The European Journal of International Law Vol. 18 no. 1 © EJIL 2007; all rights reserved

The Aaland *Case and the Sociological Approach to International Law*

Oliver Diggelmann*

Abstract

This article examines the report of the Aaland Commission of Jurists of the League of Nations against the background of Max Huber's scholarly writings. The report of the Aaland Commission, of which Huber was a member, is considered a milestone in the history of the self-determination of peoples. The article explores the common ground between the report and Huber's so-called 'sociological approach' to international law. It begins by describing Huber's method of tackling doctrinal problems. Huber believed that the decentralized character of international law meant that substantial deviations in the international legal order from its social basis should be avoided. A comparison between the report and his theory reveals that the Commission's method of tackling the Aaland problem is very similar to Huber's approach to doctrinal problems. The article further shows that the concept of the state in the report and in Huber's theory are similar in many respects. Huber's analogies between social and biological organisms seem to have influenced the report. Finally, the Commission's view that the right of self-determination has in the case of the Aaland islanders a legal character is examined vis à vis *Huber's concept of international law.*

1 Aim of this Article

Much has been written about the *Aaland* case and its role in the history of the self-determination of peoples. To shed more ink on this topic is not the object of this contribution. An article on the *Aaland* case in a symposium dedicated to the life and work of the eminent Swiss lawyer, international judge, and president of

* Professor of Law, Andrássy University Budapest; Dr. iur. (Zurich), LL.M. (Cambridge). Email: oliver.diggelmann@bluemail.ch.

 doi: 10.1093/ejil/chm004

the International Committee of the Red Cross, Max Huber,[1] leads one to expect something different. Huber was also an academic who was highly regarded for his theoretical writings on international law. This article discusses the Aaland Commission's findings against the background of Huber's scholarly writings and, more specifically, explores the common ground between the report and his work.

Huber's approach to international law has been called 'sociological' by himself and by others.[2] Huber was dissatisfied with what he perceived to be the shortcomings and simplistic concepts of positivist doctrine. In his early writings, prior to World War I, he pioneered the use of theories and concepts from the then still young discipline of sociology to tackle problems of international law.[3] He was concerned about the tendency of the international legal order to shift away from reality.[4] In his view, substantial deviations from its social basis should be avoided given the decentralized character of international law. Sociology provided appropriate intellectual tools to analyse the widely unexplored reality in international relations and to lessen the incidence of deviations.

2 Overview of the Report[5]

The facts of the Aaland question and the Commission's main findings may be briefly recalled. The Aaland Islands form an archipelago in the Baltic sea, the inhabitants of which are almost entirely of Swedish origin. In 1809, Sweden had ceded the islands – together with Finland – to Russia. Until the end of World War I, both remained Russian. After the Bolshevik revolution, Finland declared its independence from the then Soviet Union, asserting the principle of self-determination of peoples that had been recognized by the Bolshevik leaders.[6] The inhabitants of the Aaland Islands – whose territory had until that time been treated as part of Finland – took the opportunity to claim the same right for themselves and to demand accession to Sweden. Sweden supported the separatist movement, but Finland insisted on its sovereignty over the

1 On Huber's work and life see the contribution by Schindler, 'Max Huber – His Life', at 81–95 of this issue. See also Klabbers, 'The Sociological Jurisprudence of Max Huber: An Introduction', 43 *Austrian J Public and Int'l L* (1992), at 197 ff.

2 See *infra* 3.A. For a survey of sociology of international law see Blenk-Knocke, 'Sociology of International Law', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law,* vol. IV (2000), at 449 ff. Huber's approach influenced other well-known international lawyers such as Dietrich Schindler Sr., Paul Guggenheim, and Charles de Visscher.

3 For Huber's criticism of positivist doctrines see above all his *Die soziologischen Grundlagen des Völkerrechts* (1928), at 4 ff (which appeared originally as 'Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft', 4 *Jahrbuch des öffentlichen Rechts* (1910), at 56 ff) .

4 For international law's tendency to depart from its social basis see mainly Huber, *supra* note 3, at 8 ff.

5 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Questions', *Official Journal of the League of Nations*, Special Supplement No. 3, Oct. 1920; a reprint of the English version is available in H. Raschhofer, *Selbstbestimmungsrecht und Völkerbund* (1969), at 71.

6 For the role of the right of self-determination in the Bolshevik revolution see A. Cassese, *Self-determination of Peoples* (1996), at 14 ff.

archipelago. Troops were dispatched to the Islands by Finland, and the separatist leaders were arrested. Peace in the Baltic region seemed threatened. In 1920, the case was submitted to the newly founded League of Nations. Its competence to deal with the matter was, however, uncertain. The Council of the League asked a committee of three jurists – the Aaland Commission of Jurists – to give an advisory opinion on the legal aspects of the dispute.[7]

The main question before the Commission concerned the Council's competence to deal with the matter. Finland regarded the matter as falling entirely within its domestic jurisdiction.[8] A strictly positivist approach to the question would probably have supported Finland's view. The Commission could have sought a rule providing an explicit or implicit basis for the Council's competence in the Covenant of the League, in another treaty or in customary law. Such a search would, however, have probably proved futile. Instead, the Commission chose to focus on an analysis of the reality to which the key terms of the case – 'domestic jurisdiction' and 'sovereignty rights' – referred. It held, reaffirming the traditional position, that the right to dispose of national territory is an essential attribute of sovereignty. It stated, however, that this rule only applies if the sovereignty of a state is definitively constituted. The Commission introduced the terms 'transitional situation' and 'situation of fact' to deal with circumstances of transformation or dissolution of a state in which the right to dispose of territory may be limited. Consequently, it regarded the Council of the League as competent to deal with the matter and to make recommendations for its resolution.

The report also considered the role of the principle of self-determination in situations such as the one in question, holding that this principle 'may be called into play' in transitional situations. It reasoned that 'new aspirations of certain sections of a nation' can produce effects that are relevant for internal and external peace. Importance was also attached to the manifest will of the Aaland islanders, as expressed in the separatist movement.[9] The report did not, however, conclude by recognizing a general right of self-determination. The principle was attributed only a vague legal status in the concrete situation of the case. The Commission remained very cautious, reasoning that in situations such as the one in question a compromise is often necessary, since other factors such as geographical or economic circumstances must also be taken into account.[10]

[7] The Commission consisted of Ferdinand Larnaude, Dean of the Law Faculty of Paris and president of the Commission, Max Huber, and A. Struycken, a Dutch politician and councillor of the Netherlands' government. The Permanent Court of International Justice was not yet in existence when the Aaland Commission was entrusted with its task.

[8] For the problem of demilitarization that was also treated in the report see Modeen, 'Aaland Islands', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. I (1992), at 1 ff.

[9] Report, *supra* note 5, at 82 ff.

[10] The Council of the League of Nations, after taking note of the report, regarded itself as competent to deal with the matter and to make recommendations for its resolution. It suggested arrangements be made for the protection of the ethnic character of the Islands without recognizing a general right to declare independence. For the Council's reaction to the report see Cassese, *supra* note 6, at 27 ff.

3 The Report and Huber's Theory

Three aspects of the report appear to be of particular interest when read against the background of Max Huber's theory. First, there is the Commission's general approach to the Aaland question. How much common ground is there between the report and Huber's approach to doctrinal problems? Second, there is the report's flexible understanding of the terms 'domestic jurisdiction' and 'sovereignty rights'. This aspect, which refers to the concept of sovereignty, raises the question whether there are similarities with Huber's concept of the state. Third, there is the vague legal character of the right of self-determination. How does the Commission's view compare with Huber's concept of international law? In the following section, these three questions will be explored.

A *General Approach to the Aaland Question*

As explained, the Commission in its approach to the Aaland question tried to give the terms 'domestic jurisdiction' and 'sovereignty rights' a particular meaning, namely one that took account of the situation of Finland and the Aaland Islands after Finland's secession from the Soviet Union. I shall now attempt to clarify Huber's approach to doctrinal problems and its common characterization as 'sociological', a characterization that is very general and says little about his theory.

An examination of Huber's theoretical writings reveals that he makes use of the social sciences and their concepts in two different ways. First, he regards them as useful in analysing 'big' questions of the international legal order and its social basis. These questions concern, for example, the 'character' of the society of states, the origin of selfish behaviour of states, the basis of obligation of international law, and the problem of international integration. Nowadays, many of these questions are mainly treated by 'international relations', international law's sister discipline. Huber's best-known academic work, *Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts* of 1910, deals with several problems of this kind.

In addition, Huber makes use of social science in his writings regarding doctrinal questions. This latter use is of particular interest in the present context but is less known than the former. In his doctoral thesis, for example, Huber analyses the problem of succession of states with a, as he calls it, 'sociological approach'. What is meant by this? Huber makes a fundamental distinction between two categories of legal terms. On the one hand, there are the 'key terms'. They correspond with the main social facts such as property, family, state, or political community.[11] For Huber, the social sciences can help to give these terms a meaning that corresponds most closely with reality, or may be used to adjust them.[12] Adjustments and differentiations are particularly important in international law due to the tendency of the international legal order to stray from reality. Huber regards the application of highly abstract terms from private law to problems of international law as an important cause of these deviations.

[11] Huber, *supra* note 3, at 8 ff.

[12] See M. Huber, *Die Staatensuccession* (1898), at 4.

The other category of legal terms, namely legal terms that are not 'key', does not attract Huber's interest. In his theory, they have the status of auxiliary constructions.

The approach described can be seen in many judgments and arbitral awards in which Huber was involved.[13] The famous *Island of Palmas* arbitral award of 1928, which is treated in more detail elsewhere in this volume, is a good example.[14] In this case, he 'adjusts' the key terms 'state' and 'sovereignty' to reality by distinguishing the situation of the creation of sovereignty rights (by discovery) from the situation following their creation. In order to avoid substantial deviations of the legal order from its social basis, Huber regards 'effective occupation' as a condition for the continued existence of sovereignty rights.

A comparison of the Aaland report and Huber's approach reveals common ground too. The Commission did not indulge in a long positivist search for a rule limiting the domain of 'domestic jurisdiction' and 'sovereignty rights' of Finland, but analysed instead the social reality to which these terms refer. It concluded that the differences between the situations of definitively constituted states and states in transformation or dissolution cannot be ignored by international law. By recognizing that not only the dichotomy of state/full sovereignty and no state/no sovereignty exists in reality, but that there are also further possibilities of which international law must take account, the Commission differentiated the key term 'state' and its corresponding terms 'domestic jurisdiction' and 'sovereignty rights'. It thereby contributed to a diminution of the deviations of the legal order from its social basis.

B *State, Sovereignty, and Domestic Jurisdiction as Flexible Concepts*

The second aspect of the report to be analysed against the background of Huber's theory concerns the concept of the state. At first sight there is common ground between the two. The Commission, by referring to the problem of the transformation of the state and analysing the relevance of different factual situations, appears to regard the state as a living unit, not as an abstract entity endowed with abstract rights. This concept of the state resembles sociological thinking in general, as sociology regards social change as a key question of its discipline. In the following, I will explore whether the similarities go beyond this resemblance.

A closer look at Huber's theory and his concept of the state is required beforehand. Huber's concept of the state at the fundamental level is influenced by two ideas. First, there is Ferdinand Tönnies' dualism of 'community and society' (*Gemeinschaft und Gesellschaft*), which provides a tool to explain the specific form of social cohesion in nations. In Huber's view, nations are the 'basis' of the states.[15] They are 'communities' in

[13] On Huber's role as president of the Permanent Court of International Justice and as an international arbitrator see the articles by Thürer, 'Max Huber: A Portrait in Outline', at 69–80 of this issue and Khan, 'Max Huber as Arbitrator: The *Palmas (Miangas)* Case and Other Arbitrations', at 145–170 of this issue.

[14] See Khan, *supra* note 13. The arbitral award may be found in 22 *AJIL* (1928), at 867 ff.

[15] For a detailed analysis of Huber's concept of the state see O. Diggelmann, *Anfänge der Völkerrechtssoziologie—Die Konzeptionen von Max Huber und Georges Scelle im Vergleich* (2000), at 81 ff. Surprisingly an explicit reference to Tönnies cannot be found in Huber's writings. The influence is, however, obvious and substantial.

Tönnies' sense, and as such they are to be distinguished from all societal forms of social cohesion. Their core is a set of moral values such as faith and loyalty, and each nation has its own specific character and personality.[16] For Huber the division of the world into nations, which in his view provides stability in human life, is a natural fact.

States arise due to the nations' wish to organize themselves as political units.[17] Influenced by the 'historical school', and in particular by Johann Caspar Bluntschli, Huber regards states as manifestations of their 'spirit of nation' ('*Volksgeist*').[18] States are also, and here the second idea comes into play, 'social organisms' that can be compared with biological organisms.[19] This idea is derived from Otto von Gierke's theoretical writings. Analogies between social and biological organisms, according to Huber, help explain the birth, growth and death of states as well as the complex interplay between their organs. With a view to the Aaland matter, it is noteworthy that Huber distinguishes between original and derived *births* of states, depending on whether or not a nation separates from an existing state.[20] He explicitly recognizes that states, as natural organisms, can be divided and that new centres can be built in the detached part.[21] As regards *growth*, it is caused by the states' 'natural tendency' to expand and by the elites' greed and lust for war.[22] The analogy between social and biological organisms also explains that states, in order to stay alive, must adjust as best they can to changing circumstances.[23] Failure to adjust is dangerous, as suppressing renewal and adjustment can cause tensions and eventually the *death* of the state.[24] In Huber's view, only major changes of circumstance require adjustments. This is also an insight that he gains from analogies with biological organisms, which do not adjust to merely peripheral changes.[25]

Examination of the report reveals that the common ground with Huber's theory goes beyond the rather banal fact that the concept of the state is 'dynamic' in both. On the one hand, both assume that states are 'based' on nations that aim to organize themselves in independent political units. The nation in this concept has a pre-political, quasi-natural character. The report states, for example, 'all that has been said . . . only applies to a nation which is definitely constituted as a sovereign state'.[26] The reasoning in this passage coincides with Huber's concept. On the other hand, the idea

[16] Huber, *supra* note 3, at 99. Huber's position is influenced by W. Wundt, a social psychologist of the late 19th century known as a founder of the 'psychology of peoples' (*Völkerpsychologie*).

[17] Linguistic nations are, according to Huber, more likely than other nations to achieve their aim of organizing themselves in independent political units: Huber, 'Der schweizerische Staatsgedanke', in M. Huber, *Heimat und Tradition* (1947), at 22.

[18] See Huber, 'Die geschichtlichen Grundlagen des heutigen Völkerrechts' (1923), in M. Huber, *Gesellschaft und Humanität* (1948), at 188.

[19] See Huber, *supra* note 12, at 27.

[20] *Ibid.*, at 5.

[21] *Ibid.*, at 28.

[22] See Huber, *supra* note 3, at 18.

[23] An explanation of this view, which is essential for Huber's theory, can be found in Huber, 'Nationale Erneuerung aus der Geschichte' (1935), in Huber, *supra* note 17, at 189.

[24] See *ibid.*

[25] See Huber, *supra* note 12, at 27.

[26] Report, *supra* note 5, at 75.

of necessary 'adjustments' to major changes of circumstances plays a crucial role both in the report and in Huber's theory. The report uses the term 'readjustment',[27] and its reference to the intensity of the claims of the separatist movement on the Aaland Islands can be regarded as an indication of the influence of Huber's concept on the report.[28] The claim of the separatist movement could be, as Huber would put it, a major change of circumstances and a tension that endangers the organism. To sum up: the analogy between social and biological organisms in Huber's theory seems to have exercised a substantial influence on the thinking of the Aaland Commission.

In my view, it is plausible that this analogy provided a helpful analytical tool to approach the Aaland question in a pragmatic way. Huber's use of biological analogies prompts, however, further questions and some scepticism. In his doctoral thesis of 1898, for example, Huber writes that sociology is a variant of the natural sciences.[29] He reasons that both are based on precise observation of nature. For Huber, the analogy is an appropriate concept for explaining all kinds of social facts and developments. It is, he writes, a 'complete one'.[30] The slope in using biological analogies is slippery – and Huber slips. He assumes, for example, that every nation has naturally given characteristics that also determine the structure of the states.[31] He also recognized a naturally given hierachy between certain peoples and races, when he recommended in 1904 to not abuse 'highly developed institutions' for 'inferior races'.[32] Biological aspects of his thinking survived World War I and his shift from sociological to theological thinking. In 1934, Huber still regarded the idea of a hierarchy between the races and nations as part of the natural order of things, even if he admitted that it is difficult to define the word 'race' precisely.[33] As late as 1939, Huber wrote that colonization is a multiplication of civilization.[34] Huber showed in his life and work a remarkable nose for fundamental problems in international law and society, but he was for the most part unable to see the disastrous potential of such ideas. Whatever the reasons for his inability, others were able to do so.

C *Legal Character of the Principle of Self-Determination*

The third aspect of the Aaland report of interest against the background of Huber's theory concerns the legal character of the principle of self-determination.[35] The relevant passages in the report are remarkably obscure. The Commission enigmatically holds

[27] *Ibid.*, at 75.

[28] 'The Aaland islanders have not ceased to do all in their power to attain the realisation of their national hopes': *ibid.*, at 82.

[29] See Huber, *supra* note 12, at 4.

[30] 'Die Analogie zu den sozialen Körpern ist eine so vollständige, dass man schon deshalb versucht sein möchte, auf den phylogenetischen Zusammenhang zu schliessen': see Huber, *supra* note 12, at 28.

[31] For details see Diggelmann, *supra* note 15, at 95 ff (*Staatentypologie*).

[32] Huber, 'Die Entwicklungsstufen des Staatsbegriffs', *Zeitschrift für Schweizerisches Recht* (1904), at 22.

[33] Huber, 'Evangelium und nationale Bewegung' (1934), in M. Huber, *Glaube und Kirche* (1948), at 64 (reprint).

[34] Huber, 'Die Schweiz in der Völkergemeinschaft' (1939), in Huber, *supra* note 17, at 142 (reprint).

[35] Throughout the 19th and early 20th centuries, the principle of self-determination never reached the status of a legal principle at the international level, though it played a crucial role in European history.

that in situations of 'readjustments' the principle of self-determination '*may be called into play*'.[36] It further states that the community of states has an interest in transitional situations and that 'effects of certain sections of a nation', when they come to the surface, may produce effects that must be taken into account 'in the interests of internal and external peace of nations'. How do the Commission's considerations fit with Huber's concept of international law? Did Huber's concept provide a basis upon which attributing the principle of self-determination could be attributed a kind of legal status?

Huber's concept of international law may be said to be motivated mainly by his uneasiness about the fact that only a part of what is 'international law' is observed in practice.[37] Huber questions the legal character of many of these rules and seeks to provide a precise criterion that enables legally binding rules to be distinguished from non-binding rules.[38] He rejects the positivist doctrine according to which consensus is the basis of obligation in international law as blurring the differences between several categories of rules. His own concept is more power-oriented. For Huber, who was also influenced by Rudolf von Jhering's writings emphasizing the role of interests in law, the 'permanent collective interests of the states' are the basis of obligation.[39] His concept is evolutionary. Collective interests and with them international law developed gradually from the late Middle Ages, caused mainly by a steady increase in the problems concerning more than one state.[40] It became, in other words, more and more difficult for states to pursue their own interests in isolation. In Huber's view, 1648 was the year in which it was officially recognized that collective interests had emerged.[41] The increase in economic relations undoubtedly played an important role in the development of collective interests,[42] but more important was the inability of any of the Great Powers to establish permanent predominance. In the balance of power system, the Great Powers act as representatives of the society of states and of the collective interests.[43] Huber further tries to determine exactly which rules are legally binding and which are not.[44] To this end, he introduces a fundamental distinction between 'territorial' and 'extra-territorial' rules. The former are those rules that deal with the states' territorial basis. They all have legally binding character.[45] Extra-territorial

36 Report, *supra* note 5, at 75.

37 Referring to a statement by Georg Jellinek, Huber holds that 9/10 of the rules regarded as international law cannot claim legally binding character: see Huber, 'Die Gleichheit der Staaten', in F. Berolzheimer (ed.), *Juristische Festgabe des Auslandes zu Josef Kohlers 60. Geburtstag* (1909), at 115.

38 For Huber's concept of international law see Huber, *supra* note 3, at 52 ff.

39 See Huber, *supra* note 3, at 10.

40 *Ibid.*, at 32.

41 *Ibid.*, at 55.

42 Huber is also influenced by Herbert Spencer's theory of integration, which regarded integration as a process of 'densification': see Huber, *supra* note 3, at 61.

43 *Ibid.*, at 11, 81.

44 *Ibid.*, at 45 ff.

45 As regards the legally binding rules, Huber further distinguishes 'common rules' (*gemeines Recht*) from other rules with legal character. The first have the closest connection to the collective interests of the society of the states. They are universally binding and cannot be altered by bilateral or multilateral agreements. See Huber, *supra* note 3, at 42.

rules are only binding if they are necessary for the 'coexistence of states'. Huber does not, however, expound upon this concept, and it remains unclear which of the extraterratorial rules are necessary for the coexistence of states.[46]

In looking at the Aaland report against this background, two aspects come to the fore. First, there is the report's reference to the 'interests' of the community of states when the role of the principle of self-determination in transitional situations is discussed. This reference recalls Huber's concept of the discretionary power of states as being limited by the 'collective interests' of the society of states. Second, there is the Commission's reasoning that the Aaland islanders' claim may have effects on 'internal and external peace' that international law must take account of. Its reasoning is similar to Huber's distinction between the territorial rules and the extra-territorial rules necessary for the coexistence of the states on the one hand and the rest of the extra-territorial rules on the other. The binding character of rules in this concept seems directly linked to a concern with maintaining peace. In both the report and in Huber's theory, the legal quality of a rule seems to depend on its relevance for international stability. The report seems in this regard to be influenced by Huber's ideas as well.

4 Concluding Remark

The preceding analysis suggests that the influence of Max Huber's theory on the report of the Aaland Commission was far-reaching and, on the whole, probably decisive. This inference is also supported by a comparison of the style of the report and Huber's writings. Both consistently avoid discussing abstract general principles, citing social, political and historical facts considered relevant for the legal analysis instead.

Having said that, a clarification seems called for in conclusion. As large as the influence of Huber's ideas on the outcome of the Commission's work may have been, it was the Commission in its entirety that bore the responsibility for the report and that deserves respect for its pragmatic and far-sighted considerations.

[46] Huber's concept is also silent as regards the existence of rules that are observed despite being neither 'territorial' nor necessary for the coexistence of the states.