression éclatante, ardente, indiscutable, d'un sentiment national, en vue d'une solution fondée sur des motifs d'ordre national et ethnique, en une circonstance où une frontière nationale et ethnique pourrait ne pas coïncider avec une frontière économique et géographique mieux appropriée.»

independent Kurdish State, since the Kurds account for 5/8 of the total population. From a purely economic point of view, the disputed area had to be annexed to the State of Iraq. The historical consideration provided the proof that Mosul belonged to different states. Geographical reasons had to lead to the conclusion that the country had to be regarded as an indivisible unity. From a legal point of view, the Mosul region was part of Turkey, according to the Commission.

In order to come to a final solution, the individual arguments had to be weighed in their relative value against each other. The result of this examination was that the will of the population, along with the economic and geographical considerations, had to be the main emphasis because only on the basis of these aspects could a uniform solution be found. The population had, as stated by testimonies, under certain conditions – if granted cultural autonomy to the Kurds and the extension of the mandate – favourably expressed annexation to the Iraqi State. The economic reasons led to the same solution, and from the geographical point of view the area had to remain undivided. The Commission's report allowed for two more options: If the special wishes of the Kurdish people for cultural autonomy could not be met and the English mandate could not be extended, the area should fall to Turkey. If, however, the Council of the League of Nations considered the division of the area to be appropriate, for ethnographic reasons for example, then the Lesser *Zab*, which was necessary for the irrigation of Arab Iraq, should form the borderline. The Council of the League of Nations, having taken into account all the points made by the Commission, has granted the Mosul region to the State of Iraq under the precedent condition that the Treaty of Alliance between England and Iraq be extended to 25 years, and that the Kurds be given certain autonomous rights.⁶³ The will of the population and the economic and geographical aspects, have therefore, in line with the proposal of the Commission, been decisive. After England extended the Treaty of Alliance with Iraq to 25 years on January 13, 1926⁶⁴, and made binding statements concerning Kurdish autonomy, by its power of the Council Decision of March 11, 1926,⁶⁵ determined the precedent condition and thus the legal validity of the Mosul decision. At this stage, as stated above, in accordance with art. 16 in conjunction with art. 3 sec. 2 of the Treaty of Lausanne Turkish territorial sovereignty over Mosul had expired.

Implementation of the Council decision

This legal status was not recognised by Turkey. Even before the Council Decision was issued, the Turkish representative stated in a letter dated December 16, 1925⁶⁶ that a change of territorial sovereignty over Mosul could not occur without the express consent of Turkey. A special justification for this

⁶³ Decision of December 16, 1925 Journal Officiel 1925, p. 106.

⁶⁴ Cmd. 2662 (1926); Treaty Series 10, 1926.

⁶⁵ Journal Officiel 1926, p. 502.

⁶⁶ Journal Officiel 1926, p. 187.

was not provided. An attempt to justify it with the Declaration of Cession of art. 16 in conjunction with art. 3 sec. 2 of the Treaty of Lausanne was also not made. The refusal of Turkey was therefore a clear violation of its contractual obligation.

Was the Council of the League of Nations authorised to use sanctions to break the Turkish resistance? The sanctioning powers of the League under art. 16 of the Covenant of the League of Nations can only be directed against members of the League. They are therefore inapplicable to Turkey, which is not a member state. In order to justify a compulsory power of the League of Nations against Turkey, the procedure according to art. 17 of the Covenant of the League of Nations would have first needed to be applied, in which the non-member is required to submit to the obligations incumbent upon the League members to settle the dispute. The agreement of the Councils jurisdictions under art. 3 sec. 2 of the Treaty of Lausanne offered no substitute for this procedure. The Council should only act as an arbitrator outside its statutory powers. The special dispute settlement procedure of the League of Nations was not initiated, and the Council Decision was not an executable title.

The implementation of the Council Decision therefore depended on the willingness of the parties to communicate. The Council confined itself to an urgent recommendation to the parties to settle the dispute by means of a friendly agreement.⁶⁷ This was done by the Treaty of June 5, 1926 between England and the Iraqi State on the one hand and Turkey on the other.⁶⁸ Turkey recognised Iraq as an independent state and the so-called "Brussels Line", *i.e.*, the line established⁶⁹ by the Council of the League of Nations in October 1924 determining the military *status quo* as a final and inviolable state border. Moreover, the provisions of the Treaty on the Switching of Citizenship prove that the Turkish legal view has penetrated from the necessity of an explicit Declaration of Cession, for art. 4 of the Treaty stipulates that the inhabitants of Mosul, "ceded to Iraq by the present Treaty", have remained Turkish citizens until the entry into force of the Treaty.

⁶⁷ Journal Officiel 1925, p. 193.

⁶⁸ Cmd. 2679, Soc. d. N. Recueil des Traités 64, p. 380.

⁶⁹ Journal Officiel 1924, p. 1647 *et seq.* Turkish Rotbuch, p. 257-266.