ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

8

HUMAN RIGHTS AND THE INDIVIDUAL IN INTERNATIONAL LAW · INTERNATIONAL ECONOMIC RELATIONS

EDITORIAL COMMITTEE

Rudolf Dolzer, Dr. iur., S.J.D. (Harvard)
Robert E. Hollweg, J.D. (Univ. of Michigan)
Jonathan S. Ignarski, M.A. (Cantab.), Barrister
Peter Macalister-Smith, B.A. (Kent), Ph.D. (Birmingham)
Ann Rustemeyer, M.A. (Oxon.), Dip.Lib. (Univ. of N.S.W.)
Anne M. Trebilcock, J.D. (Berkeley)
Alfred-Maurice de Zayas, J.D. (Harvard), Dr. phil. (Univ. of Göttingen)

EDITORIAL ASSISTANCE

Peter M. Lawrence, B.A., LL.B. (Univ. of N.S.W.)
Charles J. Turpin, M.A. (Cantab.), Solicitor

With deep regret we record the untimely death during the preparation of this volume of Ann Rustemeyer, who was a mainstay of the Editorial Committee from the beginning of the project.

The articles in this Encyclopedia should be cited (until publication of the final edition) according to the following example:

H.-J. Schlochauer, Arbitration, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 1 (1981), p. 13.

ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

PUBLISHED UNDER THE AUSPICES OF THE
MAX PLANCK INSTITUTE FOR COMPARATIVE
PUBLIC LAW AND INTERNATIONAL LAW
UNDER THE DIRECTION OF
RUDOLF BERNHARDT

ADVISORY BOARD

RUDOLF L. BINDSCHEDLER · THOMAS BUERGENTHAL · KARL DOEHRING
JOCHEN ABR. FROWEIN · GÜNTHER JAENICKE · HERBERT MIEHSLER
HERMANN MOSLER · FRITZ MÜNCH · DANIEL P. O'CONNELL †
KARL JOSEF PARTSCH · PIERRE PESCATORE · HENRY G. SCHERMERS
ULRICH SCHEUNER † · HANS-JÜRGEN SCHLOCHAUER · MAX SØRENSEN †
HELMUT STREBEL

8

HUMAN RIGHTS AND THE INDIVIDUAL IN INTERNATIONAL LAW · INTERNATIONAL ECONOMIC RELATIONS

1985

NORTH-HOLLAND
AMSTERDAM · NEW YORK · OXFORD

© ELSEVIER SCIENCE PUBLISHERS B.V. – 1985

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic mechanical, photocopying, recording or otherwise, without the prior permission of the copyright owner.

ISBN: 0 444 87911 0

Publisher:

ELSEVIER SCIENCE PUBLISHERS B.V.
P.O. BOX 1991
1000 BZ AMSTERDAM
THE NETHERLANDS

Sole distributors for the U.S.A. and Canada:

ELSEVIER SCIENCE PUBLISHING COMPANY INC.
52 VANDERBILT AVENUE
NEW YORK, N.Y. 10017, U.S.A

Library of Congress Cataloging in Publication Data

Main entry under title:
Encyclopedia of public international law.
Issued in parts.
Includes index.
1. International law – Dictionaries.
I. Bernhardt, Rudolf, 1925–
II. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (Heidelberg, Germany)
JX1226.E5 341'.03 81–939
AACR2

PRINTED IN THE NETHERLANDS

INTRODUCTORY NOTE

The eighth instalment of the Encyclopedia of Public International Law contains 129 articles devoted to human rights and the individual in international law, and to international economic relations. As in the previous instalments, articles which relate to more than one subject area are included in the most appropriate volume. Thus, war crimes are treated in Instalment 4 which deals with war and the use of force, and the entry on the General Agreement on Tariffs and Trade (1947) is included in Instalment 5 along with other articles on universal international organizations and cooperation. Many regional international organizations concerned with economic matters are dealt with in Instalment 6.

Generally, decisions of international courts and arbitral tribunals are contained in Instalment 2 even though they may relate to individuals or international economic law. Some major decisions of regional international institutions concerned with human rights are dealt with in the present volume in the articles on the European Commission of Human Rights, the European Court of Human Rights, and the European Convention on Human Rights, as well as in the articles on the American Convention on Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

To facilitate the use of the Encyclopedia, two kinds of cross-references are used. Arrow-marked cross-references in the articles themselves refer to other entries, and are generally inserted at the first relevant point in an article (e.g. The case was submitted to the → International Court of Justice). For other topics for which a separate entry might be expected but which are discussed elsewhere or under a heading which does not immediately suggest itself, the title of the topic appears in the alphabetical sequence of articles with a cross-reference to the article where it is discussed (e.g. **INQUIRY** *see* Fact-Finding and Inquiry).

At the end of each instalment there is an updated list of articles for the entire Encyclopedia. Articles which have already appeared have a number in brackets identifying the instalment in which they may be found.

The manuscripts for this instalment were finalized in early 1985.

CONTENTS

List of Entries for this Instalment (with Names of Authors) ix
List of Abbreviations xiii
Articles in Alphabetical Order 1
List of Articles for the Entire Encyclopedia 541

LIST OF ENTRIES

African Charter on Human and People's Rights (Etienne-R. Mbaya) 1
AKU Cases (Christine Haverland) 4
Aliens (Rainer Arnold) 6
Aliens, Admission (Karl Doehring) 11
Aliens, Expulsion and Deportation (Karl Doehring) 14
Aliens, Military Service (Karl Doehring) 16
Aliens, Property (Ignaz Seidl-Hohenveldern) 20
American Convention on Human Rights (Thomas Buergenthal) 23
Amnesty International (Jonathan S. Ignarski) 27
Antitrust Law, International (Karl M. Meessen) 29
Apartheid (Jost Delbrück) 37
Asylum, Diplomatic (Julio A. Barberis) 40
Asylum, Territorial (Atle Grahl-Madsen) 42
Bancroft Conventions (Wolfgang Fritzemeyer) 46
Bills of Exchange and Cheques, Uniform Laws (Wolfgang Freiherr Marschall von Bieberstein) 48
British Commonwealth, Subjects and Nationality Rules (Richard Plender) 53
Burmah Oil Co. v. Lord Advocate (Wolfgang Fritzemeyer) 59
Cabotage (Robert C. Lane) 60
Calvo Doctrine, Calvo Clause (F.W. García-Amador) 62
Capital Movements, International Regulation (Sir Joseph Gold) 64
Cash and Carry Clause (Werner Meng) 70
Charter of Economic Rights and Duties of States (Ernst-U. Petersmann) 71
Chilean Copper Nationalization, Review by Courts of Third States (Prosper Weil and Patrick Rambaud) 76
Clearing Agreements (Hugo J. Hahn) 78
Commercial Arbitration (Bernardo M. Cremades) 82
Commercial Treaties (Gerold Herrmann) 85
Commodities, Common Fund (Christian Tomuschat) 91
Commodities, International Regulation of Production and Trade (Christian Tomuschat) 94
Concessions (Peter Fischer) 100
Crimes against Humanity (Benjamin B. Ferencz) 107

Crimes against the Law of Nations (Dietrich Schindler) 109
Customs Frontier (Herbert Miehsler) 110
Customs Law, International (Hans Ballreich) 114
Customs Union (Hans Ballreich) 123
Czarnikow v. Rolimpex (Jonathan S. Ignarski) 126
Denationalization and Forced Exile (Rainer Hofmann) 128
Discrimination against Individuals and Groups (Karl Josef Partsch) 134
Double Taxation (Werner Ebke) 138
Drago-Porter Convention (1907) (Wolfgang Benedek) 141
Economic and Technical Aid (Lothar Gündling) 143
Economic Coercion (D.C. Dicke) 147
Economic Law, International (John H. Jackson) 149
Economic Organizations and Groups, International (Ernst-U. Petersmann) 161
Eisler Case (Jonathan S. Ignarski) 167
Embargo (Hans G. Kausch) 169
Emigration (Paul Weis) 174
Etat Russe v. La Ropit (Sabine Thomsen) 177
European Commission of Human Rights (Carl Aage Nørgaard) 178
European Convention on Human Rights (1950) (Jochen Abr. Frowein) 184
European Court of Human Rights (W.J. Ganshof van der Meersch) 192
European Recovery Program (Alfred-Maurice de Zayas) 207
European Social Charter (Wolfgang Strasser) 211
Expropriation and Nationalization (Rudolf Dolzer) 214
Extradition (Torsten Stein) 222
Extradition Treaties (Torsten Stein) 229
Forced Labour (J.G.C. van Aggelen) 231
Forced Resettlement (Alfred-Maurice de Zayas) 234
Foreign Aid Agreements (Lothar Gündling) 237
Foreign Debts (Hugo J. Hahn) 240
Foreign Investments (Stefan A. Riesenfeld) 246
Free Trade Areas (Peter Fischer) 250
Genocide (Hans-Heinrich Jescheck) 255
German Nationality (Rudolf Bernhardt) 258
Havana Charter (Günther Jaenicke) 260

Hostages (M. Cherif Bassiouni) 264
Human Rights (Louis Henkin) 268
Human Rights, Activities of Universal Organizations (Stephen P. Marks) 274
Human Rights, African Developments (Emmanuel G. Bello) 284
Human Rights and Humanitarian Law (Karl Josef Partsch) 292
Human Rights Commission of the Arab States (Riad Daoudi) 294
Human Rights Covenants (Gérard Cohen Jonathan) 297
Human Rights, Universal Declaration (1948) (Juan Carrillo Salcedo) 303
Immigration (Donald P. Kommers) 308
Indigenous Populations, Protection (Gudmundur Alfredsson) 311
Indigenous Populations, Treaties with (Gudmundur Alfredsson) 314
Individuals in International Law (Karl Josef Partsch) 316
Inter-American Commission on Human Rights (Tom J. Farer) 321
Inter-American Court of Human Rights (Thomas Buergenthal) 324
International Commission of Jurists (Peter Macalister-Smith) 326
International Covenant on Civil and Political Rights, Human Rights Committee (Christian Tomuschat) 327
International Crimes (Hans-Heinrich Jescheck) 332
International Economic Order (Ernst-U. Petersmann) 336
Investment Codes (Richard M. Buxbaum and Stefan A. Riesenfeld) 344
Irredentism (Gerlinde Raub) 351
Joyce v. Director of Public Prosecutions (Jonathan S. Ignarski) 353
Kidnapping (Martin Feinrider) 355
LIAMCO-Libya, Petroleum Concessions Arbitration (1977) (Peter Fischer) 358
Loans, International (Hans-Ernst Folz) 361
London Agreement on German External Debts (1953) (Helmut Coing) 364
Lump Sum Agreements (Richard B. Lillich) 367
Migrant Workers (Maxime Tardu) 372
Migration Movements (Eberhard Jahn) 377
Military Aid (Jost Delbrück) 379
Minimum Standard (Detlev F. Vagts) 382
Minorities (Francesco Capotorti) 385
Missionaries (Theo Zimmermann) 395
Monetary Law, International (F.A. Mann) 396
Monetary Unions and Monetary Zones (Sir Joseph Gold) 403

Moratorium (Alexander Riedel) 409
Most-Favoured-Nation Clause (Endre Ustor) 411
Nationality (Albrecht Randelzhofer) 416
Option of Nationality (Karl M. Meessen) 424
Passports (Friedrich L. Loehr) 428
Permanent Neutrality and Economic Integration (Herbert Miehsler) 431
Plebiscite (Henn-Jüri Uibopuu) 434
Population, Expulsion and Transfer (Alfred-Maurice de Zayas) 438
Protected Persons (Erich Kussbach) 444
Racial and Religious Discrimination (Karl Josef Partsch) 447
Refugees (Eberhard Jahn) 452
Repatriation (Alfred-Maurice de Zayas) 456
Revere Copper Arbitral Award (Rudolf Dolzer) 461
Rose Mary, The (Robert C. Lane) 462
Sale of Goods, Uniform Laws (Gert Reinhart) 463
Schtraks v. Government of Israel (Jonathan S. Ignarski) 468
Self-Determination (Daniel Thürer) 470
Sex Discrimination (Anne M. Trebilcock) 476
Slavery (Anne M. Trebilcock) 481
State Debts (Hans-Ernst Folz) 484
State Debts, International Administration and Control (Hans-Ernst Folz) 488
Stateless Persons (Hans von Mangoldt) 490
Taxation, International (Jörg Manfred Mössner) 494
Technology Transfer (Guillermo Cabanellas) 506
Torture (Rolf Kühner) 510
Traffic in Persons (Jonathan S. Ignarski) 513
Transnational Enterprises (Peter Fischer) 515
United Nations Relief and Works Agency for Palestine Refugees in the Near East (Peter Macalister-Smith) 519
United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements) (Stefan A. Riesenfeld) 522
World Population (Ved P. Nanda) 526
World Trade, Principles (Ernst-U. Petersmann) 530

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AFDI	Annuaire Français de Droit International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International law
AnnIDI	Annuaire de l'Institut de Droit International
Annual Digest	Annual Digest and Reports of International Public Law Cases
Australian YIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
BILC	British International Law Cases (C. Parry, ed.)
BYIL	British Year Book of International Law
CahDroitEur	Cahiers de Droit Européen
CanYIL	Canadian Yearbook of International Law
CJEC	Court of Justice of the European Communities
Clunet	Journal du Droit International
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
ColJTransL	Columbia Journal of Transnational Law
Comecon	Council for Mutual Economic Aid
CTS	Consolidated Treaty Series (C. Parry, ed.)
DeptStateBull	Department of State Bulletin
DirInt	Diritto Internazionale
EC	European Community *or* European Communities
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of the United Nations
ECR	Reports of the Court of Justice of the European Communities (European Court Reports)
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
ESA	European Space Agency
ETS	European Treaty Series
EuR	Europa-Recht
Euratom	European Atomic Energy Community
Eurocontrol	European Organization for the Safety of Air Navigation
FAO	Food and Agriculture Organization of the United Nations
Fontes	Fontes Iuris Gentium
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross

ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IDI	Institut de Droit International
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
Indian JIL	Indian Journal of International Law
IntLawyer	International Lawyer
IntRel	International Relations
ItalYIL	Italian Yearbook of International Law
JIR	Jahrbuch für Internationales Recht
LNTS	League of Nations Treaty Series
LoN	League of Nations
Martens R	Martens Recueil de Traités
Martens R2	Martens Recueil de Traités, 2me éd.
Martens NR	Martens Nouveau Recueil de Traités
Martens NS	Martens Nouveau Supplément au Recueil de Traités
Martens NRG	Martens Nouveau Recueil Général de Traités
Martens NRG2	Martens Nouveau Recueil Général de Traités, 2me Série
Martens NRG3	Martens Nouveau Recueil Général de Traités, 3me Série
NATO	North Atlantic Treaty Organization
NedTIR	Nederlands Tijdschrift voor Internationaal Recht
NILR	Netherlands International Law Review
NordTIR	Nordisk Tidsskrift for International Ret
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PolishYIL	Polish Yearbook of International Law
ProcASIL	Proceedings of the American Society of International Law
RdC	Académie de Droit International, Recueil des Cours
Res.	Resolution
RevBelge	Revue Belge de Droit International
RevEgypt	Revue Egyptienne de Droit International
RevHellén	Revue Hellénique de Droit International
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
RivDirInt	Rivista di Diritto Internazionale
SAYIL	South African Yearbook of International Law
SchweizJIR	Schweizerisches Jahrbuch für internationales Recht
SCOR	Security Council Official Records
SEATO	South-East Asia Treaty Organization
Strupp-Schlochauer, Wörterbuch	Strupp-Schlochauer, Wörterbuch des Völkerrechts (2nd ed., 1960/62)

Supp.	Supplement
Texas ILJ	Texas International Law Journal
UN	United Nations
UN Doc.	United Nations Document
UN GA	United Nations General Assembly
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
UST	United States Treaties and Other International Agreements
WEU	Western European Union
WHO	World Health Organization
WMO	World Meteorological Organization
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

1. Historical Background

In the preamble to the Charter of the → Organization of African Unity (OAU), the signatories declare their determination "to fight against neo-colonialism in all its forms", affirm that they are "conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples", and refer expressly to the → United Nations Charter and the Universal Declaraton of Human Rights (→ Human Rights, Universal Declaration (1948)).

The African Charter on Human and Peoples' Rights owes its inspiration to the → European Convention on Human Rights (1950) and the → American Convention on Human Rights (1969). In 1961 a group of African jurists first proposed formulating an African charter on human rights. In 1967 the African Bar Association suggested the creation of an African human rights commission. In 1968 Nigeria pressed for the establishment of regional commissions within the framework of the → United Nations. At the OAU summit meeting in 1979 it was decided that a human rights commission should be set up within the framework of the Organization. In the course of three meetings, one in Dakar in 1979 and two in Banjul in 1980 and 1981 (the last being followed by a meeting of the OAU Council of Ministers), a definitive draft Charter was prepared; it was adopted unanimously by the Heads of State and Government of the OAU at their summit meeting in Nairobi in June 1981 (→ Human Rights, African Developments).

According to Art. 63, the Charter enters into force three months after the receipt of ratifications by a simple majority of OAU member States (i.e. the 26th OAU state). By the end of 1984 the Charter had been ratified by 14 African States (Burkina Faso, Congo, Egypt, The Gambia, Guinea, Liberia, Mali, Nigeria, Rwanda, Senegal, Sierra Leone, Tanzania, Togo and Tunisia).

2. Individual and Collective Rights

The expression "Human and Peoples' Rights" provides a useful indication of the contents of the African Charter: It is concerned not only with the civil and political rights to which individuals can lay claim, but also with the right to permanent sovereignty over natural resources (→ Natural Resources, Sovereignty over) and the right to → self-determination, rights which can only be realized collectively in their social, economic and cultural aspects. This juxtaposition reveals what might be described as an ingenious attempt to assemble in a single document ideas drawn from almost all the covenants, conventions, declarations and resolutions of the → United Nations General Assembly and from other human rights instruments promulgated since the international movement in favour of human rights was institutionalized with the inauguration of the United Nations in 1945.

Drawing inspiration from the United Nations Charter, the Universal Declaration and the OAU Charter, the African Charter on Human and Peoples' Rights reaffirms in paragraph 7 of its preamble the conviction that "it is henceforth essential to pay a particular attention to the right to development" and that "civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". The recognition in the Charter of this essential relationship represents a significant development.

In the category of individual rights, the African Charter envisages two sorts of guarantee: unlimited and limited guarantees.

The Charter guarantees without restriction the following traditional civil and political rights: the rights to equality, justice before the law and personal dignity. The elements of justice before the law are listed in Art. 7, including: the right to appeal to competent national organs, the right to defence and to be defended by counsel of the individual's choice, the right to be tried within a reasonable time by an impartial court or tribunal, and the presumption of innocence. Other rights, for example, the right to life, to freedom of conscience, to freedom of association, assembly and movement, are subjected to limitations. They may be restricted or even derogated by law. There is no provision for derogation as such; nor

is it stated that such laws must be "strictly required by the exigencies of the situation" (European Convention). As in the European Convention and in certain national constitutions, Art. 13 guarantees the right to participate in government, either directly or through freely chosen representatives, and protects the right of access to public property and services on a basis of non-discrimination.

The second series of rights consists of the collective rights enumerated in Arts. 18 to 26. Art. 18 acknowledges the family as the natural unit and the basis of society; the rights of women and children are protected; the aged and the disabled have the right to special measures of protection in keeping with their physical or moral needs. The equality of all peoples in the enjoyment of the same respect and the same rights is expressed in Art. 19, with the additional provision that nothing may justify the domination of one people by another. Art. 20 formulates the right of all peoples to existence and their unquestionable inalienable right to self-determination; it affirms that colonized or oppressed peoples have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. The mass expulsion of → aliens is prohibited (Art. 12(5); → Aliens, Expulsion and Deportation).

The Charter protects the right to property but makes restrictions "in the interest of public need or in the general interest of the community", in accordance with the provisions of appropriate laws (Art. 14). There is no mention of compensation, whether it be "prompt, adequate and effective" in the traditional Western sense, or "appropriate" or "reasonable" as used in UN terminology. The Charter also guarantees the right to work "under equitable and satisfactory conditions" and to receive "equal pay for equal work" (Art. 15). This constitutes an obligation for governments to provide employment, but there is a vast discrepancy in the factual situation. The capacity to create employment is still restricted by the inequitable ordering of international trade in a manner disadvantageous to the Third World and by the weaknesses of the industrial infrastructure (→ International Economic Order; → Developing States). As for agricultural workers, the land barely provides for their self-subsistence.

These somewhat onerous provisions serve to recall to member States that they should extend the benefits of their resources to all their nationals rather than to a minority, as seems to be the present case in many States.

Among the other peoples' rights recognized in the Charter, the right to economic and social development should be mentioned (Art. 22). The States parties to the Charter may freely dispose of their wealth and natural resources "with a view to strengthening African unity and solidarity" (Art. 21).

3. The Commission

The Charter provides for a Commission of eleven members, of which each must be a national of a different State. The Commission is to fulfil the following functions: the promotion and protection of human and peoples' rights; the interpretation of the Charter; and the performance of any other tasks entrusted to it.

Art. 60 exhorts the Commission to draw inspiration from the UN and OAU Charters, the Universal Declaration and other human rights instruments. In spite of certain similarities with the European and American human rights conventions, the African Charter displays some distinctive features reflecting the special character of the African judicial systems: lack of a court of human rights; rights limited to submitting petitions to the African Commission; incapacity of the Commission to take appropriate measures in cases of human rights violations; lack of a derogation clause, etc. The African Charter covers not only civil and political rights but also specifically economic and social rights. In this respect it differs from the American Convention which, while integrating political and social rights, refers separately to the progressive development of economic, social and cultural rights. As to the European system, economic and social rights are protected by the → European Social Charter. In contradistinction to the earlier European and Inter-American Conventions, the African Charter insists on the right to develop, the inclusion of which expresses the desire of developing States to rise to the economic level of developed States.

4. Duties

By introducing duties of the individual into an international instrument (Arts. 27 to 29) the Afri-

can Charter has created an innovation. In the past it was usual to enumerate rights which, by implication, imposed duties on States. By contrast, the Charter recognizes that the individual has duties towards his family, society, the State and the African international community.

5. Evaluation

At the risk of oversimplifying the somewhat complex situation concerning the aspirations of peoples with different traditions and cultures in the human rights field, one might venture to say that the basic principles and objectives underlying the rights and duties elaborated in the Charter comprise the following:

- Individual and collective rights contribute towards the more complete realization of development objectives;
- Development goals can hardly be attained without recognizing the close relationship between civil and political rights on the one hand, and economic, social and cultural rights on the other;
- The principle of self-determination, the eradication of colonialism and all forms of exploitation, together with promotion and realization of African unity, are for Africans just as important as other development objectives;
- Human and peoples' rights are by no means foreign to traditional African values and civilization;
- A process of development seated in human rights must be based on the collective efforts of individuals, families, communities and States;
- African efforts in favour of human rights although falling within the framework of the OAU Charter, must take their inspiration from international law: the UN Charter, the Universal Declaration and other international instruments.

The fundamental problem here is to decide whether the enforcement mechanism conforms to international standards or African traditions – the crucial test of the Charter's utility for individuals and groups whose rights it proclaims and for whom there should be the possibility of prompt and effective redress. With all due respect, it should be pointed out that the very slow pace of the Commission's bureaucratic procedures does not meet this important criterion, for three fundamental reasons:

(a) Recourse to the full range of local remedies presupposes the actual existence of such remedies, the role of the Commission being to add an international guarantee to the remedies provided by the national system. Experience has shown that this is not the case in Africa. Indeed, a few years ago, following the general erosion of the constitutional protection of human rights in the fledgling African States, a commentator rightly remarked that it was a waste of time to speak of constitutionalism and the constitutional edifice in the African context. It is a fact that, since the gaining of independence, the majority of attempts at drafting constitutions in Africa have ended in failure.

It is doubtful whether the situation has since improved sufficiently to justify including acknowledgment of the exhaustion of local remedies among the procedural aspects of the Commission's work (see Art. 56(5); → Local Remedies, Exhaustion of).

(b) One can understand that there are certain advantages in keeping the Commission's work confidential, secret negotiations often providing better results than an open confrontation. Nevertheless, certain reprehensible practices have had to be abandoned by States, precisely because they feared adverse publicity. Many detainees secretly confined in State prisons have been released as a direct result of the publicity given by → Amnesty International when adopting prisoners of conscience, and because of the negative effect which such publicity was having on international relations, whether economic or otherwise.

(c) Some of the substantive rights and duties are not merely ideals, but require rapid concrete action to give them effect. For example, the right not to be arbitrarily arrested or detained runs counter to statutory provisions allowing the authorities to make arbitrary decisions. Similarly, freedom of movement implies that certain restrictions regarding the issue of → passports should perhaps be reviewed, in conformity with the obligations of States as laid down in the Charter. These points and many others call for studied decisions on the part of States if they are to fulfil their international undertakings.

Finally, the Charter reaffirms confidence in general international law relating to human and peoples' rights, based on UN and African instruments (Art. 60). As subsidiary measures to deter-

mine the principles of law, it refers to "other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine" (Art. 61).

Thus the African Charter subscribes to the theory of relative consent to the constraints of international law, refusing to accept the validity of norms to which the parties have not consented and to the elaboration of which they have not contributed. This represents a view which is both conservative and full of good sense, in a world characterized by political, economic and military inequalities and disparate interests. Yet, however important their contribution, international organizations, both intergovernmental and regional are only instruments in the process which leads to realization of the ultimate goal for the attainment of which they have been created.

African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981); ILM, Vol. 21 (1982) 58–68.

R. GITTLEMAN, The African Charter on Human and Peoples' Rights: A Legal Analysis, Virginia Journal of International Law, Vol. 22 (1982) 667–714.

P. KUNIG, The Protection of Human Rights by International Law in Africa, GYIL, Vol. 25 (1982) 138–168.

M.L. BALONDA, African Charter on Human and Peoples' Rights, in: K. Ginther and W. Benedek (eds.), New Perspectives and Conceptions of International Law, An Afro-European Dialogue (1983) 134–146.

U.O. UMOZURIKE, The African Charter on Human and Peoples' Rights, AJIL, Vol. 77 (1983) 902–912.

E.-R. MBAYA, Menschenrechtskodifikation in Afrika, Vereinte Nationen 1984/4 August, 132–136.

ETIENNE-R. MBAYA

AKU CASES

1. Background

The AKU cases were concerned with the post-war jurisdiction of the Federal Republic of Germany in the matter of the expropriation of German-owned shareholdings in the Dutch joint stock company Allgemeene Kunstzijde Unie (AKU).

In 1929 the Nederlandsche Kunstzydefabriek, a joint stock company under Dutch law having its registered office in Arnhem, entered into a stock pooling agreement with the Vereinigte Glanzstoff Fabriken AG (VGF) in Wuppertal (Germany). Under this contract, the members of the VGF could exchange their share certificates for equities of the Dutch company. After the German occupation of Holland in 1940 (→ Occupation, Belligerent), the German Reichsbank bought up AKU stock capital and transferred it to German purchasers. The German shareholding interests in the AKU totalled about 30 per cent. The AKU for its part had an interest either directly or through the VGF in various German companies.

In 1944 the Free Netherlands Government issued the Netherlands Enemy Assets Regulation (Staatsblad 1944, No. E 133) which in Art. 3 stipulated that ownership of the entire assets of enemy countries or subjects was transferred to the Netherlands State (→ Enemy Property). After the occupation of Germany, those AKU share certificates located in the three Western zones were seized by the military governments by authority of Art. 2 of Military Government Law No. 53 (United States Area of Control) and handed over to the Dutch government.

In 1953 some of the expropriated German shareholders filed suit in Germany against the AKU for a declaration that the expropriation of the former German-owned AKU shares had no effect whatsoever in law as far as the AKU assets situated in the Federal Republic of Germany – particularly the AKU interests in German companies – were concerned and that, accordingly, the petitioners continued to participate in the AKU in proportion to the nominal amount of their shares to its capital stock. In addition the plaintiffs claimed the right to be informed about AKU physical assets situated in the Federal Republic of Germany and demanded the supply of replacement shares or alternatively the payment of equivalent compensation.

2. Judgments

The action was based mainly on the law of → reparations as developed by the United States Supreme Court. The corporation law principles

set out in Kaufmann et al. v. Société Internationale pour Participations Industrielles et Commerciales, S.A., et al., 72 S. Ct. 611 (1952) stated the possibility that the corporate veil which had hitherto separated the shareholder from company assets could be pierced and admitted a *pro rata* claim of non-enemy shareholders to the corporate assets of their company seized in the United States as enemy assets.

The Landgericht (District Court) Wuppertal (Judgment of May 27, 1953) and the Oberlandesgericht (Regional Appeal Court) Düsseldorf (Judgment of March 18, 1954, Betriebsberater (1954) p. 331) dismissed the action as inadmissible under Law No. 63 of the Allied High Commission (Official Gazette of the Allied High Commission for Germany, No. 64 (1951) p. 1107). The courts stated that the litigant shareholders' rights were situated in Holland – the actual location of the share certificates themselves was declared irrelevant – and that they had been seized in their entirety under Dutch law by the Netherlands Government. Owing to Art. 3 of Law No. 63, German jurisdiction was therefore excluded.

The Bundesgerichtshof (Federal High Court of Justice) dismissed the appeal on points of law (Judgment of December 13, 1956, Monatsschrift für Deutsches Recht, Vol. 11 (1957) p. 276). In substance the findings of the ruling required no decision on the question of the *situs* of the litigant shareholders' rights. The Court stated that Chapter Six, Art. 3(3) of the Convention on the Settlement of Matters Arising out of the War and the Occupation of May 5, 1955 (→ Peace Settlements after World War II) excluded German jurisdiction over expropriation of German assets to a greater extent than Law No. 63. According to Art. 1(1)(a) of Law No. 63 its operation presupposed that the seized German-owned property was situated in a foreign State, while Art. 3 of Chapter Six of the Treaty contained no such requirement. By para. 1 of this provision the Federal Republic had renounced any future objection to measures which had been or would be carried out with regard to German external assets or other property, seized for the purpose of reparation, restitution or the other purposes stated therein. As the further requirements necessary to exclude German jurisdiction, i.e. the seizure of German-owned property for the purpose of reparation, were declared fulfilled by the 1944 Dutch Enemy Assets Regulation, the access to the courts turned on the question of whether the litigant shareholders' interests had to be considered as seized to the extent asserted by the petitioners. The Bundesgerichtshof determined that by virtue of Art. 1(1)(a) of Law No. 63 this legal issue was governed by the law of the expropriating State, which was equally applicable to Art. 3 of Chapter Six of the Treaty. As a consequence, the application of Dutch law to the question of whether the asserted interests had been expropriated in Holland corresponded to the legal position created by the Treaty. Furthermore, the court of last resort concurred in the opinion of the appellate court that the extent of the expropriation was not subject to appeal on points of law under Art. 549 of the German code of civil procedure. As a result, the Court ruled that in accordance with Art. 3 of Chapter Six of the Treaty, judicial review under German law was excluded and therefore the action was improper.

The prejudicial impact of the AKU decision was restricted, owing to the fact that the Bundesgerichtshof considered neither the legal question of the situs of the confiscated shareholders' interests nor the issue of the extent of the expropriation in law. In a later judgment concerning the same Netherlands Enemy Assets Regulation (Judgment of July 11, 1957, Entscheidungen des Bundesgerichtshofes in Zivilsachen, Vol. 25 (1958) p. 127), the Court stated that the expropriation or seizure by the Dutch Government did not relate to German-owned property situated in the territory of the Federal Republic if the legal effect was not extended to German territory by ordinance of the former occupying powers or by inter-State agreement. In this latter ruling the Court asserted that the expropriation and seizure of the AKU shares by the Netherlands State had been executed in Germany by the occupying powers by handing over the share certificates to the Dutch Government. The AKU decision was thus elucidated as not implying, owing to Art. 3(1) of the Convention on the Settlement of Matters Arising out of the War and the Occupation, the lawfulness of the Dutch act of expropriating property in Germany in the absence of an act extending the seizure over the Dutch frontiers.

AKU Case, ILR, Vol. 23 (1956) 21–24.

E. SCHÜTTE, Die Rechtsfragen im AKU-Prozeß, Betriebsberater, Vol. 8 (1953) 576–577.

O. LIEBERKNECHT, Die Enteignung deutscher Mitgliedschaftsrechte an ausländischen Gesellschaften mit in Deutschland belegenem Vermögen, Neue Juristische Wochenschrift, Vol. 9 (1956) 571–575, 931–936.

R. SERICK, Zur Konfiskation von Mitgliedschaftsrechten, Juristenzeitung (1956) 198–206.

I. SEIDL-HOHENVELDERN, Territorale Begrenzung ausländischer Eingriffe in deutsches Vermögen nach dem Überleitungsvertrag, Das AKU-Urteil im Lichte neuerer Erkenntnisse des BGH, Recht der Internationalen Wirtschaft, Vol. 3 (1957) 179–182.

I. SEIDL-HOHENVELDERN, Die territoriale Begrenzung der Eingriffe in deutsches Vermögen nach dem Überleitungsvertrag, Zum AKU-Urteil des BGH, Recht der Internationalen Wirtschaft, Vol. 3 (1957) 134–140.

CHRISTINE HAVERLAND

ALIENS

1. Notion

The question whether a person is to be classified as an alien or not is one of a State's municipal law. As far as the determination is consistent with public → international law, it is also to be recognized by the legal order of other States. In characterizing a person either expressly or implicitly as an alien, the general criterion seems to be that of a person's → nationality. Other criteria such as the common allegiance pledged to the Crown by British subjects even when they are not of British nationality (→ British Commonwealth, Subjects and Nationality Rules), may be considered sufficient for them to be given the status of non-aliens. In the strict sense of the term, a foreign corporation is not an alien. Therefore it has no legitimate claim to the main body of rights granted to individuals under the law of nations (→ Individuals in International Law; → National Legal Persons in International Law).

In order to define the term "alien", internal legal orders must comply with the restrictive directives of international law. Under these rules → stateless persons are also to be considered as aliens. However, their status is not governed by the main body of rules relating to persons who possess a foreign State's nationality except when these rules are extended to them by convention.

Of late, → treaties have become the major sources for international law regulating the status of aliens. Additional sources are customary law and, though of minor importance, → general principles of law.

Internal law, to some extent influenced by public international law, governs the conflicts between the laws of different States (cf. → Private International Law); it also regulates the application to aliens of penal and administrative law (cf. → Criminal Law, International; → Administrative Law, International Aspects). There are special rules for aliens who have diplomatic status, which, constituting a quite separate body of law, are dealt with elsewhere (→ Diplomatic Agents and Missions).

Rules with reference to aliens in wartime are contained in the *jus in bello* and in the laws of neutrality (→ War, Laws of; → Neutrality, Concept and General Rules). Exemplary for this group are the provisions of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War of 1949 (→ Geneva Red Cross Conventions and Protocols).

2. Historical Evolution

In ancient times, aliens were not only commonly denied legal capacity and rights, they were even considered outcasts and enemies, for aliens could have no membership in communities other than their own. A community was determined by common personal elements such as birth, language, or creed. An alien's position could only be ameliorated by being present as a fugitive, in which case he was generally granted asylum and offered hospitality. As a guest the alien, by his host's authority, could nevertheless be granted legal capacity, a number of special rights, far-reaching protection, and judicial assistance. Hospitality was considered a sacred duty, partly confirmed by law, and even stipulated by treaties such as the Roman *hospitium publicum* agreements, which favoured several or all the inhabitants of other countries, or the "isopolity" treaties of ancient Greece, under which citizenship could be granted as a matter of → reciprocity.

The law of hospitality underwent further development during the Middle Ages. At the same time, the alien's status was consolidated into a

legal position, whose degree of restrictiveness varied according to region and time. The general amelioration of the treatment of aliens was a concomitant factor to the growth of trade in the Middle Ages.

Extradition and asylum have also been significant issues in the legal rules relating to aliens since ancient times (→ Extradition; → Asylum, Territorial). Imbued with its aura of sacred origin, asylum was governed by rules of convention between sovereigns in Asia Minor and was granted to alien → refugees as early as 1400 B.C. Later, political rather than legal considerations dominated. Unlike modern extradition law, whose beginnings were in the 18th century, earlier extradition law mainly concerned political offenders rather than ordinary criminals.

The legal position of the alien differed from that of the citizen in varying ways. One significant example was the *droit d'aubaine*, originating in France, which made it the king's and, later, the seigniors' duty to protect aliens. In the course of time, however, this initial understanding became converted into an arbitrary power on the basis of which an alien was ultimately made a serf. This right, in later times constituting a restriction of testamentary and hereditary capacity (*escheatage*), influenced the institutions of the *Wildfangrecht* in Germany and the *keurmede* in the Netherlands. Other examples of encroachments upon the legal status of aliens were the inability to acquire land; a wide range of restrictive conditions of trade; and the *jus naufragii*, the right to take possession of foreign shipwrecks and their cargoes.

As bad as the legal position of aliens in proceedings might have been under these circumstances, to a certain degree it also took a turn for the better in the Middle Ages. This was particularly true of the medieval guest court (*Gastgericht*) in German towns which in part survived into the 19th century. There, privileged merchants were aided by the provision of prompt legal assistance; the alien was entitled to sue a citizen or another alien in the court whose judgment had to be delivered on the day of the court hearing or the following day. However, these advantages were soon counterbalanced by a right of detention and the so-called act of reprisal. The former allowed the detention of a guest alleged to be a debtor, while the latter made it possible for a guest to be apprehended and held collectively responsible for the alleged debt of another person, if the individual was from the same town. The possibility of arrest was often excluded reciprocally by agreements between towns and/or countries. The capitulations, treaties concluded between Oriental and European rulers in a period beginning in the 16th century, also afforded advantages to aliens. They conceded to alien merchants the right of settlement under their respective laws and usages, remissions of duty and further trade facilities, → consular jurisdiction, and religious freedom.

The concept of → natural law, inherited from Greek and Roman philosophy, profoundly influenced the theory of international law in the 16th and 17th centuries. Writers of this period recognized individual rights as a common gift of nature; social connections could not be denied. The conceptional position of the individual, though not being realized in general, promoted natural law theory. But it neglected the special situation of aliens and was thus *a priori* unable to influence the behaviour of States. It is, however, very much to Vitoria's credit that he enunciated the freedom of trade by aliens, a view accepted by Gentili, Grotius and Vattel. Natural law affected the growth of internal equality but, in the face of the developing national → sovereignty, was unable to facilitate the international situation of aliens (i.e. their admission to a State). The philosophical foundation of the American constitutional process and the French Revolution further favoured the development of an internal standard for the treatment of aliens, promoting → human rights that are clearly apart from civil rights, since these belong to citizens exclusively.

An increasingly detailed standard of legal provisions dealing with aliens in general and alien merchants in particular evolved. → Commercial treaties, particularly of the 17th century, provided for the treatment of aliens on the basis of national treatment of citizens. The admission of aliens (→ Aliens, Admission) was sometimes made obligatory by trade agreements, as was the possibility for aliens to leave a country after the outbreak of → war. A State's right to exercise → diplomatic protection over its citizens abroad was based on the reciprocal responsibility of

States. Furthermore, international custom also worked in favour of developing a → minimum standard for the treatment of aliens, once admitted to a State. This conception took root in → customary international law during the 19th century, with treaties stipulating a number of rights reflecting a minimum standard dating back to an earlier period. The protection of minority groups (→ Minorities), which pre-dated that of individuals, attained its climax after World War I. In the ensuing years it has declined, to be replaced to some extent by the task of realizing individual human rights on the international level.

3. *Current Legal Situation*

The conditions for admittance, expulsion, or extradition of an alien are generally a matter of internal law. In addition to this, rules of public international law which establish certain restrictions on discretionary municipal decisions have to be taken into account.

(*a*) *Admission*

Where specific treaties exist, e.g. agreements on establishment or a special legal order such as the law of the → European Economic Community (EEC), either an unlimited or a qualified duty of a State to provide for admission of citizens of each contracting party or member State may be stipulated. A refusal of admission may also be inconsistent with international customary law or general principles of law such as the rule of non-discrimination or the prohibition of the → abuse of rights, which take precedence over municipal action. The question arises whether under international law, a person entitled to the right of asylum has to be admitted to the territory of any given State. At present, the law of nations grants no right of asylum which must be reflected by internal law. At the admittance stage no right of access can be claimed, even if the alien would be granted political asylum once he or she was admitted.

(*b*) *Expulsion*

In the expulsion of aliens, another matter of municipal law, the decisive influence of the law of nations is apparent (→ Aliens, Expulsion and Deportation). The State, which is in possession of a wide discretionary power, is forbidden by a general rule of international law to expel a person if there is not sufficient reason to fear that public order is endangered. The rule of non-discrimination and the prohibition of the abuse of rights are additional restrictions on expulsion. An expulsion encroaching upon the human rights protected by the International Covenant on Civil and Political Rights of 1966 (→ Human Rights Covenants) or a regional instrument such as the → European Convention on Human Rights of 1950 might be unlawful for the respective signatory State. Where the procedure of expulsion itself constitutes an encroachment upon human rights, the expulsion itself, even if reasonably justified, must be characterized as contrary to international law. A State expelling an alien into a country where such a violation is likely to take place would commit a breach of international law. If the existence of an objective → international public order is acknowledged, additional limitations exist.

An individual admitted to the territory of a State and having been granted asylum cannot be expelled without regard to the international principle of *non-refoulement*, which is a general principle of public international law as adopted by Art. 33(1) of the Geneva Convention relating to the Status of Refugees of 1951 (UNTS, Vol. 189, p. 137), prohibiting a refugee who has already gained access to a State from being returned to a country persecuting him or her on the basis of race, creed, nationality or political opinion (→ Racial and Religious Discrimination). International law also prohibits collective expulsion, which is expressly precluded by Art. 4 of the Fourth Protocol to the European Convention on Human Rights of 1963 (ETS 46) and Art. 22 of the → American Convention on Human Rights of 1969, in force since 1978.

(*c*) *Extradition*

The → extradition of a person enables the State requesting the surrender of a fugitive criminal to realize its *jus puniendi*. If the requesting State is the alien's native country, its continuing personal sovereignty over the citizen competes with the → territorial sovereignty of the requested State. At present, the latter State has the right but not the duty, to extradite an alien under general international law. Extradition can be set

up in obligatory terms by bilateral or multilateral agreements such as the European Extradition Convention of 1957 (ETS 24). Both international customary law and treaty law impose restrictions upon extradition which have generally been adopted and implemented by municipal law. Thus it is required that the principle of reciprocity as to criminality (double criminality rule) and punishment be observed. The principle of speciality limits the trial of the surrendered fugitive to the offences explicitly stated in the request for extradition. Furthermore, extradition is not permitted if there are impediments similar to those forbidding expulsion. Extradition is legally excluded if the offender has been granted asylum. If a general extradition treaty exists laying down a duty on the requested State to extradite persons, political offenders are regularly exempted from it. In the absence of such a treaty provision, the privileged position of political offenders results from international custom.

(*d*) *Diplomatic asylum*

The institution of territorial asylum is to be distinguished from diplomatic asylum (→ Asylum, Diplomatic). In the latter, protection from persecution is not sought in the State of refuge, but rather in the persecuting State, in which a diplomatic mission gives legal or at least actual shelter. Since the fugitives are mostly citizens of the State in which the mission is located, and not aliens, the granting of refuge is exercised by diplomatic personnel as privileged aliens. Whether such a right exists in international law is a matter for doubt. Neither the → Vienna Convention on Diplomatic Relations of 1961 nor universal customary law cover the matter, except for cases in which there is an immediate danger to life and liberty which represents a grave violation of human rights. Regional custom in South America as well as a few treaties make provision for the granting of diplomatic asylum (→ Regional International Law; → International Law, American).

(*e*) *Minimum standard*

Aliens enjoy a → minimum standard of rights under the general law of nations. This standard consists of certain fundamental rights, which may be extended by municipal or international law. As commonly acknowledged, these rights are the recognition of juridical personality, standards of humane treatment, law-abiding procedures in cases of detention, the right of unobstructed access to court, the protection of life and liberty against criminal actions, the prohibition of confiscation, etc. The minimum standard does not, however, apply to stateless persons although it may be extended to them by treaty.

(*f*) *Treaty provisions*

Treaty provisions which concern human rights enlarge upon the minimum standard in many important respects; examples are the Geneva Convention on the Status of Refugees, the Convention relating to the Status of Stateless Persons of 1954 (UNTS, Vol. 360, p. 117), the United Nations Convention on the Reduction of Statelessness of 1961 (ICLQ, Vol. 11 (1962) p. 1090), and the Protocol relating to the Status of Refugees of 1967 (UNTS, Vol. 606, p. 267). The first two agreements mentioned oblige the signatories to facilitate the incorporation and naturalization of refugees and stateless persons as far as they possibly can. Treatment on the basis of that accorded to citizens is provided for to a certain extent. The European Convention on Social and Medical Assistance of 1953 (UNTS, Vol. 218, p. 255) stipulates measures in the field of welfare (→ Social Security, International Aspects). The law of the EEC forms a special legal order for integration which is distinct from traditional public international law (→ European Law). Discrimination on the basis of member State nationality is excluded pursuant to Arts. 48 to 66 of the EEC Treaty. These provisions, which are part of the so-called primary law of the Community, are directly applicable in the municipal law of the member States, which enables the individual to claim his or her rights directly before domestic tribunals. The same effect is partly attributed to the so-called secondary law of the Community, which consists of rules created by the authorities of the Community. The legal development of the Community order shows an increasing degree of amelioration in the status of aliens in relation to that of the citizens of the member States, which is unprecedented in the international legal order. This process is vigorously furthered by the jurisdiction of the → Court of Justice of the European Communities.

(*g*) *Groups*

Groups of persons such as minorities (→ Discrimination against Individuals and Groups), in so far as these are not citizens of the State where they reside, have to be considered as aliens. The group as such may not be denied the possession of rights under the law of nations. Though the subjects of rights may not be exactly defined, collective rights such as the right of → self-determination for ethnic groups and other minorities might be considered. Treaty provisions such as Art. 1 of the International Covenant on Civil and Political Rights and the identically worded Art. 1 of the International Covenant on Economic, Social and Cultural Rights may be regarded, no matter how contested the issue is, as referring to individual as well as collective rights. The same holds true for Art. 27 of the International Covenant on Civil and Political Rights which protects the enjoyment of a person's characteristic culture, the profession and practice of a particular religion, and the use of a native language. Apart from this, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) is of great importance (→ Genocide). Nonetheless, it can generally be stated that the development of a body of international rules with respect to groups has been less pronounced than that applying to individuals.

(*h*) *Nationality*

The conferring of nationality upon a person and the determination of the conditions for so doing are principally matters of the internal law of each State. Here, however, the law of nations imposes certain restrictions on the competence of States. A conferring of nationality which is not in line with these rules need not be recognized by other States. In the much-criticized → Nottebohm Case, the → International Court of Justice referred to the need for a "genuine connection" between the individual and the conferring State. Such links may be based on birth, marriage, residence, etc. The person's consent as to his or her naturalization is also generally required, and a decisive criterion for recognizing a nationality is its → effectiveness. If a person retains his or her previous nationality, he or she will have the status of a dual national, which, while not being ruled out completely, is definitely not favoured by international law. The rules for the deprivation of nationality are also laid down in municipal law, but are seriously restricted by the law of nations.

Citizens' links to their countries might be seriously infringed by an obligation to serve in a foreign State's army (→ Aliens, Military Service). The principle that a State may demand compulsory military service only from citizens owing allegiance to it results from the home State's continuing personal sovereignty over its nationals abroad. However, it is completely in line with the law of nations to impose the duty of military service upon an alien in exceptional cases, e.g. if the alien's intention to immigrate was evident and the person would be exempted from military service simply by cancelling his application for naturalization.

(*i*) *Property*

Regarding the protection of an alien's property (→ Aliens, Property), a State is entitled by virtue of its territorial sovereignty to expropriate or nationalize an alien's property (→ Expropriation and Nationalization), but it is obliged to pay adequate, prompt and effective compensation. Of late → developing States in particular have tended completely or partially to rule out compensation by deducting "unjustified profits", or by making compensation conform with internal expropriation measures. This view is often based on an alleged sovereignty of States over natural resources (→ Natural Resources, Sovereignty over), but it does not accord with present-day public international law. There are numerous agreements which aim at ensuring compensation.

(*j*) *Redress*

A violation of a rule of public international law applying to an alien constitutes an → internationally wrongful act. In this case the injured international person is the State whose national the alien is. It is the right of the injured State to exercise diplomatic protection for its citizens, which, bearing in mind the local remedies rule, may comprise a varying number of measures, including an action brought before the International Court of Justice, if admissible, and the execution of peaceful → reprisals, if these are proportionate to the harm done and do not

violate human rights (→ Proportionality). Protection of refugees and *de facto* stateless persons can be exercised by the United Nations High Commissioner for Refugees (→ Refugees, United Nations High Commissioner). Stateless persons who are not refugees lack any such protection. In general, the alien in being protected by the State, is not entitled as an individual to advance a claim before an international court, even if a violation of human rights is involved. An important exception to this is the individual right of access to the → European Commission of Human Rights under Art. 25 of the European Convention on Human Rights. Some other judicial or quasi-judicial institutions such as the Human Rights Committee (→ International Covenant on Civil and Political Rights, Human Rights Committee) also afford protection albeit in ways which are less effective for individual cases.

4. Evaluation

The present international situation is characterized by the increasing influence of public international law on the status of individuals. However, national sovereignty sometimes presents impediments to a comprehensive protection of the individual at the international level. The deficient legal position of aliens under the law of nations is founded on a long-standing system of categorizing the → subjects of international law. To a large extent, the rules relating to aliens fall within municipal competences which in turn differ widely according to State practice. Public international law imposes restrictions upon domestic law and, in some respects, lays down rules dealing with certain legal matters such as human rights. Although considerable progress has been made in the internationalization of matters formerly belonging exclusively within the province of municipal law, international rules are not sufficiently endowed with legal enforcement mechanisms. Phenomena such as the refugee problems of the 20th century, which have assumed proportions hitherto unheard of, must be coped with on the level of international law. A great variety of legal problems concerning aliens remain to be tackled in the coming years.

A. SCHULTZE, Über Gästerecht und Gastgerichte in den deutschen Städten des Mittelalters, Historische Zeitschrift, Vol. 101 (1908) 473–528.

E.M. BORCHARD, The Diplomatic Protection of Citizens Abroad (1915).

A.H. ROTH, The Minimum Standard of International Law Applied to Aliens (1949).

G. JAENICKE and K. DOEHRING, Die Wehrpflicht von Ausländern, ZaöRV, Vol. 16 (1956) 523–566.

K. DOEHRING, Die Pflicht des Staates zur Gewährung diplomatischen Schutzes (1959).

O. KIMMINICH, Der internationale Rechtsstatus des Flüchtlings (1962).

K. DOEHRING, Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht (1963).

A. GRAHL-MADSEN, The Status of Refugees in International Law, 2 vols. (1966–1972).

O. KIMMINICH, Asylrecht (1968).

I.A. SHEARER, Extradition in International Law (1971).

R. PLENDER, International Migration Law (1972).

J.H.W. VERZIJL, International Law in Historical Perspective, Part V (1972); Part VI (1973).

R. LILLICH, Duties of States regarding the Civil Rights of Aliens, RdC, Vol. 161 (1978 III) 329–443.

P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979).

H.-I. VON POLLERN, Das moderne Asylrecht (1980).

T. STEIN, Die Auslieferungsausnahme bei politischen Delikten (1983).

RAINER ARNOLD

ALIENS, ADMISSION

In answering the question whether a State is under a legal obligation to grant foreigners entry into its territory a two-fold analysis is necessary: Such an obligation may, namely, be based either on → customary international law or it could follow from international → treaties.

1. Customary International Law

Whether or not international customary law contains the obligation of States to admit foreign nationals and → stateless persons into their territories has long been a matter of controversy. Different opinions in this respect were already presented by the classical scholars of international law. Whereas numerous scholars have maintained that the admission of → aliens is a matter of free and unlimited discretion of governments (Vattel, Christian Wolff, the so-called Anglo-American position), others have asserted a certain duty of States to admit foreigners (F. de Vitoria, Grotius, the so-called continental position). The first point

of view stresses the principle of State → sovereignty and underscores the thesis that the admission of aliens falls within the → domestic jurisdiction of every State as long as treaties are not involved. The second opinion invokes a certain duty of States to promote → interdependence, i.e. a duty to construe more liberally → international relations and international traffic in a broad sense. Both of these positions are still being advocated, at least in modified forms. State practice, however, demonstrates that the discretion of governments in this respect has nearly no limitation. There are very few cases in which the non-admission of an alien has been seen as an → internationally wrongful act; even in cases of an arbitrary decision, only the commission of an → unfriendly act has been assumed. Moreover, the non-admission of an alien cannot be seen as an international offence, merely because factually → discrimination has occurred. Customary international law does not recognize any rule requiring equal protection of all aliens in every respect. In a given case, one perhaps could say that the non-admission violates generally recognized → human rights, but it may be that those cases are the only ones which raise the question of international responsibility (→ Responsibility of States: General Principles). Even the recognition of such an exceptional duty, on the other hand, would not automatically mean that a State in a general sense would be obliged to grant asylum (→ Asylum, Territorial); in the sphere of human rights a duty to admit a foreigner only exists if his life is clearly and directly threatened.

In spite of the fact that a duty to admit aliens has gained very little recognition in either State practice or doctrine, many reasons have regularly been invoked to justify the non-admission of aliens in particular cases. Such reasons include the criminal record of aliens, their poverty or illness, the protection of the culture of the receiving State and the danger to public order and security. States are not under the obligation to give grounds when admission is refused, and they autonomously decide whether such grounds are given. A suit before an → international court solely based on the assertion that a State arbitrarily prevents foreigners from entering its territory would not be successful. Nevertheless, in doctrine, despite a somewhat rigorous State practice, the presentation of reasons for the non-admission of aliens has been recommended (by, for example, the → Institut de Droit International).

States lay down in their municipal law the conditions under which aliens may enter their territory. Generally, such laws require identification by → passport, and reserve the right to grant special permission by issuing visas. An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified (→ Aliens, Expulsion and Deportation). The question whether the foreigner can claim judicial protection before national courts to contest the non-admission can only be answered by application of the rules of the national legal system concerned. Even if a State does not grant judicial protection in cases of non-admission and treats the administrative decision as final, no violation of international customary law arises.

2. Treaty law

A particular duty to admit aliens may, however, result from international treaties. Treaties protecting generally recognized human rights often contain the right of nationals to move freely inside their own State, the right not to be arbitrarily expelled from this territory, and also the right to return to their own State (Art. 13 of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)); Art. 12 of the International Covenant on Civil and Political Rights (→ Human Rights Covenants); Art. 22 of the → American Convention on Human Rights; and Art. 2 of the Protocol No. 4 to the → European Convention on Human Rights). By contrast, a right to enter a foreign State has not yet been formulated in such treaties.

However, in specific cases bilateral and multilateral treaties have created an obligation on States to admit aliens. In particular, there are treaties on establishment containing such an obligation, e.g. the European Convention on Establishment of December 15, 1955 (Art. 1; ETS 19). But even those treaties usually contain a restrictive provision under which, in spite of the general obligation, the admission can be limited or even excluded if otherwise the protection of public security and order, or the health of the population, would be endangered. Generally, the reasonableness of such grounds for excluding

aliens is to be decided by the refusing State itself, unless the parties to the treaty have accepted → arbitration of the issue. Conventions founding international organizations may also create the right of foreigners to freely enter the territories of the members of the organization, as in the case of the → European Economic Community. The members of the Community are under the duty to guarantee freedom of movement of the nationals of the member States to seek employment and engage in economic activities. But these treaties, too, admit some restrictions since they also contain special clauses which may be invoked by the States concerned if → vital interests are endangered. Under the Treaty establishing the European Economic Community, the → Court of Justice of the European Communities is competent to decide finally and with binding force whether such escape clauses have been applied arbitrarily. Whether an individual right to enter foreign territory arises from treaty obligations, or whether an obligation only between the partners to the treaty has been created, must be decided according to the circumstances (→ Individuals in International Law). Generally, only an obligation between States arises; the arrangement under the European Community affirming individual rights is an exception, as the respective provisions have been recognized as directly applicable by the European Court (→ Self-Executing Treaty Provisions). Although in treaty law no generally recognized prohibition of discrimination exists, it may be expressly introduced. If this is not the case, the freedom to conclude treaties entails the right of a State to admit only certain foreigners in the exercise of its discretion.

There are also treaties which grant privileges to some persons regarding a right of entry into foreign territory. An example is the → Vienna Convention on Diplomatic Relations (1961) which stipulates that not only the members of a diplomatic mission, but also other staff members such as → couriers, have the opportunity to enter the receiving territory (→ Diplomatic Agents and Missions, Privileges and Immunities). The right to enter foreign territory can also be based on the diplomatic privilege to cross the territory of a third State in order to reach the territory of the State in which the diplomat is accredited. Similar guarantees are laid down in the → Vienna Convention on Consular Relations (1963). Members of international tribunals for the most part have a similar right, as do employees of international organizations, at least in so far as their functions require such privileges (→ International Organizations, Privileges and Immunities).

3. Evaluation

Although some publicists regret that the freedom of an individual to enter a foreign country does not yet form part of generally recognized human rights or of the → minimum standard of the law of aliens, this state of affairs rests on relevant and decisive grounds. Despite all activities of universal and regional organizations, States retain their predominant interest in and ultimate responsibility for their own security and for the welfare of their nationals (→ States, Fundamental Rights and Duties). In particular, as long as States are neither willing nor able to abstain from spying activities concerning nearly all matters, military or economic, each State must preserve its right of self-protection (→ Espionage; → Self-Preservation). Steps taken by States to protect their economic interests, for instance in limiting domestic unemployment, also cannot be prohibited as long as universal rules do not exist. The only recommendation which could be expressed under the now applicable law would be to strengthen the willingness of States to facilitate the freedom of movement of individuals to a greater extent. At present, the guarantee of complete freedom of movement would tend to endanger the system of international law in its peacekeeping role.

Droit d'admission et d'expulsion des étrangers, Ann-IDI, Vol. 12 (1892–1894) 184 et seq.

E. PEPIN, De l'admission et de l'expulsion des étrangers en Angleterre, Clunet, Vol. 41 (1914) 425–437.

G. LYON-CAEN, La réserve d'ordre public en matière de liberté d'établissement et de libre circulation, Revue trimestrielle de droit européen, Vol. 2 (1966) 693-705.

U. ERDMANN, Europäisches Fremdenrecht, Dokumente (1969).

J.-M. CROUZATIER, L'entrée et l'expulsion des étrangers en Grande-Bretagne, L'actualité juridique, droit administratif, Vol. 34 (1978) 248-256.

J.A.R. NAFZIGER, The General Admission of Aliens under International Law, AJIL, Vol. 77 (1983) 804–847.

KARL DOEHRING

ALIENS, EXPULSION AND DEPORTATION

1. General Scope

Expulsion refers to the order of a State government advising an individual – in general, a foreign national (→ Aliens) or a → stateless person – to leave the territory of that State within a fixed and usually short period of time. This order is generally combined with the announcement that it will be enforced, if necessary, by deportation. In short, expulsion means the prohibition to remain inside the territory of the ordering State; deportation is the factual execution of the expulsion order. It is irrelevant whether the individual concerned is passing through the territory, or is staying only temporarily, or has established residence there; these differences may be of importance, however, regarding the lawfulness of the expulsion in a concrete case since provisions of municipal law or → treaties could influence the decision. Expulsion differs from non-admission in that in the latter case the alien is prevented from entering the State territory (→ Aliens, Admission), whereas expulsion regularly concerns individuals whose entry, and in a given case residence, has been initially permitted. Where an alien has entered the territory illegally and without realization of this fact by the national authorities, and afterwards is deported, it may be somewhat doubtful whether this State action constitutes an expulsion or a non-admission. However, the difference is only a question of terminology, because the legal consequence in both cases can be coercive deportation.

In general, expulsion affects foreign nationals or stateless persons. A general rule of → customary international law forbidding the expulsion of nationals does not exist. The right to expel, however, may be restricted by international treaties protecting → human rights (e.g. United Nations Covenant on Civil and Political Rights, Art. 12(4) (→ Human Rights Covenants); Protocol No. 4 to the → European Convention on Human Rights, Art. 3), and these principles may in the future also influence customary international law. Under the municipal law of many States, the expulsion of nationals is unlawful, since the right to live in one's own State is widely regarded as an essential element of the relationship between a State and its nationals. International law also to a certain extent indirectly opposes the expulsion of nationals because third States have no international duty to receive expelled individuals of foreign nationality or stateless persons. A duty to receive foreigners is only established if it rests upon treaties (e.g. the 1951 Convention Relating to the Status of Refugees; → Refugees). Nevertheless, it has occurred in some rare cases that governments have expatriated nationals (→ Denationalization and Forced Exile) and subsequently expelled them as foreigners or have forbidden them to return to the State territory if the expatriated individuals were residing in a foreign country at that time. Such a practice may contravene existing conventions on human rights and it probably contradicts a trend in international law. However, until now no violation of general rules of international law can be asserted, unless the governmental action is judged to be absolutely arbitrary and not based on any reasonable ground, or grossly violates recognized human rights.

Expulsion as an action to preserve the public security of the State (→ Ordre public (Public Order)) must be distinguished from → extradition, since the latter applies to criminal prosecutions, supports the principle of → legal assistance between States, and thus suppresses criminality. Extradition is primarily performed in the interest of the requesting State, whereas expulsion is performed in the exclusive interest of the expelling State. Extradition needs the consensual cooperation of at least two States, whereas expulsion is a unilateral action apart from the duty of the receiving State to accept its own national. Therefore, for reasons of either international law or municipal law, the expulsion of an individual may be illegal, whereas the extradition of the same person may be lawful, and vice versa. The position is also taken that an unlawful extradition should not be replaced by an expulsion; but such a principle, even when recognized, can only derive from municipal law and not from international law.

2. Lawfulness

Whether an alien may lawfully be expelled is a matter within the discretionary power of the ex-

pelling government. This discretionary power is subject only to limits in extreme cases because under customary international law no State has a duty to harbour aliens in its territory. The limits of discretion may be found in governmental actions considered as → abuse of rights. Owing to the generally recognized freedom of governments in this field, it may even be doubtful whether a State is under an international duty to inform the aliens concerned or their countries of the reasons for expulsion. Such a duty, however, has been asserted by some publicists, and it has also been argued that an expulsion needs a special justification. State practice, on the other hand, does not seem strictly to confirm such a duty, and thus theory and practice show a certain contradiction in this field.

Nevertheless, a duty not to expel and a duty to give reasons for expulsion may arise from international treaties (e.g. United Nations Covenant on Civil and Political Rights, Art. 13, European Convention on Establishment of 1955, Art. 3). Only in cases where an arbitrary expulsion and subsequent deportation would at the same time violate generally recognized human rights is there an international duty to refrain from expulsion, for example because the alien's life, health, or → minimum standard of existence would otherwise be seriously threatened or because, for instance, the destruction of the family or an → expropriation is foreseeable which would constitute an abuse of rights. But even these limits on the freedom to expel aliens need not be respected in cases where the security of the State concerned or the security of its nationals would be seriously endangered. Even international treaties guaranteeing non-expulsion regularly contain an escape clause in this regard (e.g. European Convention on Establishment, Art. 3).

The expulsion and deportation into a State in which the expelled individual is threatened by inhumane persecution may also violate human rights and would only be lawful if the expelling government did not have other means at its disposal to protect State security. Even special treaties which prohibit exposing an alien to political persecution by a foreign government generally contain such a restriction (e.g. Convention relating to the Status of Refugees, Art. 33). A duty of the expelling State to give the individual the possibility of choosing a receiving country is not recognized although this opportunity may be, and often is, granted. The expulsion and deportation into a particular State is of course only possible if that State is willing to receive the individual. Only the country whose nationality the individual possesses is obliged to receive him. Thus, under international law, the freedom of States in matters of expulsion is nearly unlimited.

National legal systems, however, often restrict the lawfulness of expulsion, but those restrictions are not based on international duties. Under municipal law, long-term residence in a host State will often be regarded as a factor limiting the discretionary power of the government, unless serious additional considerations require the expulsion. Customary international law also does not require the granting of judicial protection against expulsion – probably because a right of sojourn in a foreign territory is not recognized in the absence of treaty obligations. If municipal law guarantees the alien access to the courts, for example as a check on arbitrary expulsion, this guarantee rests only on the municipal law concerned, which often surpasses the exigencies of international law. In case of an expulsion constituting an abuse of rights, the alien's State of nationality is entitled to exercise → diplomatic protection. The expulsion and deportation into a State in which the individual is exposed to political persecution is not unlawful *ab initio*, as long as treaties do not prohibit this action, because there exists only a right of States to grant asylum, but not a respective duty (→ Asylum, Territorial). States generally are not prevented from using expulsion as a deterrent measure, i.e. expelling an individual as a warning for others. Such actions, however, may be declared unlawful by treaties (e.g. by the Treaty establishing the → European Economic Community, Art. 48, as interpreted by the → Court of Justice of the European Communities).

The execution of expulsion normally entails deportation, i.e. the coercive transportation of the alien out of the territory of the expelling State, if the alien refuses to leave voluntarily. In performing the deportation, States are obliged not to violate human rights, and the deportation must be effected without brutality.

3. *Collective Expulsion*

Whereas the freedom of States to expel single individuals must be judged as nearly unlimited and as ultimately restricted solely by the general prohibitions of abusives of rights and violations of human rights, the expulsion of groups of aliens – so-called collective expulsion – is subject to narrow limitations (→ Population, Expulsion and Transfer). Often it may not be easy to distinguish the expulsion of many individuals from the collective expulsion of a group of individuals. The notion of collective expulsion presupposes that it would detrimentally affect a specific category of aliens, for instance, members of ethnic, racial, or religious groups. Collective expulsions are only considered to be lawful if serious and limited grounds furnish sufficient justification, so that the discretionary power is at a minimum. The reason for this restriction lies in the concern that otherwise the door to committing the crime of → genocide could be opened; a further reason may be that in cases of collective expulsion it is not the behaviour of a single individual which is taken into consideration, but solely membership in a group. Moreover, the execution of a collective expulsion may easily disregard the requirements of human rights in not respecting individual needs. However, a State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and the existence of the expelling State would otherwise be seriously endangered, for example if specific groups of aliens engage in political activities which are inimical to the → vital interests of the host State, or during a state of → war. Apart from such cases and in the absence of specific justification, collective expulsions must be seen as violations of international law; thus, the burden of proof that an exception is given remains with the expelling State. This principle has also found expression in international conventions (e.g. Protocol No. 4 to the European Convention on Human Rights, Art. 3).

Droit d'admission et d'expulsion des étrangers, Ann-IDI, Vol. 11 (1889/1892) 273 et seq.; Vol. 12 (1892/1894) 184 et seq.

O.A. CREYDT, El derecho de expulsión (1927).

W. KOBARG, Ausweisung und Abweisung von Ausländern (1930).

J. IRIZARRY Y PUENTE, Exclusion and Expulsion of Aliens in Latin America, AJIL, Vol. 36 (1942) 252–270.

T.W. KAMMERMANN, Die fremdenpolizeiliche Ausweisung von Ausländern aus der Schweiz (1948).

P. VIGOR, Du contrôle juridictionnel de l'expulsion des étrangers, Revue politique et parlementaire, Vol. 58 (Novembre 1956) 290–297.

P.M. TRAUTVETTER, Die Ausweisung von Ausländern durch den Richter im Schweizerischen Recht (1957).

A. GRAHL-MADSEN, Expulsion of Refugees, NordTIR, Vol. 33 (1963) 41–50.

S. FRÖHLICH, Niederlassungsrecht und Freizügigkeit in der EWG und EFTA (1965).

L.S. MORALES-TRINIDAD, Expulsión de extranjeros y extradición (1966).

U. ERDMANN, Europäisches Fremdenrecht, Dokumente (1969).

K. BUSCHBECK, Verschleierte Auslieferung durch Ausweisung (1973).

G.S. GOODWIN-GILL, The Limits of the Power of Expulsion in Public International Law, BYIL, Vol. 47 (1974–1975) 55–156.

G. DRUESNE, La réserve d'ordre public de l'article 48 du traité de Rome, Revue trimestrielle de droit européen, Vol. 12 (1976) 229–258.

T. STEIN, Die Einschränkung der Freizügigkeit von EWG-Ausländern aus Gründen der öffentlichen Sicherheit und Ordnung, Neue Juristische Wochenschrift, Vol. 29 (1976) 1553–1557.

M. DISTEL, Expulsion des étrangers, droit communautaire et respect des droits de la défense, Recueil Dalloz-Sirey (1977 I) 165–172.

J.-M. CROUZATIER, L'entrée et l'expulsion des étrangers en Grande-Bretagne, Actualité juridique, droit administratif, Vol. 34 (1978) 248–256.

G. FINKEL, L'expulsion des étrangers et le juge administratif en droit français, Actualité juridique, droit administratif, Vol. 34 (1978) 257–267.

A. DE ZAYAS, Collective Expulsion in the Light of International Law, in: T. Veiter (ed.), Entwurzelung und Integration, Abhandlungen zu Flüchtlingsfragen, Vol. 11 (1979) 57–64.

J. LEBULLENGER, A propos de l'expulsion des étrangers: Les garanties de procédure administrative en droit français et communautaire, Revue critique de droit international privé, Vol. 70 (1981) 447–488.

J.-Y. VINCENT, La réforme de l'expulsion des étrangers par la loi du 29 octobre 1981, Juris-Classeur Périodique, Vol. 56 (1982) I 3054.

M. PELLONPÄÄ, Expulsion in International Law, A Study in International Aliens Law and Human Rights with Special Reference to Finland (1984).

KARL DOEHRING

ALIENS, MILITARY SERVICE

1. *Introduction*

When considering military service performed by individuals enroled in the military forces of a

State whose nationality they do not possess, a distinction must be drawn as to whether this military service is exercised voluntarily or performed on a compulsory basis. A further important factor is whether the individual concerned has a single foreign → nationality, dual nationality or indeed, being a → stateless person, no nationality at all. Treaties between States which deal with the military service of their nationals must also be respected. That every State has the right to compel its own nationals to perform military service is undisputed. Despite the fact that some States do not require military service from their nationals or may only enroll them in their forces during a state of → war, international law leaves the decision entirely to the national legal systems which in such cases will also regulate the military service of aliens. International law contains only two fundamental principles, which are, however, subject to certain qualifications: The voluntary military service of aliens as a rule is allowed, while the compulsory military service of aliens as a rule is prohibited.

2. *Voluntary Military Service of Aliens*

International law does not prevent States from permitting aliens to serve in the military. On the other hand, States are free to forbid their own nationals to perform military service in foreign armies. Those prohibitions can be enforced under municipal law, for instance by means of → denationalization (see A.N. Makarov, Allgemeine Lehren des Staatsangehörigkeitsrechts (2nd ed. 1962), pp. 233–238). Such sanctions imposed by municipal law do not, however, prevent other States from enlisting volunteers in their military forces; taking advantage of this voluntariness cannot be seen as an intervention in the domestic affairs of other States. However, certain actions accompanying the enlistment of volunteers may constitute violations of international law. Thus, the official enlistment of volunteers on foreign territory is only allowable if the foreign State permits such actions. If the foreign State does not permit this kind of enlistment, the agents of the enlisting State are illegally exercising jurisdiction on a foreign territory (→ Administrative, Judicial and Legislative Activities on Foreign Territory), and the → sovereignty of the other State is infringed. In the past, controversies of this nature have occurred, for instance, when soldiers for the French → Foreign Legion were being recruited. International responsibility also may arise if the enlisting agents take improper advantage of the inexperience or youth of the volunteers. Moreover, in very recent times the recruitment of → mercenaries is being judged as being in opposition to at least a tendency within international law. The time has perhaps not quite arrived when it can be stated that the enlistment of mercenaries contradicts → customary international law, but a treaty obligation to the same effect has binding force and may influence the development of customary law. Art. 47 of the 1977 Additional Protocol I to the → Geneva Red Cross Conventions requires the contracting parties to treat mercenaries differently from → combatants, i.e. regular soldiers. The relevant conditions under which an individual may be qualified as a mercenary are, however, somewhat uncertain. It is required *inter alia* that the motive to render military service consist in the intention to gain money, that the mercenary actively participate in the hostilities, that the mercenary be not a member of the regular military forces nor possess the nationality of the State in whose army his service is rendered. Given these narrow criteria it would be impossible to characterize the members of the French foreign legion, for instance, as mercenaries under Additional Protocol I.

3. *Compulsory Military Service of Aliens*

In principle, a foreign national cannot be compelled to do military service, whereas this prohibition does not apply in respect of stateless persons. The reasons for this prohibition are easily identifiable. The system of compulsory military service arose as one of the consequences of the French Revolution and was first introduced in France in 1793 (see Makarov, op. cit., p. 6). Since one of the fundamental concepts concerning the structure of the newly established Republic held that the people were sovereign, the participation of all citizens in the power of State required that all the necessary duties of State be shared equally. Because aliens did not participate in the power of State, the duty of defending the country should not be imposed on them. Later on, a further suggestion of perhaps essential importance was made: The relationship between the power of State and the citizen has been regarded as a

mutual one involving protection by the State on the one side and loyalty of the citizen to the protecting State on the other (*protectio trahit subjectionem et subjectio trahit protectionem*). Since under international law no State is entitled to protect aliens (→ Diplomatic Protection; → Diplomatic Protection of Foreign Nationals), it follows from this legal situation that an alien cannot be required to protect a foreign State with military service. The fact that most States do not allow political rights, such as the right to take part in elections, to be exercised by aliens also plays a certain role in this connection, since those who do not possess such rights should not be forced to sacrifice their lives for a foreign State.

These principles which at first glance seem clear enough have nevertheless been repeatedly discussed; State practice has not always respected the principles, and various restrictions on them have been invoked on a number of grounds.

State practice derives overwhelmingly from regulations contained in national laws. It is not possible here to report all the peculiarities of the national provisions in question, but it may suffice to indicate examples and some statements (see Karamanoukian). Only some of the legal systems in which special rules existed or still exist can be mentioned here. It is furthermore important to understand that some national legislation has undergone various changes, for instance compulsory military service may have been suspended or abolished completely or it may have been newly introduced. In States which have large numbers of immigrants within their populations, there is a discernible tendency to compel immigrants to perform military service even before nationality has been acquired. Other States have made a distinction between non-immigrants and immigrants and have required military service from immigrants only, although also in these cases before naturalization (→ Immigration; for the legislation in the United States see Karamanoukian, pp. 184–191; see also Walz, pp. 7–20). The justification for this deviation from a rule of international law evidently consists in the argument that immigrants, intending a new life in a new country, should also be prepared to fulfil duties imposed on nationals. National legislation also sometimes withholds naturalization from immigrants if military service is refused. In addition, there are legal systems which extend compulsory military service to aliens who permanently reside in the State without having demanded naturalization. In some, this military service has only been required when the residence of the alien had a duration of several years. In this connection, the legislation of Australia, Israel and Norway among others has been of importance (for Australia and Norway see Karamanoukian, pp. 191–196; for Israel see Walz, pp. 77–78). In addition, some distinction may be made with regard to the military service of aliens in time of peace and in time of war (see Karamanoukian, pp. 219–262). One special rule is found in the legislation of France which obliges aliens to whom asylum has been granted, to perform military service (decree of June 5, 1964, Journal Officiel, June 10, 1964; Law of June 10, 1971, Journal Officiel, June 12, 1971).

Compulsory service in the military by stateless foreigners has always been regarded as conforming with international law, since the military service of a stateless individual cannot *per definitionem* infringe his obligation of loyalty to another State, and it is not too much to demand from a stateless individual that he contribute to the defence of the State, in which the basis of his life is found. Moreover, no State exists which would be entitled to exercise diplomatic protection on that individual's behalf.

If an individual possesses double nationality and if no special arrangements govern the relations between the two States concerned, the individual can be compelled to perform military service in both these States, because also in this respect the principle applies that the State of the one nationality is not required to take notice of a second nationality.

It follows from the above survey that a failure by States to observe the fundamental rule of granting aliens freedom from national military service requires justification, and reasons in justification are, in general, supplied by the States concerned. Nevertheless, even when the reasons have been given, the countries of the aliens concerned have been known to protest. Switzerland, for instance, did so when Swiss nationals were forced to render military service in Israel (see Bachofner, p. 112). Taking account of such protests, it is possible to say with certainty that the general principle forbidding compulsory military

service of aliens has been confirmed by State practice, and no customary law in opposition has arisen. At present, a majority of the members of the community of nations have respected this rule.

One particular justification for the enlistment of aliens for military service remains to be indicated. There are some States which have introduced legislation allowing the imposition of compulsory military service on foreign nationals, if the country of their nationality adopts such a practice for nationals of the former States (see Walz, pp. 122–152). Such legislation is intended to act in → reprisal against a given foreign State in order to induce the State to cease its wrongful behaviour. A reprisal of this sort has until now been regarded internationally as justified. Certain doubts, however, arise, if the view is accepted that the individual should not be used as a mere device in the execution of a reprisal of this kind, since otherwise there is always the danger that → human rights and human dignity may be violated. However, this view in respect of individual rights and reprisals has not yet been taken in international law, despite reasons against imposing such a sacrifice on the individual, who generally has no personal means of altering the illegal behaviour of his own State. Given those considerations, one should perhaps judge such reprisal measures as being of a degrading character.

4. Regulations by Treaties

From the very beginning of compulsory military service, it has frequently been an object of international → treaties to avoid unnecessary hardships in this field in particular. Treaties can be mentioned here only by way of example, since an exhaustive enumeration is not possible. At the → Hague Peace Conferences of 1899 and 1907 it was stipulated that during a war the nationals of enemy States could not be forced to act against their own countries, including cases where the individuals concerned had voluntarily agreed to serve in the foreign army before the outbreak of the war. This principle was laid down as Art. 23(2) of the Regulations on Land Warfare annexed to Hague Convention IV of 1907 (→ Land Warfare). Convention IV of the 1949 Geneva Red Cross Conventions, dealing with the protection of civilians during war, prohibits enemy nationals being used for any labour directly in connection with military activities (→ Forced Labour). Hague Convention V of 1907 on the Rights and Duties of Neutral Powers and Persons in Case of War on Land provides under Arts. 17 and 18 that nationals of neutral States serving voluntarily in foreign armies cannot invoke the neutrality of their country (→Neutrality, Concept and General Rules; → Neutrality in Land Warfare).

Art. VI of the Treaty of Peace and Amity between the Central American States (February 7, 1923, British and Foreign State Papers, Vol. 130 (1929) p. 517) provides that a member State of the treaty will not enroll nationals of the other treaty partners and that the consent of the other State must be requested even in cases of voluntary service. Similar provisions were introduced into the Pan American Convention on the Status of Aliens (February 20, 1928, LNTS, Vol. 132, p. 301). A conference held by the → League of Nations on the treatment of aliens in 1929 did not result in the conclusion of an appropriate convention. The European Convention on Establishment (December 13, 1955, ETS, No. 19) also does not contain a provision on aliens and military service, though one had been intended at an earlier stage. However, in the European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (May 6, 1963, ETS, No. 43) provisions were introduced allowing persons having double nationality to discharge their military duties by serving in only one of the national forces concerned.

By the middle of the 19th century, numerous bilateral treaties had been concluded providing for the freedom from military service of aliens in their State of residence (e.g. Art. 6 of the treaty between Costa Rica and the German Reich, May 18, 1875. CTS, Vol. 169, p. 197). This practice was continued into the 20th century (e.g. the treaty between the German Reich and the United Kingdom, December 2, 1924, LNTS, Vol. 43, p. 89), and after World War II (e.g. the treaty between the Federal Republic of Germany and Italy, November 21, 1957, German Bundesgesetzblatt (1959 II) p. 949). Countries of immigration have naturally tended not to favour this course. Thus a treaty between the United States

and Switzerland (November 25, 1850, CTS, Vol. 104, p. 443) was concluded in order to mutually free their respective nationals from military service as aliens. However, a later treaty concluded between the United States and the German Reich allowed the parties in case of war to enroll the nationals of the countries concerned for compulsory military service, if they permanently resided in the other country and if they were applying to become naturalized subjects (December 8, 1923, LNTS, Vol. 52, p. 133). These particular provisions were later repealed (American-German Treaty of June 3, 1953, UNTS, Vol. 253, p. 89), but many treaties subsequently concluded with other countries contained similar provisions.

The question of the compulsory military service of individuals having dual nationality has always posed the need for particular rules to deal with it. This is so because under international law each State is entitled to impose on its nationals all the ordinary duties of citizens even if some of the individual citizens also possess another nationality. In order to avoid those hardships, treaties have often been concluded according to which military service in only one of the countries concerned can be required (see Probst, Zwischenstaatliche Abgrenzung der Wehrpflicht (1955) pp. 23–46; see also → Bancroft Conventions). One of the most recent provisions to this effect is contained in the treaty concluded by the members of the Council of Europe as mentioned above.

W. VON RAUCHHAUPT, Mehrfache Wehrpflicht, Völkerbund und Völkerrecht, Vol. 2 (1935) 378–382.

A.N. MAKAROV, Militär- und Arbeitsdienstpflicht der Ausländer in Frankreich, ZaöRV, Vol. 10 (1940) 494–504.

W.W. FITZHUGH and C.C. HYDE, The Drafting of Neutral Aliens by the United States, AJIL, Vol. 36 (1942) 369–382.

M.O. HUDSON, Willingness to Bear Arms as a Requirement of Naturalization, AJIL, Vol. 45 (1951) 153–154.

C. PARRY, International Law and Conscription of Non-Nationals, BYIL, Vol. 31 (1954) 437–452.

R. PROBST, Zwischenstaatliche Abgrenzung der Wehrpflicht (1955).

G. JAENICKE and K. DOEHRING, Die Wehrpflicht von Ausländern, ZaöRV, Vol. 16 (1956) 523–566.

R. PROBST, International Demarcation of Compulsory Military Service with Special Emphasis on the Swiss-United States Situation, Georgetown Law Journal, Vol. 45 (1956) 60–74.

H. BACHOFNER, Die militärische Stellung des Schweizers im Ausland (1958).

D. WALZ, Die Wehrpflicht von Ausländern, Sowjetzonenflüchtlingen und Mehrstaatern nach dem Wehrpflichtgesetz der Bundesrepublik Deutschland als Problem des internationalen und des nationalen Rechts (1969).

B. PENNER, Der Tatbestand des Eintritts in fremden Militärdienst (1973).

A. KARAMANOUKIAN, Les étrangers et le service militaire (1978).

KARL DOEHRING

ALIENS, PROPERTY

1. Notion

The notion as well as the protection of alien property raises many problems in → international law. Movable and immovable property situated in a given State is often owned by foreign natural or legal persons (→ Nationality; → National Legal Persons in International Law); aliens may have claims against persons and institutions in another State; aliens may also have property rights and interests in → industrial property, → literary and artistic works, and many other types of property. Shares and other partnership rights in national legal persons held by → aliens are also alien property. However, the home State of such an alien may grant him → diplomatic protection only for acts directed against his partnership rights, and not against the legal person as such (→ Barcelona Traction Case). In peacetime a legal person is held to be an alien if it is incorporated under the law of a foreign State or has its seat or centre of business in such State. In wartime, a legal person controlled by enemy subjects (→ Enemies and Enemy Subjects) may be held to be → enemy property, even if according to the above criteria it would be a national legal person. → Transnational enterprises as well as enterprises jointly established by several States may have no nationality at all, or at least no effective nationality, yet they too will claim to be alien rather than national enterprises of any State which seeks to interfere with their property rights or interests.

2. Expropriation and Nationalization

International law does not prohibit all interference with alien property by the State of the *situs*

of such property, such *situs* being determined by the effective power to enforce measures against such property rather than by the fictions established in the conflict of law rules concerning the localization of intangible rights. However, the home State of the alien concerned may consider this → foreign investment of its national to be a part of its national assets. Thus, this State will be able to grant him diplomatic protection and thereby assert a right of its own which its national cannot waive, even if the host State had made him sign a Calvo clause by which he allegedly waives any diplomatic protection by his home State and submits to the exclusive jurisdiction of the host State (→ Calvo Doctrine, Calvo Clause). The → Charter of Economic Rights and Duties of States (UN GA Res. 3281 (XXIX) of December 12, 1974) claims that each State has the right

> "to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless [otherwise agreed]" (Art. 2(2)(c); → Expropriation and Nationalization).

The settlement of the United States-Iranian property dispute has shown that the home State of the investor will not accept the host State's claim to be the sole judge of the legality of the taking and of the amount of compensation due (→ United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)).

The host State may take alien property for a public purpose by direct confiscation, expropriation or nationalization. However, the international law rules concerning the protection of alien property apply also to cases where the economic use of such property has been so seriously impaired by measures adopted or tolerated by the host State as to deprive the owner of the effective use of his property ("constructive taking", sometimes also referred to as "creeping nationalization"). The enactment of new currency control or labour laws, of excessive new tax laws (cf. → Taxation, International), the refusal of export or import licences (→ Revere Copper Arbitral Award), the establishment of State-subsidized competing enterprises (→ Chinn Case) or the instigation or toleration of anti-alien riots may amount to a constructive taking.

The granting of a → concession for a fixed period of time may at first glance appear as a guarantee that during this period the conceding State will not interfere with this concession. Experience has shown that the State partner to such a concession contract will frequently ask for its renegotiation, threatening that, should this request be ignored, the State acting in its capacity as sovereign (→ Sovereignty) will no longer abide by the promises it made as a partner to the concession contract. The legality of such an appeal to an "inalienable full permanent sovereignty", even if accompanied by the offer of an adequate indemnity, is contested *inter alia* in virtue of the doctrine of → estoppel. Moreover, home States of investors tend to conclude "umbrella agreements", whereby the host State promises to the home State to abide by the promises made to the investor; breach of such an investment protection treaty will constitute an → internationally wrongful act. Authors alleging that such treaties are to be considered null and void for violating the host State's sovereign rights, raised by them to the status of → *jus cogens*, do not give due weight to the fact that the nullity to any treaty allegedly contrary to *jus cogens* must be established by an international tribunal (→ International Courts and Tribunals; → Treaties, Validity).

Interference with alien property will often raise problems of discrimination if such measures are directed only against foreigners or against foreigners of a determined nationality (→ Discrimination against Individuals and Groups). Yet discrimination will be illegal under international law only if the criteria adopted are chosen in order to achieve this very effect (→ Chilean Copper Nationalization, Review by Courts and Third States). A State may, however, avoid all such difficulties by nationalizing only property belonging to its nationals, as France did in its 1982 nationalization laws. The French Constitutional Council has held this to be compatible with the international as well as with the French rules against discrimination.

3. *Compensation*

The quantum of compensation due for the taking of alien property has long been disputed between home States and host States. Home States insist that investments by their nationals may be taken only against "prompt, adequate and effective" compensation. This → minimum standard is said to be owed to aliens no matter how the host State treats investments of its own nationals. The host States claim to have a sovereign right to determine the amount of compensation owed according to their own preferences and that in any case the treatment accorded to alien property cannot be better than that accorded to that of their own nationals. Some authors hesitate to apply the "prompt, adequate and effective" compensation rule to cases of large-scale takings for purposes of social reform (nationalizations) as opposed to the *ad hoc* taking of a given asset, e.g. for the widening of a road (expropriation). According to these authors, application of such compensation rules to nationalization would in practice deny to the State concerned a right to nationalize.

In his report to the → International Law Commission, García Amador tried to reconcile home State and host State views on this point by granting to aliens and citizens alike minimum standard treatment. He based his view on the fact that Art. 17 of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)) held that: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." However, the → human rights covenants do not protect property as a human right. Protection against the taking of property, but not against legitimate control of its use, is granted by Art. 1 of the first additional protocol to the → European Convention on Human Rights, "subject to the conditions provided for by law and by the general principles of international law". Thus, such protection is certainly owed to aliens; dominant practice extends this protection also to the property of nationals of the host State.

Practice has often overcome the rift between home State and host State conceptions on compensation due in cases of large scale nationalizations by the conclusion of → lump sum agreements. In such cases aliens receive higher compensation than nationals of the host State, yet not full compensation. Such agreements are compromise solutions rather than evidence of an emergent new rule of → customary international law. A large number of investment protection treaties and → commercial treaties provide that property belonging to nationals of the other partner shall be taken only against a compensation "equivalent [to the value] of the property taken", e.g. Art. V(4) of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany of 1954 (→ Treaties of Friendship, Commerce and Navigation). The German Federal Court has held that by virtue of this article a United States national should receive full compensation for his property taken under a town planning law where compensation below the full value had been held compatible with the property protection clause of the Basic Law of the Federal Republic of Germany (Judgment of December 19, 1957, Entscheidungen des Bundesgerichtshofes in Zivilsachen, Vol. 26 (1958) p. 200; ILR, Vol. 24 (1957) p. 8).

4. *Expropriation in Wartime*

In wartime, a belligerent State will acquire a good title to enemy property as prize (→ Prize Law) according to the rules of → sea warfare. The Hague Regulations on Land Warfare, however, protect the property of residents in occupied territory (→ Hague Peace Conferences of 1899 and 1907; → War, Laws of; → Land Warfare; → Occupation, Belligerent). Enemy property within the territory of a belligerent will be placed under custodianship to be returned to the owner at the end of the war. In World Wars I and II the victors seized such property for → reparation purposes, imposing a duty on the losing States to compensate their nationals affected by such takings. The Franco-Italian Conciliation Commission (→ Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947) in its decision *in re* Rizzo (ILR, Vol. 19 (1952) p. 317) has held such rules to be exceptions to the basic rule to return such property. After World War II some German property seized for reparation purposes was returned to its owners, e.g. by the Austro-German Property Treaty of

1957 (→ Austro-German Property Treaty (1957), Arbitral Tribunal). At the end of the United States-Iranian conflict on the hostage crisis and of the → Falkland Islands dispute, alien property placed under custodianship was returned to its owners. Where such property had been nationalized in the meantime the owners received compensation awarded by an arbitral tribunal applying principles of commercial and international law (→ Private International Law).

F.V. GARCÍA AMADOR, Fourth Report on International Responsibility, YILC (1959 II) 1–36.

K. GINTHER, Nationality of Corporations, Österreichische Zeitschrift für öffentliches Recht, Vol. 16 (1966) 27–83.

LORD MCNAIR and A.D. WATTS, Legal Effects of War (4th ed. 1966).

I. SEIDL-HOHENVELDERN, The Impact of Public International Law on Conflict of Law Rules on Corporations, RdC, Vol. 123 (1968 I) 1–113.

W. KEWENIG, Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Handelsbeziehungen (1972).

Z.A. KRONFOL, Protection of Foreign Investment (1972).

I. SEIDL-HOHENVELDERN, The Austrian-German Arbitral Tribunal Established by the Property Treaty of June 15, 1957 (1972).

H. FRICK, Bilateraler Investitionsschutz in Entwicklungsländern (1975).

R.B. LILLICH and B.H. WESTON, International Claims: Their Settlement by Lump Sum Agreements, 2 vols. (1975).

B. LINDEMEYER, Schiffsembargo und Handelsembargo (1975).

D.M. POLTER, Auslandsenteignung und Investitionschutz (1975).

I. SEIDL-HOHENVELDERN, Chilean Cooper Nationalization Cases before German Courts, AJIL, Vol. 69 (1975) 110–119.

R. KEMPER, Nationale Verfügung über natürliche Ressourcen und die Neue Weltwirtschaftsordnung (1976).

I. SEIDL-HOHENVELDERN, Austrian Practice on Lump Sum Compensation by Treaty, AJIL, Vol. 70 (1976) 763–777.

S. BEYER, Der diplomatische Schutz der Aktionäre im Völkerrecht (1977).

G. HARTMANN, Nationalisierung und Enteignung im Völkerrecht (1977).

S.K.B. ASANTE, Restructuring Transnational Mineral Agreements, AJIL, Vol. 73 (1979) 335–371.

H.D. KREIKAMP, Deutsches Vermögen in den Vereinigten Staaten (1979).

H. REINHARD, Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht (1980).

I. SEIDL-HOHENVELDERN, The Social Function of Property and Protection in Present-Day International Law, in: Essays in memoriam H.F. van Panhuys (1980) 77–97.

B. AUDIT, Les "Accords" d'Alger du 19 janvier 1981 tendant au règlement des différends entre les Etats-Unis et l'Iran, Clunet, Vol. 108 (1981) 713–775.

R. DOLZER, New Foundations of the Law of Expropriation of Alien Property, AJIL, Vol. 75 (1981) 553–589.

B. GOLDMANN, Les décisions du Conseil Constitutionnel relatives aux nationalisations et le droit international, Clunet, Vol. 109 (1982) 275–329.

I. SEIDL-HOHENVELDERN, Règles juridiques et le conflit Nord-Sud, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 33 (1982) 199–244.

J. STOLL, Vereinbarungen zwischen Staat und ausländischem Investor (1982).

IGNAZ SEIDL-HOHENVELDERN

AMERICAN CONVENTION ON HUMAN RIGHTS

1. Drafting History

The American Convention on Human Rights (ACHR) (Handbook, p. 29; ILM, Vol. 9 (1970) p. 99), also known as the Pact of San José, was adopted by the Inter-American Specialized Conference on Human Rights, which was sponsored by the → Organization of American States (OAS) and met in San José, Costa Rica, from November 7 to November 22, 1969. The Convention was opened for signature on November 22 and signed on that day by twelve of the nineteen nations attending the Conference. (For a compilation of the Conference documents and proceedings, see Conferencia Especializada Interamericana sobre Derechos Humanos. For an English translation, see Buergenthal and Norris, Human Rights, Vol. 2.) It entered into force on July 18, 1978 with the deposit of the eleventh instrument of ratification (→ Treaties, Conclusion and Entry into Force). By October 30, 1983, 17 of the 31 OAS member States had ratified the Convention: Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, and Venezuela.

The drafting history of the ACHR begins for all practical purposes with the proclamation in 1948 of the American Declaration of the Rights and Duties of Man (Handbook, p. 19). (The Amer-

ican Delaration was adopted in the form of a conference resolution – Resolution XXX – at the Ninth International Conference of American States, which met in Bogotá, Colombia, from March 30 to May 2, 1948.) Thereafter various OAS conferences recommended the drafting of an OAS human rights treaty, and in 1959 that task was formally assigned to the Inter-American Council of Jurists (Res. VIII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12–18, 1959, Final Act, OEA/Ser. C/II.5 (1960) 10–11). The draft that body prepared in 1959 drew heavily on the American Declaration, the → European Convention on Human Rights, and the 1952/1953 versions of the → United Nations covenants on → human rights, which at that time were still being revised by the UN Commission on Human Rights (→ Human Rights Covenants; → Human Rights, Activities of Universal Organizations). The OAS took no noteworthy action on the 1959 draft convention until 1965, when the Second Special Inter-American Conference asked the OAS Council to involve the → Inter-American Commission on Human Rights in the drafting process and urged the convening of an OAS diplomatic conference to adopt the treaty as soon as the necessary consultations had been completed (Res. XXIV, Second Special Inter-American Conference, Rio de Janeiro, Brazil, November 17–30, 1965, Final Act of the Conference, OEA/Ser. C/I. 13 (1965) 35). The review by the Commission of the 1959 draft prompted the OAS Council to request the Commission to produce a new text that took account also of the newly adopted United Nations Covenant on Civil and Political Rights and a number of draft proposals and comments that had been received from various OAS member States. The Commission's draft became the basic working document of the San José Conference. (For the text of the Commissions's draft, see Conferencia Especializada Interamericana sobre Derechos Humanos, p. 13; Inter-American Yearbook of Human Rights 1968 (1973) p. 389.)

2. *Rights Guaranteed*

The ACHR consists of 82 articles and guarantees 23 broad categories of civil and political rights. Included among these are: the right to juridical personality (Art. 3); right to life (Art. 4); right to humane treatment (Art. 5); freedom from → slavery (Art. 6); right to personal liberty (Art. 7); right to a fair trial (Art. 8); freedom from *ex post facto* laws (Art. 9); right to compensation for miscarriage of justice (Art. 10); right to privacy (Art. 11); freedom of conscience and religion (Art. 12; → Racial and Religious Discrimination); freedom of thought and expression (Art. 13); right of reply (Art. 14); right of assembly (Art. 16); right of the family (Art. 17); right to a name (Art. 18); right of the child (Art. 19); right to → nationality (Art. 20); right to property (Art. 21); freedom of movement and residence (Art. 22); right to participate in government (Art. 23); right to equal protection of the law (Art. 24); and right to judicial protection (Art. 25). These guarantees are supplemented by a sweeping non-discrimination clause (Art. 1) and an undertaking by the States parties to take progressive measures for "the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires" (Art. 26).

The ACHR contains a number of other provisions which bear directly on the enjoyment of the rights it guarantees. Among these is Art. 27, which allows the States parties to derogate from their obligations under the Convention "[i]n time of war, public danger, or other emergency that threatens [their] independence or security" (Art. 27(1); → Self-Preservation). Derogation is not permitted, however, from the application of ten of the more basic human rights proclaimed in the treaty (Art. 27(2)). The Convention's catalogue of non-derogable rights is longer than that of other human rights treaties, probably because the right of derogation authorized by Art. 27(1) may be invoked not only in time of → war and other comparable situations, but also in an emergency that "threatens the . . . security of a State Party". Although the → Inter-American Court of Human Rights has thus far not had an opportunity to apply Art. 27 as such, an advisory opinion in 1983 noted the significance of Art. 27(2) for the interpretation of the Convention in general (→ Advisory Opinions of International Courts). In that opinion (Restrictions to the Death Penalty, Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of September 8, 1983, Series A:

Judgments and Opinions, No. 3 (1983)), the Court suggested that a reservation to the Convention that would permit the denial of rights defined as non-derogable under Art. 27(2) would have to be considered incompatible with the object and purpose of the Convention (ibid., para. 61; → Treaties, Reservations).

The ACHR, unlike the vast majority of modern human rights treaties, contains a so-called → federal clause, which makes it possible for a → federal State to limit its obligations under the Convention to those matters only over which it "exercises legislative and judicial jurisdiction" (Art. 28(1); → Jurisdiction of States). It remains to be seen how this by no means unambiguous provision will be applied in practice and, in particular, what obligations, if any, the constituent units of a federal State have in ensuring the rights which the Convention guarantees. Art. 29 of the ACHR (entitled Restrictions regarding Interpretation) lays down various rules designed to guide the interpretation and application of the instrument (→ Interpretation in International Law). Most interesting among these is the rule that "[n]o provision of this Convention shall be interpreted as: . . . (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have". Since the legal effect of the American Declaration remains to be fully determined, it is unclear to what international human rights instruments the phrase "other international acts of the same nature" refers. OAS human rights practice suggests, however, that at the very least the Universal Declaration of Human Rights is one such instrument (→ Human Rights, Universal Declaration (1948)).

Two other provisions of the Convention deserve to be noted. One is Art. 1(2), which provides that "for the purpose of this Convention, 'person' means every human being". It follows that the rights guaranteed by the Convention do not protect corporations or other juridical persons as such (→ Subjects of International Law; → Individuals in International Law; → National Legal Persons in International Law). The second provision to be noted is Art. 75, which declares that "[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969" (→ Vienna Convention on the Law of Treaties). Art. 75 has been interpreted by the Inter-American Court of Human Rights in its advisory opinion on the Effect of Reservations on the Entry into Force of the American Convention (Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of September 24, 1982, Series A: Judgments and Opinions No. 2 (1982)). There the Court emphasized that, given the object and purpose of the Convention and of modern human rights treaties in general, the → reciprocity requirements found in the reservation provisions of the Vienna Convention on the Law of Treaties are irrelevant for determining when the ACHR enters into force for States that ratify it with a reservation.

3. Convention Organs

Art. 33 of the ACHR declares:

"The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

a. The Inter-American Commission on Human Rights, referred to as 'The Commission'; and

b. The Inter-American Court of Human Rights, referred to as 'The Court'."

Although the → Inter-American Commission and the → Inter-American Court are organs established by the Convention to supervise the enforcement of the rights it guarantees, the Commission is also listed in Art. 51(e) of the OAS Charter as an OAS organ. The Court, on the other hand, is not expressly mentioned in the OAS Charter. This anomalous situation can be attributed to the fact that the Protocol of Buenos Aires, which amended the OAS Charter and designated the Commission as an OAS organ, was signed on February 27, 1967 – more than two years before the adoption of the Convention. In 1967 an OAS human rights commission already existed (established in 1959) which, while not a Charter organ, had clearly defined functions. The drafters of the Protocol knew, of course, that the OAS was considering the adoption of a human rights treaty. In order to ensure that the commission to be established under that treaty would continue to exercise the functions of its predecessor in addition to whatever new powers it might be given, the Protocol added Art. 112 to the OAS Charter.

Art. 112(1) describes the Commission as an organ "whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters". Art. 112(2) furthermore declares that "[a]n inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters". Since at the time of the adoption of the Protocol of Buenos Aires it was uncertain whether the future convention would establish a human rights court, no express reference is made to it in the amended OAS Charter. It is clear, however, that the last phrase of Art. 112(2) – "as well as those of other organs responsible for these matters" – constitutes an implicit reference to the Court.

The provisions of the Protocol of Buenos Aires relating to the Commission – particularly Arts. 51 and 112 – had to be taken into account by the drafters of the Convention, even though the Protocol itself did not enter into force until 1970. This situation explains another anomaly, namely, that the ACHR confers on the Commission functions relating not only to the States parties to the Convention but also to all OAS member States whether or not they have ratified the Convention. The latter functions are designed to permit the Commission to discharge its obligations as an OAS organ. To the extent that the relevant provisions of the ACHR apply to States which are not parties to it, their obligations thereunder derive from Art. 112 of the OAS Charter. Art. 35 of the ACHR thus provides that "[t]he Commission shall represent all the member countries of the Organization of American States" and Art. 41, in delimiting the functions of the Commission, makes clear that some concern all OAS member States while others apply only to the States parties to the Convention.

As a Convention organ, the Commission has fact-finding (→ Fact-Finding and Inquiry), conciliation (→ Conciliation and Mediation), reporting (→ Reporting Obligations in International Relations), and extensive quasi-judicial powers (ACHR, Arts. 46 to 50). The Convention empowers the Commission to hear private and inter-State complaints charging a State party with a violation of a right guaranteed by that treaty. Unlike other international human rights instruments, the ACHR makes the right of private petition mandatory as soon as a State has ratified the Convention, whereas the Commission's inter-State complaint jurisdiction is optional and requires a separate declaration of acceptance (ACHR, Arts. 44 and 45). As a Convention organ, moreover, the Commission is required to appear in all cases before the Court.

As an OAS Charter organ, on the other hand, the powers of the Commission are governed by Art. 112 of the Charter and those provisions of the ACHR which implement it, supplemented by the Statute of the Commission. On the whole, these powers do not differ significantly from those conferred on it as a Convention organ, except that its role as a consultative organ to the OAS on human rights matters gives the Commission great flexibility and the right to initiate studies and investigations that do not have to be founded on any specific complaint. It must be emphasized, however, that the human rights norms the Commission applies differ depending upon whether it deals with States parties to the Convention or OAS member States. The latter, not being parties to the ACHR, are judged by reference to the human rights provisions of the OAS Charter and of the American Declaration of the Rights and Duties of Man, whereas the States parties are under a treaty obligation to guarantee the rights proclaimed in the Convention (Statute of the Inter-American Commission on Human Rights, Art. 1(2), Handbook, p. 107).

The Court is the judicial organ of the Convention. It hears contentious cases (Art. 62) that may be referred to it by the Commission and by the States parties after the relevant procedures before the Commission have been completed and provided the States in question have accepted the tribunal's jurisdiction. Individuals have no standing to refer cases to the Court (→ Standing before International Courts and Tribunals). The Court also has extensive advisory jurisdiction, which may be resorted to by all OAS organs and all OAS member States whether or not they have ratified the Convention (Art. 64). Here the Court performs an important judicial consultative function for the OAS and its members, complementing the reporting and fact-finding functions of the Commission.

4. *Evaluation*

The fact that the ACHR has been in force only since 1978 explains, in part at least, why it has thus far had only a limited impact. It must be kept in mind, moreover, that although the ACHR is modelled on the European Convention on Human Rights, the political, economic and social conditions of Western Europe cannot be compared to those of the Americas where large-scale violations of human rights frequently tend to be the rule rather than the exception. These conditions make it extremely difficult for the supervisory organs of the ACHR to obtain the necessary political support from a majority of the governments in the region for measures designed to strengthen the institutional system established by the Convention and to achieve compliance with the human rights it guarantees.

Although the full implementation of the ACHR is still a long way off, much progress has been made in that the treaty is in force, 17 States have ratified it, the Court and Commission are functioning and having a measure of success. All these are important developments in the struggle to achieve the protection of human rights in the Americas.

Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II 60 (1983) [also in Spanish].

Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7–22 de noviembre de 1969, Actas y Documentos, OAS/Ser. K/XVI/I. 2 (1973).

Inter-American Commission of Human Rights, Ten Years of Activities 1971–1981 (1982) [also in Spanish].

J. CABRANES, The Protection of Human Rights by the Organization of American States, AJIL, Vol. 62 (1968) 889–908.

K. VASAK, La Commission interaméricaine des droits de l'homme (1968) 176–203.

P. CAMARGO, The American Convention on Human Rights, Revue des droits de l'homme, Vol. 3 (1970) 333–356.

T. BUERGENTHAL, The American Convention on Human Rights: Illusions and Hopes, Buffalo Law Review, Vol. 21 (1971) 121–136.

D. URIBE-VARGAS, Los derechos humanos y el sistema interamericano (1972).

L. SOHN and T. BUERGENTHAL, International Protection of Human Rights (1973) 1356–1374.

C. GARCÍA-BAUER, La proyectada convención interamericana de derechos humanos, in: Veinte años de evolución de los derechos humanos (1974) 425–461.

T. BUERGENTHAL, The Revised OAS Charter and the Protection of Human Rights, AJIL, Vol. 69 (1975) 828–836.

H. GROS-ESPIELL, Le système interaméricain comme régime régional de protection internationale des droits de l'homme, RdC, Vol. 45 (1975) 1–55.

H. GROS-ESPIELL, L'Organisation des Etats Américains (OEA), in: K. Vasak (ed.), Les dimensions internationales des droits de l'homme (1978) 600–633.

J.A. FROWEIN, The European and the American Conventions on Human Rights, A Comparison, Human Rights Law Journal, Vol. 1 (1980) 44–65.

M. MONROY-CABRA, Los derechos humanos (1980) 97–174.

R. NORRIS and P. REITON, The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties, American University Law Review, Vol. 30 (1980) 189–219.

Symposium: The American Convention on Human Rights, American University Law Review, Vol. 3o (1980) 1–187.

T. BUERGENTHAL, The Inter-American System for the Protection of Human Rights, Anuario Jurídico Interamericano 1981 (1982) 80–120; Spanish translation, 121–164.

T. BUERGENTHAL and R. NORRIS, Human Rights: The Inter-American System, Vols. 1 and 2 (1982), Vol. 3 (1983).

T. BUERGENTHAL, R. NORRIS and D. SHELTON, Protecting Human Rights in the Americas (1982) (Spanish edition 1983).

A.H. ROBERTSON, Human Rights in the World (2nd ed. 1982) 132–159.

C. SEPÚLVEDA, The Inter-American Commission on Human Rights (1960–1981), Israel Yearbook on Human Rights (1982) 46–61.

THOMAS BUERGENTHAL

AMNESTY INTERNATIONAL

Amnesty International is an international → non-governmental organization concerned with the protection of → human rights. It originated with the private initiative of the British barrister Peter Benenson, who launched an "Appeal for Amnesty, 1961", conceived of as a one-year campaign in aid of people imprisoned for their opinions throughout the world. The scale of response led to the establishment of a permanent organization, which continues to reflect its founding spirit as a self-consciously impartial and inde-

pendent body whose members are volunteers working "to secure throughout the world the observance of the Universal Declaration of Human Rights" (Amnesty International Statute as amended by the 16th International Council, 1982, Art. 1; → Human Rights, Universal Declaration (1948)).

Amnesty International pursues this end by seeking the release of "prisoners of conscience" (defined as people imprisoned by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origins, sex, colour or language, provided they have not used or advocated violence); by opposing detention without fair and prompt trial for "all political prisoners"; and by opposing the death penalty and → torture or other cruel, inhuman or degrading treatment or punishments for "all prisoners" (Art. 1(a) to (c)).

Unlike other non-governmental organizations with roughly comparable aims, such as the → International Commission of Jurists and the International League for Human Rights, Amnesty International has a large membership (presently over 500 000 members and subscribers in 60 countries or territories) and a substantial organizational structure.

The basic units of the organization are the 3000 local groups which are formed by five or more members and affiliated either directly to Amnesty International or, much more commonly, to one of the 41 affiliated national "sections" which have been recognized by the organization and which act in accordance with its rules and guidelines (Art. 8). Each of these groups is allotted the cases of prisoners it is to "adopt"; in the interests of impartiality and balance, the cases thus supplied do not come from a single country or ideological bloc and no group may adopt prisoners of conscience detained in its own country (Art. 9). The largest national sections are in the Federal Republic of Germany, Sweden, the Netherlands, France, Great Britain and the United States, in that order.

The "directive authority" of Amnesty International is vested in the International Council which meets biennially (Art. 4). Voting representatives to the Council are appointed by the national sections in proportion to the number of their groups or individual members (Art. 13). Groups from the 93 other countries or territories where no sections exist may each send a non-voting observer (Art. 14).

The International Council fixes the budget, sets policy and elects the Treasurer and seven regular members from separate countries to serve on the International Executive Committee (Art. 25(a)) which, between Council meetings, is the authority responsible for the conduct of Amnesty International's affairs. The International Executive Committee elects its chairperson and also appoints the Secretary-General who heads the organization's International Secretariat in London, conducts its day-to-day business and implements the decisions of the International Council under the direction of the International Executive Committee (Art. 36). As a private law organization, the International Secretariat is subject to English law. Amnesty's sections in the United States and the Federal Republic of Germany, for example, enjoy tax-exempt status, but the United Kingdom section does not qualify as a charity under English law.

The Secretariat now has over 150 modestly-paid staff, working in the research, membership and publicity departments, the legal office and the documentation centre. Its members elect one further member to the International Executive Committee (Art. 25(b)). The Secretariat implements the decisions of the International Council and services the needs of the sections.

In the twelve months to December 31, 1983, Amnesty International's budgeted income amounted to £3.9 million, £3.35 million of which was contributed by the membership through the national sections, a considerable achievement. The organization's guidelines do not allow it to accept income which will compromise its independence and impartiality or undermine its broadly-based and self-supporting character, or which is not donated in accordance with the objects of its Statute. In particular, it does not accept government money for its work.

Amnesty International's activities are extensive, but the central effort concentrates on seeking the release of individual prisoners of conscience, fair and prompt trial for political prisoners and an end to torture and executions through campaigns, appeals, organizational fund-raising and the provision of relief. The 1983 Amnesty

International report states that 5557 individuals were either adopted or were under investigation for adoption. Only when an individual is confirmed as a prisoner of conscience does Amnesty International call for his or her unconditional release. However, the organization also highlights patterns of human rights abuse in various countries and also conducts campaigns against specific widespread practices such as torture, the death penalty, and recently the growing phenomenon in a number of countries where people simply "disappear" or are subjected to extrajudicial executions. Amnesty International seeks to persuade governments and authorities to its point of view, either privately or publicly, and to inform public opinion over a given issue or case. To this end the organization publishes a wide range of reports on individual cases, countries and widespread practices. Amnesty International also sends missions to discuss issues and individual cases with governments or to act as fact-finders or observers at trials (→ Fact-Finding and Inquiry).

Another important aspect is the effort mounted to ensure that the organization's concerns and aims are fully understood in the various agencies of the → United Nations concerned with human rights. Under ECOSOC Resolution 1296 (UN Doc. E/4548 (1968)), Amnesty International, as a non-governmental organization, has category II consultative status and prepares material, *inter alia*, for the → United Nations Economic and Social Council, the United Nations Commission on Human Rights and the Subcommission on the Elimination of Discrimination and Protection of Minorities (→ Human Rights, Activities of Universal Organizations). The organization also regularly communicates information to delegates to the → United Nations General Assembly through its liaison office in New York; it further has consultative status with the → Council of Europe and cooperative relations with the → Inter-American Commission on Human Rights. In all these organizations, Amnesty International is respected as a major actor in the human rights field. Thanks to its political independence, Amnesty International's efforts often achieve results where inter-governmental organizations, for whatever reasons, have failed.

During the past two decades, Amnesty International has emerged from an idea to become one of the best known human rights organizations. It combines the sophistication of its Secretariat's professional research facilities with the idealism of a widespread membership of active volunteers. Having emerged from the many controversies which have accompanied its activities over the years with its reputation intact, Amnesty International has helped to breathe life into the international legal régime of human rights. Amnesty International's achievements were acknowledged by the award of the Nobel Peace Prize in 1977, the United Nations Human Rights Prize in 1978 and Council of Europe's Human Rights Prize in 1983.

Statute of Amnesty International (1982).
Amnesty International Reports (annual).

T. CLAUDIUS and F. STEPAN, Amnesty International, Portrait einer Organisation (1976).

D. WEISSBRODT, The Role of International Nongovernmental Organizations in the Implementation of Human Rights, Texas International Law Journal, Vol. 12 (1977) 293–320.

J. SHESTACK, Sisyphus Endures: The International Human Rights NGO, New York Law School Law Review, Vol. 24 (1978) 89–123.

E. LARSEN, A Flame in Barbed Wire, The Story of Amnesty International (1979).

N. RODLEY, Monitoring Human Rights by the U.N. System and Nongovernmental Organizations, in: D. Kommers and G. Loescher (eds.), Human Rights and American Foreign Policy (1979) 157–208.

J. POWER, Amnesty International, The Human Rights Story (1981).

M. ENNALS, Amnesty International and Human Rights, in: P. Willetts (ed.), Pressure Groups in the Global System (1982) 63–83.

JONATHAN S. IGNARSKI

ANTITRUST LAW, INTERNATIONAL

1. Terminology

The term antitrust law is used here in the sense it has in the law of the United States, i.e. it designates a body of rules of municipal law which seek to establish and to safeguard freedom of competition against countervailing forces resulting from private conduct, such as forming cartels, abusing a dominant position in the market,

adversely affecting market structure by merging with other enterprises, and so forth. Freedom of competition is seen as requiring a framework of regulations frequently adjusted to economic development and vigilantly supervised by administrative agencies. Antitrust law is based upon prohibitory rules. Infringements may entail sanctions under private law (invalidity of contracts, claims for single or multiple damages, etc.), under administrative law (orders of enforcement, such as dissolving mergers), and under criminal law (fines, imprisonment). Special rules of procedural law relating to service of process, investigations, etc., are designed to enhance the effectiveness of enforcement.

The aforementioned field of law is often called competition law. The latter term which is used in British law and also in the law of the → European Communities (EC) would, however, cover the law of unfair competition as well; it is, therefore, wider than antitrust law. The term cartel law, used in German Law and in German language publications on EC law, is too narrow, at least in its literal meaning which relates only to horizontal agreements in restraint of trade. The American term antitrust law is preferred here, also because United States practice originally raised the problems to be discussed below and continues to raise a fair number of them today.

This article deals with the international aspects of antitrust law: Reference is made not only to sources of public international law regarding questions of antitrust law, but also to rules of municipal law pertinent to cases involving foreign elements. The "extraterritorial" application of domestic antitrust law to such cases has given rise to legal controversies on the plane of both domestic conflict of laws and international law.

2. Sources

Antitrust regulation operates within the sphere of municipal law. Antitrust agencies, private parties and, of course, municipal courts seek orientation first in municipal law when confronted with issues of international antitrust law. International law comes in to the extent that this is provided for under the relevant municipal law. In addition, any measures of antitrust law may be subject to review under international law as is evidenced by extensive diplomatic practice.

In municipal law, only few statutory provisions directly address problems of international antitrust. Such specific regulation is, however, contained in § 98(2) of the German Law Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, as revised to September 24, 1980), which provides for the applicability of German antitrust law whenever domestic anticompetitive effects are present. A similar provision has now been included in the antitrust law of the United States by the Foreign Trade Antitrust Improvements Act of 1982. Reflecting judicial practice since 1945, the Sherman Act and the Federal Trade Commission Act are now, with regard to certain conduct, expressly stated to be applicable whenever there are direct, substantial and reasonably foreseeable anticompetitive domestic effects (15 U.S.C. §§ 6a, 45a(3)). In the absence of explicit statutory provisions, municipal law rules regarding international antitrust had to be developed by reference to substantive antitrust law (e.g. foreign commerce clause), to general notions of conflict of laws (e.g. public policy), or even to principles of constitutional law (e.g. due process).

State practice under domestic law has to some extent contributed to the formation of rules of → customary international law regarding international antitrust issues. A major part of this article will be devoted to a discussion of such rules. So far, there are only few pertinent rules of treaty law. Consultation clauses in → treaties of friendship, commerce and navigation preceded bilateral → executive agreements between the United States, on the one side, and Australia, Canada and the Federal Republic of Germany on the other, providing for obligations of notification, consultation and coperation in administrative and judicial matters of antitrust law. An important international law instrument is the 1967 Recommendation of the Council of the → Organisation for Economic Co-operation and Development (OECD) which was revised various times to assume its present form in 1979. Mention may also be made of Resolution 35/63 of the → United Nations General Assembly of 1980 adopting the Restrictive Business Practices Code. The → United Nations Conference on Trade and Development (UNCTAD) is presently preparing a model law on restrictive business practices to be

recommended for adoption in municipal law (see UN Doc. TD/B/RBP/15 of September 23, 1983).

3. *Scope of Application*

(*a*) *General remarks*

The division of the world into territorial → States is reflected by the territoriality of the "scope of binding force" (*Geltungsbereich*): The binding force of legislative, executive and judicial acts of a State is strictly confined to the territory of the State which issues them. But business conduct very often crosses State frontiers. Offers and their acceptances may be effectuated in different States. Performance of contracts may relate to the territories of two or more States. The effects of business conduct may reach many different States. Participants and affected parties may have different nationalities, or they may form corporate groups comprising legal entities attached to a great number of States (→ Transnational Enterprises). The problem, therefore, is that restrictive business practices, like any other business conduct, constitute transterritorial situations to be regulated, however, by the territorial acts of States. The factual situations to which measures of antitrust law are related therefore do not necessarily, and not even as a rule, coincide with the territory of the acting State; the "scope of application" (*Anwendungsbereich*) has to be wider (cf. → Extraterritorial Effects of Administrative, Judicial and Legislative Acts). The scope of application is determined by domestic rules of conflict of laws selecting the type of connecting factors under which jurisdiction is asserted. That selection, however, may be subject to limitations by international law rules regarding the basis of jurisdiction.

Writers on conflict of laws have from time to time put forward the proposition that domestic rules of choice of law might, as in → private international law, refer to foreign antitrust law. Such suggestions have never been taken up in practice. States, so far, do not support each other in the enforcement of laws whose regulatory goals are deemed to be closely related to particular, perhaps even competing, economic interests. Moreover, a number of general clauses incorporate policy interests which could properly be ascertained only by domestic agencies and courts. In international antitrust law therefore, the only conflict of laws question is: To what kind of conduct, as described in terms of domestic contacts, is domestic antitrust law to be applied?

International law itself does not select the applicable law, but it establishes a framework of rules within which the criteria for the application of domestic law may be selected. Its focus is on the minimum requirements for a basis of State jurisdiction, whereas conflict of laws purports to decide upon the assertion of jurisdiction in an optimal way (*völkerrechtliches Minimum, kollisionsrechtliches Optimum*).

(*b*) *Applicability of antitrust law under conflict of laws*

Domestic antitrust law is only applicable as regards conduct which has an impact on the domestic economic order or, to put it more technically, which exercises anticompetitive domestic effects. That requirement is expressly provided for by rules of German and, since 1982, United States conflict of laws. Elsewhere it is mainly derived from elements of substantive antitrust law.

State practice varies as to the extent additional connecting factors, such as a domestic place of conduct, have been made a requirement of the application of domestic antitrust law. Several legal orders, some of them with very strict and extensively enforced antitrust laws, subscribe to the effects principle, i.e. no additional connecting factor other than domestic anticompetitive effects is required (United States, Federal Republic of Germany, → European Economic Community (EEC), Switzerland). Other States, usually having more lenient antitrust laws and/or enforcement practices, subscribe to the principle of territoriality, i.e. at least a part of the conduct has to take place in domestic territory (among the OECD member States according to an OECD study: Australia, the Netherlands and the United Kingdom; see the 1977 Report of the Committee of Experts on Restrictive Business Practices). Only rarely is a principle of active → nationality adopted: Domestic antitrust law is applicable whenever a domestic enterprise or a foreign enterprise controlling a domestic enterprise is involved. Here, the antitrust law under the → European Coal and Steel Community Treaty

and the merger control law of Great Britain may serve as examples.

Although the effects principle clearly dominates in legislative State practice, there are relatively few cases in which the principle has actually been applied. Most examples are found in United States practice. American courts confirmed various antitrust proceedings against world-wide cartels concluded and performed outside the United States, mainly, sometimes exclusively, between foreign enterprises (see U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (ALCOA Case); U.S. v. General Electric Company, 82 F. Supp. 753 (D.N.J. 1949); 115 F. Supp. 835 (D.N.J. 1953) (Bulb Case); U.S. v. Imperial Chemical Industries Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) (Nylon Case)). In several series of cases, sea freight rates between United States and foreign ports were reviewed in antitrust proceedings. In the field of merger control the United States has challenged a number of mergers between foreign enterprises affecting the American market through American subsidiaries. One case had even been brought where the alleged anticompetitive domestic effects resulted from direct selling of foreign firms into the American market rather than from the business of their respective American subsidiaries.

Germany initiated proceedings against the German partners of Shipping Conferences relating to foreign-to-foreign port traffic. In the Dyestuffs Case, the German Bundeskartellamt (Federal Cartel Office) proceeded only against the German members of alleged price cartels concluded outside Germany with several foreign firms (Bundeskartellamt, Decision of November 28, 1967, Wirtschaft und Wettbewerb/Entscheidungssammlung (WuW/E) BKartA 1179). In the Synthetic Rubber Case (Kammergericht (Court of Appeals of Berlin), Decisions of November 26, 1980 I & II, Bayer/Firestone, WuW/E, Oberlandesgericht (OLG) 2411), Germany prohibited a merger transaction between the French subsidiaries of a German firm and an American firm. In the Cigarettes Case (Bundeskartellamt, Decision of February 24, 1982, Morris/Rothmans, WuW/E, BKartA 1943; Kammergericht, Decision of July 1, 1983, WuW/E, OLG 3051), the purchase of shares of a British firm by an American firm from a South African firm was challenged because both partners held a strong position on the German cigarettes market through their German subsidiaries.

In the Dyestuffs Case the Commission of the European Communities held Art. 85 of the EEC Treaty to be applicable to a concerting of prices between EC firms and non-EC firms although the concerting took place outside the EC but related to prices to be charged within the EC. The → Court of Justice of the European Communities confirmed that decision, reasoning though that the non-EC firms actually acted within the EC because their EC subsidiaries with which they were forming an "economic unity" had quoted those prices. The Commission continues to favour a straightforward application of the effects principle.

It may be added that Canada frequently applied its Foreign Investment Review Act to mergers between non-Canadian enterprises if those enterprises had Canadian subsidiaries. The main objective of the Act is, however, not one of competition policy but of attempting to reduce foreign control of Canadian industry at the occasion of such merger transactions.

The Restrictive Business Practices Code of 1980 (→ Codes of Conduct), if one day adopted in domestic legislation, would bring about a new development regarding the scope of application of antitrust laws: The emphasis again is on effects, but the effects are no longer exclusively related to the domestic market but to international trading interests, especially to those of → developing States.

(c) *Basis of antitrust jurisdiction under customary international law*

The conflict of laws approach to international antitrust is very pragmatic. It differs considerably from State to State and it is open to future changes. Despite that overall picture of diversity and fluidity, attempts have been made to propose rather rigid rules of customary international law establishing minimum requirements as regards the basis of antitrust jurisdiction. The thesis usually was that, under a principle of territoriality, domestic antitrust law may only be applied if there is a territorial link, normally resulting from a domestic place of conduct. Different reasons have been put forward to support that thesis, but

none of them withstands close scrutiny:

On the premise that international law requires an affirmative authority for a basis of jurisdiction, it was held that the very diversity of State practice did not allow the formation of a rule authorizing the assertion of jurisdiction under the effects principle. Here, the reverse → positivism underlying that argument is at odds with the attitude of the → International Court of Justice towards the → sources of international law and also with the changing needs of the international community.

The traditional principle of territoriality could not, it is argued, have been abrogated by a small group of dissenting States which have even been confronted with fairly regular diplomatic protests. So far as this argument is concerned, whatever the meaning of the principle of territoriality may have been, it did not cover antitrust law or any other field of economic regulation. Even in the context of criminal law, that principle, as the → *Lotus* decision of the → Permanent Court of International Justice demonstrates, may be understood to encompass objective territoriality, i.e. to allow for jurisdiction at the place of those effects that are elements of the offence. Finally, even British protests have not been that regular, and their relevance is further diminished by legislation inconsistent with such protests.

It is further argued that chaos would result, if the principle of territoriality were not applied within the field of antitrust law. Against this argument it may be said that the need for a rule of international law is no substitute for the evidence of its formation. Furthermore, chaos does not necessarily result since there is a rule of customary international law which does not, however, relate to the basis of jurisdiction but to its exercise, as will be elaborated below.

In sum, State practice of international antitrust may at most be deemed to reflect the notion that States follow their regulatory interests as they see them, but that, in pursuing those interests, they are determined to avoid unnecessary conflicts with foreign States, if only for considerations of → reciprocity. One might characterize that notion by the term enlightened self-interest. That principle means little as regards the selection of regulatory goals. It is, however, of more than descriptive value after a particular State has decided to adopt certain regulatory goals. That State would then be bound to determine the scope of application of its antitrust law by reference to those connecting factors that are apt to reach those goals under the principle of enlightened self-interest. For example, States subscribing to the pure effects principle would have to respect the fact that it does not make sense to base jurisdiction on effects which are not direct, substantial and foreseeable. That requirement, which forms part of both the American Law Institute's Second Restatement of Foreign Relations Law of the United States (1965) and, with a slight modification, of the → International Law Association's resolution regarding antitrust jurisdiction (Report of the 55th Conference (1972) p. XIX), could, therefore, be held to constitute a more precise minimum requirement of international law, binding, however, only States that have adopted the effects principle. States which were, in the future, to adopt legislation pursuant to the Restrictive Business Practices Code would then be subject to different minimum requirements under the notion of enlightened self-interest.

4. Respect for Prevailing Foreign Interests

Under the respective domestic rules of conflict of laws, the antitrust laws of two or more States are very often applicable in one and the same factual situation. The applicability of those laws is usually covered by the international law principle of enlightened self-interest and any of its more specific offshoots. It may be added that the situation would not be much better if every State adhered to the principle of territoriality in combination with the principle of nationality as advocated by some authors, since international antitrust cases may have territorial and/or nationality contacts to two or more States at the same time.

If, in a situation of concurrent jurisdiction, State A takes measures of antitrust law, those measures might impair the interests of State B. State B might consider the business conduct prohibited in State A to be in conformity with its competition policy and/or of advantage to its nationals. Assertions of antitrust jurisdiction have sometimes led to rather strong reactions of foreign States which have filed diplomatic → protests, submitted *amicus curiae* briefs, enacted special legislation in order to block the enforcement of the antitrust measures, or had

their courts entertain actions designed to frustrate the antitrust proceedings. Such international antitrust conflicts have usually been settled to the satisfaction of all the States involved. Very often, of course, conflicts were avoided because, in view of countervailing foreign interests, States took less drastic measures of antitrust enforcement or refrained from taking any measures at all. Both the settlement and the avoidance of antitrust conflicts reflected respect for prevailing foreign interests, though they were operated under a variety of legal concepts of domestic law, of international law or of a blend of the two:

Administrative restraint, for example, was exercised either voluntarily or on account of foreign protests. Working out compromise solutions was gradually institutionalized by executive agreements and by the OECD Recommendation in its various forms.

In the United States, private antitrust suits were sometimes dismissed on the grounds of → State immunity, the → act of State doctrine and/or the foreign government compulsion defence. In all those cases it was held that foreign governments were involved in the business conduct of private defendants which were, for instance, ordered to refuse to supply certain customers. In that case, it was sometimes also argued that the substantive antitrust law requirement of private conduct was not present.

On the basis of an international law provision of the Second Restatement of Foreign Relations Law of 1965, United States courts entered into a process of judicial interest-balancing in a number of cases. United States interests to take certain measures were ascertained and weighed against countervailing foreign interests likely to be impaired in case the envisaged measures were taken. In most but not all of the cases, American courts concluded American interests preponderated and therefore justified the enactment of antitrust measures. In 1984, the United States Court of Appeals for the District of Columbia Circuit held that it was for the executive branch, but not for the courts, to engage in such balancing of interests (Laker Airways Ltd. v. Sabena, 731 F.2d 9o9 (D.C. Cir. 1984)).

In German conflict of laws theory, restrictive application of German antitrust law is advocated under a so-called "in-so-far-as formula" which is assumed to authorize the application of German law only to the extent that this is absolutely necessary in order to reach the regulatory goals of German antitrust law. It has also been argued that, even if German law were applicable under the effects principle, it should not be applied, whenever the "centre of gravity" of the challenged conduct is outside Germany. Both concepts have left some trace in the Synthetic Rubber and Cigarettes Cases.

Bilateral agreements and the aforementioned Recommendation of the OECD Council provide for obligations to notify antitrust proceedings at an early stage and to engage in a consultation process. The OECD Recommendation and the Restrictive Business Practices Code strongly suggest taking account of foreign countervailing interests but the freedom of ultimate decision is, explicitly or implicitly, reserved to the State initiating proceedings. The United States-Canadian Understanding of March 9, 1984 goes one step further (ILM, Vol. 23 (1984) p. 275). It carefully describes the way in which foreign interests have to be ascertained and it is even implied that, whenever one party sees the interests of the other party to be "predominant", it will yield jurisdiction.

The above survey of State practice may be summarized as follows: (1) In the practice of international antitrust, significant interests of foreign States have been taken account of usually voluntarily, sometimes as a result of foreign protests. (2) Interest balancing by administrative agencies and by the courts has become a normal feature of the process of enforcing antitrust law in cases containing foreign elements. (3) States have never in principle claimed to be allowed to proceed even though foreign interests were prevailing.

As regards *opinio juris*, it is important to note that States, confronted in a particular controversy, always brought their case on the basis of legal arguments. If settlements were also due to political considerations, such considerations do not appear to have been predominant since, unlike in purely political disputes, States failed to link antitrust controversies with other pending controversies to be decided in a package deal. That sense of legal obligation may be related to the general principle of sovereign equality of

States: In antitrust disputes States did not make use of superior power, but generally offered foreign States an equal chance of pursuing their respective policy goals. Thus, sovereign equality could be maintained even though hard and fast rules on the basis of antitrust jurisdiction are lacking (→ States, Sovereign Equality).

In a monograph of 1975, the present author submitted the thesis that under the principle of non-interference States are prohibited from taking measures of antitrust law if those measures substantially affect foreign interests and if foreign interests against taking such measures outweigh domestic interests of taking them. Subsequent United States court practice, notably in the Timberlane and Mannington Mills Cases (Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); 574 F. Supp. 1453 (N.D. Cal. 1983); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)), has contributed to consolidating that principle as a rule of customary international law. As such it was applied by the Kammergericht in the Synthetic Rubber Case and by a quasi-judicial "Deciding Division" of the Federal Cartel Office in the Cigarettes Case. The balancing rule of non-interference received the endorsement of most authors who discussed it, but it has not yet been included into the set of well-established rules laid down in international law text books.

5. Interests of the Individual

The enforcement of antitrust legislation on the one side and of blocking statutes on the other side may produce a difficult situation for the enterprise concerned: The same conduct that may be prohibited under criminal law sanctions in State A may be compulsory in State B, again under sanctions of criminal law. It has not yet been fully explored to what extent such squeezing of individuals between two jurisdictions may violate rules of international law. Surely, the standards regarding the treatment of → aliens and perhaps even → human rights may be invoked. But, generally speaking, those standards give less protection than could be expected from constitutional guarantees under the law of each of the States involved. Due process, protection of property rights and the principle of → proportionality would be among the legal positions of municipal law most likely to be pertinent. In addition, interests of the individual may also form part of foreign State interests to be respected under the balancing rule of non-interference. Thus, in the Swiss Watch Case (U.S. v. The Watchmakers of Switzerland Information Center, 133 F. Supp. 40 (S.D.N.Y. 1955); Trade Cases 1963, § 70,600 (S.D.N.Y. 1962); Trade Cases § 71,352 (S.D.N.Y. 1965)), Switzerland pursued not only the abstract interest of a competition policy favouring cartels but also economic interests resulting from the performance of a great number of Swiss enterprises. The extent to which such indirect protection of individual interests of the individual is granted would have to be examined according to the facts of each particular case.

6. Judicial Cooperation

In antitrust, as in any other field of law, enforcement is limited to the domestic territory. In other words, acts of enforcement on foreign territory are prohibited unless the respective State gives its consent (→ Administrative, Judicial and Legislative Activities on Foreign Territory). In international antitrust law, that rule is of considerable importance especially when process is served or when attempts are made to take evidence abroad. A service of process effectuated abroad without the consent of the territorial State would violate international law and be invalid, as has been stated in FTC v. St. Gobain (Federal Trade Commission v. Compagnie de St. Gobain-Pont-à-Mousson, 636 F.2d 1300 (D.C. Cir. 1980)). The same would apply if evidence is taken abroad, for instance by members of the consular staff.

In order to overcome the aforementioned difficulties the Conventions on the Service of Documents Abroad and on the Taking of Evidence Abroad were concluded at The Hague in 1965 and in 1970 (→ Hague Conventions on Civil Procedure). It is, however, still unsettled whether those conventions apply to antitrust matters. Apart from the Hague Conventions, the OECD Recommendation of 1979 and several bilateral agreements provide for a limited amount of administrative and judicial cooperation in the field of antitrust (see the articles on → Legal Assistance between States).

States also take recourse to domestic acts of

enforcement that, however, have an extraterritorial impact. Thus, to avoid serving documents abroad, domestic law may provide that service be made by publication in some official journal. Or it may be attempted to serve documents on the foreign corporations by mailing them care of the domestic subsidiaries of such corporations. Since the document is ultimately supposed to be transmitted to the officers of the foreign corporation in foreign territory, that type of service must be considered to constitute an illegal circumvention of the above prohibitory rule. Furthermore, orders have been issued requiring the production of documents located abroad or even the presentation of witnesses domiciled abroad. Such measures, regulating foreign conduct without violating the physical integrity of foreign States, are not generally illegal. But, depending on the circumstances of the particular case, the balancing rule of non-interference and/or domestic law provisions of due process may be violated.

Whenever there is an opportunity to obtain judicial assistance by the foreign State that channel has to be used first. Otherwise the balancing rule of non-interference would be infringed upon, because, in view of that less intrusive alternative, domestic interests to enforce such measures by domestic sanctions would normally be inferior to the interests of the foreign State to have its administrative and judicial authority respected. It is envisaged to formulate a rule to that effect in the forthcoming Third Restatement of the Foreign Relations Law of the United States.

7. *Harmonization of Substantive Law*

Since drafting the → Havana Charter, efforts have been made to prescribe a body of rules of antitrust law to be applied by a multitude of States (→ Unification and Harmonization of Laws). Among the member States of the European Communities it was at least agreed to adopt the antitrust rules of the ECSC Treaty and of the EEC Treaty in addition to rules of municipal antitrust law which continue to be divergent. At present, UNCTAD is preparing a model law on restrictive business practices. Whether such law would ever be adopted by domestic legislation, is open to doubts.

Even a harmonization of antitrust laws does not necessarily remove the risk of jurisdictional clashes, because, at many points, divergent national interests have an impact on the enforcement of antitrust law. For example, an export cartel in State A may there be a welcome protection of domestic industry, but the same cartel, constituting an import cartel in State B, could there be regarded as impairing substantial interests of competition policy. Furthermore, divergent interpretation of general clauses, resulting from different enforcement policies, is likely to cause jurisdictional friction from time to time.

G.W. HAIGHT, International Law and the Extraterritorial Application of the Antitrust Law, Yale Law Journal, Vol. 63 (1953) 639–654.

R.Y. JENNINGS, Extraterritorial Jurisdiction and the United States Antitrust Laws, BYIL, Vol. 33 (1957) 146–175.

K. BREWSTER, Antitrust and American Business Abroad (1958).

I.E. SCHWARTZ, Deutsches internationales Kartellrecht (1962).

F.A. MANN, The Doctrine of Jurisdiction in International Law, RdC, Vol. 111 (1964 I) 1–162.

R. BÄR, Kartellrecht und Internationales Privatrecht (1965).

E. REHBINDER, Extraterritoriale Wirkungen des deutschen Kartellrechts (1965).

H. KRONSTEIN, Das Recht der internationalen Kartelle (1967).

K. MARKERT, Die Anwendung des Gesetzes gegen Wettbewerbsbeschränkungen auf internationale Wettbewerbsbeschränkungen, in: Zehn Jahre Bundeskartellamt (1968) 205–229.

B. GOLDMAN, Les champs d'application territoriale des lois sur la concurrence, RdC, Vol. 128 (1969 III) 631–729.

F. HERMANNS, Völkerrechtliche Grenzen für die Anwendung kartellrechtlicher Verbotsnormen (1969).

H. ZWARENSTEYN, Some Aspects of the Extraterritorial Reach of the American Antitrust Laws (1970).

K.M. MEESSEN, Völkerrechtliche Grundsätze des internationalen Kartellrechts (1975).

K.M. MEESSEN, Völkerrechtliches Minimum und kollisionsrechtliches Optimum, in: Internationales Recht und Wirtschaftsordnung, Festschrift für F.A. Mann (1977) 227–239.

J.P. GRIFFIN (ed.), Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws (1979).

B.E. HAWK, United States, Common Market and International Antitrust (since 1979) [looseleaf ed.].

K.M. MEESSEN, Zusammenschlußkontrolle in auslandsbezogenen Sachverhalten, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, Vol. 143 (1979) 273–287.

E. NORDMANN, Die Beschaffung von Beweismitteln aus dem Ausland durch staatliche Stellen (1979).
B. SCHMITZ, Fiktive Auslandszustellung (1980).
J.R. ATWOOD and K. BREWSTER, Antitrust and American Business Abroad, 2 vols. (2nd ed. 1981).
B. BARACK, The Application of Competition Rules (Antitrust Law) of the European Economic Community to Enterprises and Arrangements External to the Common Market (1981).
C. CANENBLEY, Enforcing Antitrust against Foreign Enterprises (1981).
W. MENG, Neuere Entwicklungen im Streit um die Jurisdiktionshoheit der Staaten im Bereich der Wettbewerbsbeschränkungen, ZaöRV, Vol. 41 (1981) 469–513.
J.H. SHENEFIELD, Extraterritoriality and Antitrust, Trade Regulations Reports (1981), Address of December 10, 1980, §§ 50,424, 55,959–55,966.
D.F. TURNER, Die Lösung von Zuständigkeitskonflikten bei der Anwendung nationaler Wettbewerbsvorschriften, Wirtschaft und Wettbewerb (1981) 5–13.
K. MARKERT, Die Anwendung der deutschen Fusionskontrolle (§§ 23 ff. GWB) auf Zusammenschlüsse mit und zwischen ausländischen Unternehmen, in: Schwerpunkte des Kartellrechts 1980/81 (1982) 91–139.
D.E. ROSENTHAL and W.M. KNIGHTON, National Laws and International Commerce, The Problem of Extraterritoriality (1982).
B. WAGNER, Die Konzentrationskontrolle in der EWG und ihre Bedeutung für Zusammenschlüsse schweizerischer Unternehmen (1982).
J.-G. CASTEL, The Extraterritorial Effects of Antitrust Laws, RdC, Vol. 179 (1983 I) 9–144.
A.V. LOWE, Extraterritorial Jurisdiction, An Annotated Collection of Legal Materials (1983).
F.A. MANN, Staatliche Aufklärungsansprüche und Völkerrecht, in: Völkerrecht als Rechtsordung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler (1983) 529–544.
W. MENG, Extraterritoriale Anwendung der Wettbewerbsregeln, Vorbemerkungen zu den Artikeln 85 bis 89, in: H. von der Groeben et al. (eds.), Kommentar zum EWG-Vertrag, Vol. 1 (3rd ed. 1983) 895-915.
K.M. MEESSEN, Antitrust Jurisdiction Under Customary International Law, AJIL, Vol. 78 (1984) 783–810.
K.M. MEESSEN, Kollisionsrecht der Zusammenschlußkontrolle (1984).
W. MENG, Völkerrechtliche Zulässigkeit und Grenzen wirtschaftsverwaltungsrechtlicher Hoheitsakte mit Auslandswirkung, ZaöRV, Vol. 44 (1984) 675–783.
OECD, Competition Law Enforcement, International Cooperation in the Collection of Information, Report of the Committee of Experts on Restrictive Business Practices (1984).

KARL M. MEESSEN

APARTHEID

1. Notion and Origin

The term "apartheid" denotes a special type of discrimination and separation of peoples or groups of individuals along racial lines as it is exercised in the Republic of South Africa and – under its auspices – in the former colony of South-West Africa, now known as → Namibia (→ Colonies and Colonial Régime; → Mandates). The notion of apartheid as a manifestation of racial discrimination needs further specification reflecting the particular historical and legal context in which it is applied. Racial discrimination as defined in various international and national legal instruments means the unequal allocation and the denial of fundamental rights to individuals or groups in the political, economic, social, or cultural fields on grounds of race, colour or ethnic origin, including unequal access to public or private services, facilities, education, and employment (→ Racial and Religious Discrimination).

Until the middle of the 20th century the policy of separate but equal facilities and/or opportunities in the areas mentioned was seen by the international community as being socially acceptable, but today this doctrine is overwhelmingly rejected. It is deemed incompatible with the right of human beings to command respect for their inherent dignity and incapable of ever resulting in equality before and under the law.

The special characteristic of apartheid is not only that it condones discriminatory practices, but that the racial discrimination is "legally endorsed in a carefully constructed legal order premised on racial separation" (Dugard, p. 53). It is the latter aspect – the intentional geographic and social separation based on race and colour – which leads the South African Government to assert that it is not engaged in a racially discriminatory policy but rather is pursuing a policy of "constructive differentiation" or "differentiation without inferiority" between the racial and/or ethnic groups which form South African society (Dugard, ibid.). Therefore, the South African Government has replaced the term "apartheid" by that of "separate development", claiming that it thereby aims to form a multinational or multiracial plural

democracy which affords each racial or ethnic group the opportunity of preserving its political, social, and cultural identity. While South Africa does not deny the persistence of racially discriminatory laws and practices, these are referred to as remnants of the legal and social order preceding the introduction of apartheid.

Apartheid as a deliberate system of racial discrimination and segregation is a relatively young phenomenon. While during the 19th century the development of race relations differed from region to region, with the Cape area tending towards social and legal integration of all non-whites and the parts of the country under Boer domination developing a social and legal order based on strict racial separation and white supremacy, discriminatory attitudes and practices became established in the whole of the Union of South Africa, which was formed in 1910. Between the turn of the century and 1948 – the year when the Nationalist Party under the Boer leader Dr. Daniel Malan came to power – racial discrimination became socially and legally entrenched in the South African political, economic, and cultural system. In 1948 apartheid was proclaimed as a new model of race relations which was supposed to lead towards the separate development of all races and ethnic groups based on mutual respect for their cultural identities.

In the eyes of not only the vast majority of the international community, but also of white and non-white critics of apartheid within South Africa, the system has not lived up to its own criteria. Rather, it has led to the complete exclusion of the black population from participation in the Union's political system, although some discriminatory laws have been repealed. The constitutional reform of 1983 has brought about more political participation on the part of the coloured (of mixed black and white parentage) and Indian/Asian populations. However, this only underlines the persisting inferiority of the legal and social status of black people who form about 67 per cent of the total population of 24 million. Beyond the fact that the apartheid system has fallen short of its own aims, the international community has overwhelmingly repudiated the very premise of the system – racial segregation – and the discriminatory effects resulting from it. Moreover, governments have not granted → recognition to the Transkei and other separate bantustans carved out for blacks, inspite of South Africa's claim that they constitute independent → States. The creation of what South Africa calls "self-governing homelands" has also been criticized for resort to → forced resettlement (→ South African Bantustan Policy).

2. Illegality under International Law

The → United Nations General Assembly has made repeated pronouncements that the practice of apartheid constitutes a "crime against humanity" and a threat to international peace and security (e.g. UN GA Res. 2202(XXI) of December 16, 1966; UN GA Res. 3324 E (XXIX) of December 16, 1974; UN GA Res. 37/69 A of December 9, 1982; → Peace, Threat to). The prohibition of apartheid has also found its way into various international treaties. While apartheid as a special type of racial discrimination must be considered prohibited by all treaty norms outlawing discrimination based on race, colour or ethnic origin (e.g. the United Nations Covenant on Civil and Political Rights, Art. 2(1); → Human Rights Covenants), it is expressly prohibited in the 1965 Convention on the Elimination of All Forms of Racial Discrimination (entry into force 1969) and in the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (entry into force 1976). It is also mentioned as a → crime against humanity in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (entry into force 1970). These Conventions have received more or less widespread acceptance, but South Africa has not subscribed to any of them. Thus South Africa is only bound by the rather vaguely phrased human rights clauses of the → United Nations Charter, which do, however, establish a clear principle of non-discrimination (Arts. 1(3), 13(1)(b) and 56(c)).

This gives rise to the question as to whether there is any rule of → customary international law prohibiting racial discrimination, and apartheid in particular. In view of the rapid development of international → human rights law in general and the growing acceptance of fundamental human rights norms, including the prohibition of discrimination as a norm of customary international law, much may be said today in

favour of the position taken by Judge Tanaka in his dissenting opinion in the 1966 South West Africa Judgment (ICJ Reports, 1966, p. 291 et seq.; → South West Africa/Namibia (Advisory Opinions and Judgments)), that there is an established rule of customary international law prohibiting racial discrimination including the practice of apartheid.

Accepting this line of argument, one must examine further whether South Africa is considered bound by such a rule of customary law or not, given her objections to it (cf. → Protest). The answer depends on an evaluation of South Africa's attitude towards international concern about the apartheid system. Two lines of argument are possible. On the one hand, South Africa has never expressly objected to the emergence or existence of a rule of customary law prohibiting racial discrimination. Rather, she has objected to the assertion that she was engaged in racial discrimination. From this it would follow that an existing rule of customary international law prohibiting racial discrimination would also be binding upon South Africa. On the other hand, it could be argued that South Africa, by invoking the → domestic jurisdiction clause of Art. 2(7) of the UN Charter to justify her refusal to have her internal racial policies discussed in international fora, has implicitly denied the existence of an international rule of customary law prohibiting racial discrimination, for only by such a rule could South Africa's racial policy be considered internationalized, and thereby outside the scope of the domestic jurisdiction clause. From this it could be inferred that South Africa has in fact continuously objected to an international principle of non-discrimination. However, in the light of the criteria set by the → International Court of Justice in the → Fisheries Case (U.K. v. Norway), it seems to be more than doubtful that a merely implicit objection to an emerging rule of international law could allow a State to take on the role of a "persistent objector" (cf. → Acquiescence). Ultimately, even if this were the case, South Africa may be considered bound indirectly by the prohibition of racial discrimination as a customary law rule, in that such a rule is to be deemed part of the human rights principles to be implemented by all members of the → United Nations under the UN Charter.

3. International Reaction

The international community has repeatedly condemned apartheid as an illegal practice. Hence attempts have been made through the United Nations and the → United Nations Specialized Agencies to subject South Africa's refusal to abandon the policies of apartheid to → sanctions. Economic sanctions (→ Economic Coercion), arms → embargoes, and cultural → boycotts have been recommended by both the General Assembly and the → United Nations Security Council (see also → Sport, International Legal Aspects). An arms embargo was made mandatory on UN members by the Security Council in 1977 (Res. 418/1977). However, none of these has been effective, as most of the major Western countries, among others, have not complied.

Furthermore, South Africa has been subjected to restrictions on her rights to participate in the work of international organizations (e.g. the → World Health Organization in 1964, the → International Telecommunication Union in 1973; the → International Civil Aviation Organization and the → Universal Postal Union in 1974, and the → World Meteorological Organization in 1975; → International Organizations, Membership). The UN General Assembly has denied recognition of the credentials of the representatives of South Africa (e.g. Res. 3206(XXIX) of September 30, 1974).

The United Nations and many Specialized Agencies, such as the → International Labour Organisation, have also engaged in a massive programme of information dissemination on the origins and implications of apartheid policies. However, steps to sanction individual violations of the prohibition of apartheid as provided for by, *inter alia*, the Convention on the Suppression and Punishment of the Crime of Apartheid have not yet been undertaken in practice (→ International Crimes).

International Convention on the Suppression and Punishment of the Crime of "Apartheid", adopted by UN General Assembly Res. 3068 (XXVIII), November 30, 1973.

International Convention on the Elimination of all Forms of Racial Discrimination, adopted by the UN General Assembly, December 21, 1965, UNTS, Vol. 660 (1969) 195–318.

Special Report of the Director-General on the Application of the Declaration concerning the Policy of Apartheid in South Africa, International Labour Office (annually since 1964).

J. DELBRÜCK, Die Rassenfrage als Problem des Völkerrechts und nationaler Rechtsordnungen (1971) 132–138, 141–252.

J. DUGARD, Human Rights and the South African Legal Order (1978).

H.J. RICHARDSON, Self-Determination, International Law and the South African Bantustan Policy, Columbia Journal of Transnational Law, Vol. 17 (1978) 185–219.

R. LILLICH and F. NEWMAN, International Human Rights, Problems of Law and Policy (1979) 124–181, 388–482.

Ö. ÖZGÜR, Apartheid, The United Nations and Peaceful Change in South Africa (1982).

I. D. VAN DER VYVER, Human Rights Aspects of the Dual System applying to Blacks in South Africa, Comparative and International Journal of Southern Africa, Vol. 15 (1982) 306–318.

M. RAOUL, Déclaration Universelle des Droits de l'Homme et Réalités Sud-Africaines, UNESCO (1983).

JOST DELBRÜCK

ARBITRATION, COMMERCIAL *see* Commercial Arbitration

ARGOUD CASE *see* Kidnapping

ASYLUM, DIPLOMATIC

1. Origin

The origin of diplomatic asylum is closely related to the establishment of permanent diplomatic missions (→ Diplomatic Agents and Missions). Amongst the initiators of this practice were the Italian States of Venice, Milan, Florence and Naples, which had accredited diplomatic missions by the middle of the 15th century.

The establishment of permanent diplomatic missions led to the inviolability of the diplomatic agent's residence being added to the personal inviolability which the diplomat had traditionally enjoyed as the representative of his sovereign (→ Diplomatic Agents and Missions, Privileges and Immunities). The fiction of extraterritoriality was used as a legal justification for this practice. According to this theory, the residence of the diplomatic agent was considered as part of his country's territory which could not be entered by the local authorities of the host State, since such an act would imply a violation of the sovereignty of a foreign prince (→ Territorial Sovereignty). Between the 16th and 18th centuries, the inviolability of the residence of the diplomatic representative was extended to the whole quarter of the city in which it was located. Thus, the *franchise des quartiers* or *jus quarteriorum* came into being.

One consequence of the diplomatic agent's inviolability was the power to grant refuge to persons persecuted for a crime or felony. In contrast to contemporary practice, refuge was then granted principally to persons who had committed common crimes. This situation was explicable by the prevailing view at that time that penal justice was not an essential function of the State but rather the concern of those who had been personally injured by a crime. The State occupied itself primarily with the persecution and punishment of political crimes which affected the authority of the prince.

This conception changed completely in the modern period. The fiction of extraterritoriality was abandoned. Crimes began to be seen as actions detrimental to the public interest and the exercise of penal justice came to be considered an essential function of the State. In addition, the notion was developed that there had to be cooperation between States to repress delinquency (→ Extradition). As these ideas began to prevail within the international order, diplomatic asylum began gradually to disappear.

However, the institution of diplomatic asylum continues to exist in Latin America, mainly because of two phenomena: the liberal and rationalistic ideas which predominated in the region after the new republics gained their independence during the early 19th century, and the numerous revolutions and *coups d'état* that have since taken place. Revolutionary activities and conspiracies were deemed to be crimes which affected governments only. Similarly, the political ideals pursued by the perpetrators of these acts were held to be such as to remove from their activities the characteristics which would be considered harmful beyond the boundaries of the State in question. Moreover, with the political instability existing in many countries, diplomatic asylum was accepted as a rule to be respected within a political struggle: the revolutionaries of today might form the

government of tomorrow, and the government of the day might be the next to seek refuge in an embassy.

2. *Concept*

Diplomatic asylum is the refuge which certain international subjects (→ Subjects of International Law) may grant beyond the boundaries of their territory, in places which are granted immunity from jurisdiction, to an individual seeking protection from the authority who persecutes or claims him. It is necessary to specify who may grant diplomatic asylum and the places in which it may be granted.

Diplomatic asylum may be granted by States. It may also be granted by the Roman Catholic Church in the Apostolic Nunciatures (→ Holy See) and by the Sovereign Order of Malta (→ Malta, Order of) in its embassies. International organizations may not grant diplomatic asylum.

Diplomatic missions and the private residences of the heads of mission must first be mentioned as the places where diplomatic asylum may be granted. Diplomatic asylum may also be granted on a → warship or → aircraft or by a military corps in the field. Diplomatic asylum may not be granted in the premises of a consulate.

Certain international subjects enjoy the right but not the obligation to grant diplomatic asylum. Consequently, the individual who requests diplomatic asylum has no right to claim it, as the giving of asylum is at the discretion of the grantor.

3. *Legal Régime*

A detailed analysis of the practice adopted by the ministries of foreign affairs of Latin American countries leads to the conclusion that at present diplomatic asylum is a regional custom (→ International Law, American; → Regional International Law). This custom is now codified and regulated mainly by the Convention of Caracas (March 28, 1954). Since the independence of the Latin American States, asylum has been the object of consideration in various treaties. There have also been cases in which diplomatic representatives accredited to some of the Latin American States have met to establish certain rules on the granting of asylum. In this context, it is relevant to mention the rules of Lima (1867), La Paz (1898) and Asunción (1922). The specific treaties which deal with the subject are the Conventions of Havana (February 20, 1928), Montevideo (December 26, 1933 and August 4, 1939) and the Convention of Caracas mentioned above.

The most famous diplomatic asylum case in international law is undoubtedly that of Victor Raúl Haya de la Torre, which gave rise to three decisions of the → International Court of Justice (→ Haya de la Torre Cases). However, the study of these decisions is not to be recommended as the best means of achieving a precise idea of the nature of diplomatic asylum.

According to regional custom and to the Convention of Caracas, the main characteristics of diplomatic asylum can be summarized in the following manner: Asylum is granted in cases of urgency to persons persecuted for political motives or crimes. It is not permissible to grant asylum to persons who have either been prosecuted for a common crime or who have been found guilty of a common crime and who have not served the sentence imposed. Determining the nature of the crime (political or common) imputed to the asylum seeker and deciding whether a case is urgent are matters for the determination of the State granting the asylum. Then, the international subject which has granted the asylum requests a safe-conduct to remove the asylee from the country. The territorial State must provide sufficient guarantees that the asylee will be allowed to leave the country without molestation.

On occasions, the territorial State questions the legitimacy of the asylum granted, because, for example, it disagrees with the classification of the crime made by the authority granting asylum and maintains that the asylee has committed a common crime. In such cases the territorial State refuses to grant a safe-conduct and the asylee is obliged to remain in the place of the asylum. However, in no case can the territorial State put an end to the asylum by means of coercion or violence.

If the territorial State breaks off diplomatic relations with the international subject which has granted the asylum, the asylee must be allowed to leave the country together with the diplomatic representative who granted the asylum

(→ Diplomatic Relations, Establishment and Severance).

Both scholars and the → United Nations have made some attempt to incorporate diplomatic asylum into universal international law. Thus, the → Institut de Droit International on September 11, 1950 approved a resolution which deals with diplomatic asylum (AnnIDI, Vol. 43 II (1950) p. 388), and in August 1972 the → International Law Association approved a draft treaty on the subject (ILA, Report of the 55th Conference (1972) p. 199). Although the → United Nations General Assembly in Resolution 1400(XIV) requested the → International Law Commission to deal with the subject of diplomatic asylum, it has not yet done so. In December 1974, the General Assembly also adopted Resolution 3321(XXIX) which entrusted the → United Nations Secretary-General with the drafting of a study on diplomatic asylum and asked member States to give their opinions on this matter. On the whole, it can be said that to date the international community has been somewhat reluctant to extend the institution of diplomatic asylum to the universal sphere.

Organization of American States, Inter-American Treaties and Conventions on Asylum and Extradition (1967), OAS Treaty Series No. 34.

Question of Diplomatic Asylum (1975), UN Doc. A/10139.

E. REALE, Le droit d'asile, RdC, Vol. 63 (1938 I) 511–540.

A. DEUSTUA, Derecho de asilo, Revista peruana de derecho internacional, Vol. 7 (1947) 23–81, 178–201; Vol. 8 (1948) 13–22, 109–127.

A.E. EVANS, The Colombian-Peruvian Asylum Case: The Practice of Diplomatic Asylum, AJIL, Vol. 46 (1952) 142–157.

L.M. MORENO QUINTANA, Derecho de asilo (1952).

F.A. URSUA, El asilo diplomático (1952).

F. VILLAGRÁN KRAMER, L'asile diplomatique d'après la pratique des Etats latino-américains (1958).

L.C. ZÁRATE, El asilo en el derecho internacional americano (1958).

C.A. FERNANDES, Do asilo diplomático (1961).

C. TORRES GIGENA, Asilo diplomático (1961).

M.A. VIEIRA, Derecho de asilo diplomático (1961).

L. BOLESTA-KOZIEBRODZKI, Le droit d'asile (1962) 213–302.

E. ORTEZ COLINDRES, Reglamentación del asilo en América, Anuario hispano-luso-americano de Derecho internacional, Vol. 2 (1963) 115–134.

H. KITSCHENBERG, Das diplomatische Asyl (1965).

C.N. RONNING, Diplomatic Asylum (1965).

F. FRANCIONI, Asilo diplomatico (1973).

P. PORCINO, Toward Codification of Diplomatic Asylum, New York University Journal of International Law and Politics, Vol. 8 (1975–76) 435–456.

M. FRANCHINI-NETTO, Asilo diplomático (1978).

H.-I. VON POLLERN, Das moderne Asylrecht (1980) 92–122.

JULIO A. BARBERIS

ASYLUM, TERRITORIAL

1. *Concepts*

(a) *Asylum*

The word "asylum" is the Latin form of the Greek word *asylon*, which literally means something not subject to seizure or freedom from seizure.

At its Bath session (1950), the → Institut de Droit International defined "asylum" as the protection accorded by a State – in its territory or in some other place subject to certain of its organs – to an individual who comes to seek it. It is important to note that the definition speaks of "protection accorded by a State". The protection in question is protection against another State, acting through its lawful, duly accredited, and duly authorized organs, or, in some cases, through agencies operating openly or covertly on behalf of the government, the ruling party, or the ruling clique.

Asylum accorded by a State to persons in its territory is generally referred to as territorial asylum. Asylum accorded in other places, most notably on the premises of an embassy or a legation (→ Diplomatic Agents and Missions), is referred to as extraterritorial or, more particularly, diplomatic asylum (→ Asylum, Diplomatic).

Territorial asylum may be granted in different ways and in different contexts, e.g. under → aliens legislation or by way of refusing → extradition. Asylum may be implicit or explicit.

Asylum may entail a right for the individual concerned to remain in a given territory, but this is not necessarily the case. When merely extradition is refused, or if the individual is only protected by the rule of *non-refoulement* from being returned to a country where he would risk

persecution, a right of residence will often not be implied.

A person enjoying asylum may be referred to as an "asylee". He may or may not be a → refugee in accordance with an accepted definition in international or municipal law.

(*b*) *Right of asylum*

The term "right of asylum" is currently used in two, basically different senses.

Traditionally, the right of asylum is understood as the right of a State to grant asylum. But in modern times one may also speak of a right of asylum for the individual, as, for example, in Art. 16(2) of the Basic Law of the Federal Republic of Germany, 1949: Persons persecuted on political grounds are to enjoy the right of asylum.

The right of a State to grant territorial asylum implies, to use the words of the → International Court of Justice in the Asylum Case in 1950, "only the normal exercise of the territorial sovereignty" (ICJ Reports, p. 274) and needs no further justification (→ Haya de la Torre Cases; → Territorial Sovereignty).

The right of asylum (or right to asylum) as an individual right is laid down in the constitutions and laws of many States. At the international level, a right of asylum in this sense may flow from international conventions, but so far there are only embryonic provisions to this effect (non-extradition, *non-refoulement*).

In this connection we must distinguish between (i) a right *vis-à-vis* the State in whose territory (or locality) asylum is requested, which may be described as a right to be granted asylum; and (ii) a right *vis-à-vis* the pursuing State, which may be described as a right to seek and to enjoy asylum in a foreign country (see Art. 14 of the Universal Declaration of Human Rights; → Human Rights, Universal Declaration (1948)).

2. *History*

(*a*) *Before World War II*

The custom of granting asylum may be traced a long way back. Already in antiquity there was a well-established – albeit by no means universal – tradition of asylum.

The modern European (and also the Latin-American) tradition is soundly based on the teachings of the founders of international law, not least Hugo Grotius and Emmerich de Vattel. But the actual practice, on an important scale, may well be said to date from 1685, when Louis XIV, the "Sun King" of France, repealed the Edict of Nantes, and Friedrich Wilhelm, the "Great Elector", Marquis of Brandenburg, a few days later issued his Edict of Potsdam, whereby the French Huguenots were given every facility to establish themselves in his territories.

At about the same time, large numbers of Huguenots were allowed to establish themselves in other non-Catholic countries: in other German States, in Denmark, England, the Netherlands, Russia, Sweden, Switzerland, and also in North America.

The French Revolution gave the practice of granting asylum a new dimension. From that time onwards, the Old World was divided not only into Catholic and Protestant realms but also into kingdoms and republics, which, at the time, had diametrically opposed political conceptions. The aristocratic refugees from France were followed by untold legions of political asylum-seekers of the most diverse political outlooks.

Vattel, in his magisterial work, Le droit des gens ou principes de la loi naturelle (1758), distinguished between three categories of refugees: those who do not want to subject themselves to a new régime established in their home country; the innocently persecuted; and political offenders.

The rule that political offenders should not be extradited found legal expression for the first time in the Belgian Law on Extradition of 1833, which set an example for similar legislation in other countries.

At the international level, the rule was incorporated in the Belgo-French Extradition Treaty of 1834, and later found its way into other such treaties (→ Extradition Treaties). The Institut de Droit International only took note of a firmly established practice when in Art. XIII of its Oxford Resolution on Extradition of 1880 it proclaimed: "Extradition shall not take place for political acts."

Towards the end of the 19th century, the institution of expulsion became an issue of special interest for international lawyers (→ Aliens, Expulsion and Deportation). At its Geneva session of 1892 the Institut de Droit International ex-

pressed the view that, whereas extradition and expulsion are different and mutually independent measures, a refugee should not by way of expulsion be delivered up to another State that sought him unless the conditions set forth with respect to extradition were duly observed.

In the instruments relating to refugees adopted between the two World Wars (→ Refugees, League of Nations Offices), we find provisions restricting the expulsion of refugees. And the rule of *non-refoulement*, that is to say the prohibition of the forcible return of a refugee to a country of persecution, was firmly established, although with certain exceptions.

(*b*) *After World War II*

The Universal Declaration of Human Rights of 1948 contains in Arts. 13(2) and 14 provisions bearing on the question of territorial asylum: Art. 13(2) sets forth that everyone has the right to leave any country, including his own, and to return to his country, subject to the provisions of Arts. 29 and 30. Art. 14(1) lays down "the right to seek and to enjoy in other countries asylum from persecution". As the drafting history of Art. 14 shows, this provision does not mean much more than what follows from Art. 13(2). But the very fact that Art. 14 gave express recognition to asylum as a → human right was instrumental in bringing about the Declaration on Territorial Asylum, adopted by the → United Nations General Assembly (Res. 2312 (XXII) of December 14, 1967).

The Convention relating to the Status of Refugees of 1951 (amended by the Protocol relating to the Status of Refugees of 1967) lays down the rule of *non-refoulement* in binding terms and provides a satisfactory legal status for recognized refugees. The Hague Agreement relating to Refugee Seamen 1957 (amended by a Protocol of 1973), has done much to provide a haven for seafaring refugees.

The right of → emigration has been confirmed in Art. 12(2) of the International Covenant on Civil and Political Rights of 1966 (→ Human Rights Covenants; → International Covenant on Civil and Political Rights, Human Rights Committee), which is modelled upon an identical provision in Protocol No. 4 of 1963 (Art. 2(2)) to the → European Convention on Human Rights of 1950.

In recent years the world has been preoccupied with → terrorism in its different forms, and provisions affecting asylum (normally in the form *aut dedere, aut punire* – either extradite or punish) are found in some recent conventions dealing with aspects of terrorism, such as the Hague Convention for the Unlawful Seizure of Aircraft of 1970 (→ Aircraft; → International Crimes; → Civil Aviation, Unlawful Interference with), the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents of 1973.

(*c*) *Regional developments*

In Latin America, the question of political asylum has been a matter of particular importance for some time. Principles of asylum were first laid down in the Montevideo Treaty on International Penal Law of 1889 and have subsequently been elaborated in a number of regional asylum conventions: the Havana Convention fixing the Rules to be Observed for the Granting of Asylum of 1928; the Montevideo Convention on Political Asylum of 1933; the Montevideo Treaty on Political Asylum and Refuge of 1939; the Caracas Conventions on Diplomatic Asylum and on Territorial Asylum of 1954.

A right to seek and be granted asylum has been laid down in the → American Convention on Human Rights of 1969. The question of asylum is also affected by the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance of 1971.

The various conventions have not all been ratified by the same States, so that between States A and B one convention may apply, between States A and C another, and between States B and C a third. The asylum conventions are all custom-tailored with a view to the particular conditions prevailing in Latin America and may not be equally well-suited for application elsewhere (→ Regional International Law).

In Europe there is not yet agreement on any binding instrument concerning asylum in a broad

sense; but the Committee of Ministers of the Council of Europe in 1967 adopted a resolution on Asylum to Persons in Danger of Persecution (Res.(67)14) and reaffirmed its position in a Declaration on Territorial Asylum, 1977. Of relevant binding provisions which have come into being under the auspices of the Council of Europe, note should be taken of Art. 3 of the European Convention on Extradition of 1957 which prohibits – on a multilateral basis – extradition for political offences and of persons likely to become victims of persecution. Also affecting the right of asylum is the European Convention on the Suppression of Terrorism of 1977.

The → Organization of African Unity adopted in 1969 a Convention governing the Specific Aspects of Refugee Problems in Africa, which contains important provisions relating to asylum.

(d) Municipal provisions

In many countries we find constitutional and/or statutory provisions dealing with asylum in its various aspects.

Statutory provisions prohibiting the extradition of political offenders are commonplace. In several legislations we now also find provisions prohibiting extradition if the person concerned is likely to become a victim of political persecution.

Constitutional provisions spelling out a right of asylum for the politically persecuted are found in the constitutions after World War II of France, the Federal Republic of Germany, Italy, and, with certain qualifications, in the constitutions of a number of Latin American countries and in those of Socialist countries.

Statutory provisions on a right of asylum for the individual are found in countries such as Austria, Belgium, the Netherlands, Norway, Sweden and Switzerland, to mention a few.

(e) Towards an Asylum Convention

Throughout the post-World-War-II period there have been serious efforts towards a binding Asylum Convention on a global basis, giving the fleeing individual a right to asylum while safeguarding the legitimate interests of States.

At its Bath session in 1950, the Institut de Droit International adopted a resolution on "Asylum in Public International Law" (AnnIDI, Vol. 43 II (1950) p. 375). Between 1964 and 1972, the → International Law Association developed texts for draft conventions on diplomatic and territorial asylum. Another initiative was taken by the → Carnegie Endowment for International Peace which in 1972 resulted in a draft convention which was transmitted by the United Nations High Commissioner for Refugees (→ Refugees, United Nations High Commissioner) to the → United Nations Economic and Social Council (ECOSOC) and the UN General Assembly, which decided to convene a diplomatic conference. The United Nations Conference on Territorial Asylum (A/CONF. 78) took place at Geneva from January 10 to February 4, 1977. Unfortunately it did not achieve much. A few draft articles were considered by the Committee of the Whole, but none were adopted by the Conference as such. Since then the matter has been allowed to rest.

3. The Right to Grant Asylum

It may be stated as a general rule of → customary international law that a State may grant asylum in its territory to any person at its own discretion. This right is subject only to the provisions of those conventions or treaties, notably extradition treaties, to which the State is a party.

Already Grotius maintained that the admittance of individuals – and hence the granting of asylum – is not contrary to friendship between States. In the → Preamble to the Declaration on Territorial Asylum of 1967, the UN General Assembly recognized "that the grant of asylum by a State . . . is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State" (→ Unfriendly Act). In Art. 1(1) of the Declaration, the same notion is expressed in somewhat different words: "Asylum granted by a State . . . shall be respected by all other States."

The instruments restricting the freedom of States to offer an abode to all interested persons may be brought under three different headings: instruments relating to → crimes against humanity, including → war crimes and → crimes against peace; → alliance agreements, notably concerning the status of → military forces abroad; and conventions and treaties concerning ordinary offences, including regular extradition treaties.

During and immediately following World War

II, the Allied Powers concluded agreements and took other steps to secure the surrender, prosecution, trial, and punishment of German and Japanese war Criminals.

The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, was the first in a line of conventions dealing with crimes against humanity in a more general fashion (→ Genocide). It was followed by the "grave breaches" provisions of the → Geneva Red Cross Conventions of 1949 and the conventions concerning different aspects of terrorism, mentioned in section 2(b) and (c) above. The general rule is that perpetrators of the acts in question shall either be prosecuted, tried, and punished, or they shall be extradited to a State seeking to bring them to justice.

Perhaps the most important agreement in the second category is the Agreement between the Parties to the → North Atlantic Treaty Organization regarding the Status of Their Forces, 1951, which provides, *inter alia*, for the "handing over" of offenders from one party to another and also for certain offences which normally are qualified as political offences and hence excluded under ordinary extradition treaties. It is arguable that the *non-refoulement* provisions of the Refugee Convention of 1951 takes precedence over the provisions of the Status of Forces Agreement.

4. A Right to be Granted Asylum

Because the parties have full control over the application of any bipartite extradition treaties, their provisions to the effect that extradition shall not be granted for political offences surely give the requested State a right, but hardly a duty, to refuse extradition and thus to grant asylum. It is only a multilateral convention such as the European Convention on Extradition of 1957 which can be construed so as to contain a prohibition (in international law) of extradition of political offenders and political persecutees, thus implying a right to asylum for the individual.

The *non-refoulement* provisions of the Refugee Convention of 1951 do not affect existing obligations to extradite, but it is hardly permissible to circumvent the provisions by extradition which is not compulsory. A much discussed question is whether the rule of *non-refoulement* is binding apart from the conventional obligation.

United Nations High Commissioner for Refugees, Collection of International Instruments concerning Refugees (2nd ed. 1979).

G. MELANDER and P. NOBEL (eds.), International Legal Instruments on Refugees in Africa (1979).

W. SCHÄTZEL and T. VEITER (eds.), Handbuch des internationalen Flüchtlingsrechts (1960).

L. BOLESTA-KOZIEBRODZKI, Le droit d'asile (1962).

O. KIMMINICH, Der internationale Rechtsstatus des Flüchtlings (1962).

O. KIMMINICH, Asylrecht (1968).

T. VEITER (ed.), Asylrecht als Menschenrecht (1969).

S.P. SINHA, Asylum and International Law (1971).

A. GRAHL-MADSEN, The Status of Refugees in International Law, Vol. 2 (1972).

V. LIEBER, Die neuere Entwicklung des Asylrechts im Völkerrecht und Staatsrecht (1973).

United Nations Library, A Select Bibliography on Territorial Asylum (UN Doc. ST/GENEVA/LIB.SER.B/Ref. 9) (1977).

H.-I. VON POLLERN, Das moderne Asylrecht (1979).

W.G. BEITZ and M. WOLLENSCHLÄGER (eds.), Handbuch des Asylrechts, 2 vols. (1980–81).

H. SPAICH (ed.), Asyl bei den Deutschen (1982).

ATLE GRAHL-MADSEN

BANCROFT CONVENTIONS

1. Historical Background

In 1868 the United States entered into a number of separate international agreements with several German States which dealt with questions of nationality law arising in connection with → immigration. These agreements are known as the Bancroft Conventions after the United States negotiator George Bancroft, who served as the American envoy in Berlin from 1867 to 1874.

The issues which the Bancroft Conventions were intended to resolve concerned the treatment of German persons who had emigrated but who later returned to live in their former German home States (→ Emigration). The United States Government contended that an immigrant, upon his naturalization in the United States, would be stripped of all the rights and obligations resulting from his original → nationality. Under the laws of many German States, on the other hand, an emigrant did not lose his nationality at all or, if he did, then only after a number of years, even in cases when emigrants had acquired a foreign nationality. These divergent approaches became

obvious and most crucial where military service was concerned (cf. → Aliens, Military Service): The United States did not consider it admissible for naturalized American citizens to be conscripted by their former home States upon their return to the mother country, whereas under their own legislation the German States continued to regard such persons as their nationals and thus felt bound to compel them to serve in their military forces. During the discussions on this subject in the United States and Germany the view which prevailed held that these conflicts would best be settled by entering into formal international agreements.

2. *Parties and Contents*

The United States concluded the following five Bancroft Conventions: with the North German Federation on February 22, 1868 (CTS, Vol. 137, p. 7; Flournoy and Hudson, p. 660); with Bavaria on May 26, 1868 (CTS, Vol. 137, p. 265; Flournoy and Hudson, p. 661); with Baden on July 19, 1868 (CTS, Vol. 137, p. 409; Flournoy and Hudson, p. 663); with Württemberg on July 27, 1868 (Flournoy and Hudson, p. 665); and with Hesse – covering the citizens of those parts of the Grand Duchy which were not part of the North German Federation – on August 1, 1868 (Flournoy and Hudson, p. 666).

The treaties concluded with the south German States closely followed the pattern and language established in the Bancroft Convention with the North German Federation. The agreements laid down a number of basic provisions: Citizens of one of the contracting parties who had become naturalized citizens of the other contracting party and who had resided within the territory of that State for an uninterrupted period of five years were to be regarded as citizens of that State and were to be treated as such also by their former State (Art. 1). A naturalized citizen of one of the contracting parties remained "liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saving, always, the limitations established by the laws of his original country" (Art. 2; → Criminal Law, International.) If a person naturalized by one of the contracting parties renewed his residence in the territory of the other contracting party without the intent to return to the country where he had been naturalized, he was to be considered as having renounced his naturalization (Art. 4).

The Bancroft Conventions did not address or decide the question whether naturalization in one country would result in the loss of nationality in the other. The answer to this question continued to depend on the nationality laws of the State concerned.

3. *Subsequent Events and Evaluation*

The Act concerning the Acquisition and the Loss of Federal and State Nationality (Reichsgesetz über den Erwerb und Verlust der Reichs- und Staatsangehörigkeit) of June 1, 1870 (Federal Gazette (1870) p. 355) unified the nationality laws within the North German Federation. In 1871 this Act was extended to all other parts of the German Reich established in that year. Under this legislation, a person lost his German nationality if he remained abroad for a period of ten years without being registered with the appropriate German consulate. However, section 21(3) of the Act provided that, with respect to German citizens who had resided in a foreign country for at least five years and acquired the nationality of that country, the ten-year period could be reduced by international treaty to five years. This provision was tailored to the legal arrangement created under the Bancroft Convention between the United States and the North German Federation. As a rule, it was therefore presumed that naturalization in the United States combined with residence in the United States over a period of five years effected the loss of German nationality.

Following the unification of the nationality laws within the German Reich, the United States proposed in 1873 that either the different Bancroft Conventions should be unified or that the Bancroft Convention concluded with the North German Federation should be extended to cover the German Reich as a whole. However, these proposals were rejected by Germany. On January 1, 1914 a new nationality act (the Reichs- und Staatsangehörigkeitsgesetz) came into force which significantly diminished the importance of the Bancroft Conventions by providing in section 25(1) that the acquisition of a foreign nationality, based upon an individual's residence or permanent stay in that country, resulted in the loss of

the individual's German nationality. After World War I the Bancroft Conventions lapsed because the United States did not opt to request, under Art. 2(1) of the → Germany-United States Peace Treaty of 1921, that the Bancroft Conventions remain in force (cf. Art. 289 of the → Versailles Peace Treaty).

Between 1868 and 1932 the United States entered into treaties with a number of other States (Belgium (November 16, 1868), Norway and Sweden (May 26, 1869), Great Britain (May 13, 1870 and February 23, 1871), Austria-Hungary (September 3, 1870), Ecuador (May 6, 1872), Denmark (July 20, 1872), Haiti (March 2, 1903), Peru (October 15, 1907), Portugal (May 7, 1908), Bulgaria (November 23, 1923), Czechoslovakia (July 16, 1927) and Albania (April 5, 1932)) whose contents placed them in the same category as the Bancroft Conventions.

The conclusion of the Bancroft Conventions must be regarded as an early and successful attempt to avoid double nationality or at least to mitigate its consequences. Particularly where the crucial questions of military service is concerned, the Bancroft Conventions have served as an example of how to overcome the problems arising out of conflicting national laws on citizenship and naturalization.

On the level of customary law, problems of dual nationality still give rise to considerable problems (see also → Flegenheimer Claim; → Nottebohm Case; → United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)).

R.W. FLOURNOY, JR. and M.O. HUDSON (eds.), A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties (1929) 660–674.

J.B. MOORE, A Digest of International Law, Vol. 3 (1906) 358–407.

S. DZIALOSZYNSKI, Die Bancroft-Verträge, Thesis, University of Breslau (1913).

F. VON KELLER and P. TRAUTMANN, Kommentar zum Reichs- und Staatsangehörigkeitsgesetz (1914) 405–432.

P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979) 131–133.

WOLFGANG FRITZEMEYER

BILLS OF EXCHANGE AND CHEQUES, UNIFORM LAWS

1. Introduction

Uniform laws regulating bills of exchange and cheques can have two purposes. They can be adopted with the aim of unifying the rules in the area of conflicts of law that determine which of a number of national laws on bills of exchange and cheques has to be applied. Alternatively, such problems of → private international law can be avoided if a unification of the substantive laws on bills of exchange and cheques can be achieved (→ Unification and Harmonization of Laws). Therefore, the developments regarding the substantive law deserve special attention.

A difference in terminology should be noted. In civil law countries, a general term (*cambiale*, *cambio*, *lettre de change*, *Wechsel*) is used which includes bills of exchange as well as promissory notes, whereas a general term for the two different forms is not known in common law countries. For the sake of brevity, the term "bills of exchange" will be used here as including promissory notes, unless otherwise indicated.

2. Historical Evolution of Uniform Laws on Bills of Exchange

Historical experience has demonstrated a need for unification of the law, particularly in the field of commercial relations. Unification usually begins with the law governing bills of exchange. Merchants in all countries use bills of exchange (as well as cheques) for the same purposes. The commercial functions of these instruments have led to legal regulations in different legal systems which are based on the same principles. Differences in detail are, however, numerous and the need for unification is apparent. In Germany the first step for the unification of private law was the "Allgemeine Deutsche Wechselordnung" (Uniform German Law on Bills of Exchange) of 1848, which replaced 56 different state laws. In Scandinavia the Scandinavian Law on Bills of Exchange of 1880 was the first of a series of uniform laws. In the United States, the National Conference of Commissioners on Uniform State Laws began their work with the Uniform Negotiable Instruments Law of 1896.

The movement for an international unification of the law of bills of exchange began more than 100 years ago, when three different systems, each followed by several countries, prevailed in international commerce: the French Code de Commerce of 1807 (Arts. 110 to 189), the Allgemeine Deutsche Wechselordnung of 1848 and the English system, which was codified in the English Bills of Exchange Act of 1882. Proposals by the → International Law Association (1876) and many other institutions led to two conferences at The Hague in 1910 and 1912, which resulted in a convention on a uniform regulation concerning bills of exchange and promissory notes. It was signed by 17 European and 10 Central and South American countries. Due to World War I, the Convention was not ratified, but the → League of Nations resumed the work of unification thereafter and on June 7, 1930 a Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and two additional conventions (a Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes and a Convention on stamp laws in connection with Bills of Exchange and Promissory Notes) were adopted at a conference held in Geneva under the auspices of the League. The Convention on Bills of Exchange and Promissory Notes is more than a uniform law in so far as the member States undertake to introduce either one of the original texts of the law forming Annex I of the Convention or a text in their own language.

The following countries ratified the three Geneva Conventions: Austria, Belgium, Brazil, Danzig, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Luxembourg, Monaco, the Netherlands, Norway, Poland, Portugal, the Soviet Union, Sweden and Switzerland. Greece ratified only the first and the second Conventions. Australia, the United Kingdom and Ireland ratified only the third Convention on Stamp Laws. A greater number of countries have adopted the Uniform Law for Bills of Exchange and Promissory Notes without ratifying the Convention: Afghanistan, Albania, Algeria, Argentina, Bulgaria, Cambodia, Czechoslovakia, Ethiopia, Haiti, Honduras, Iceland, Indonesia, Iran, Israel, Jordan, Korea, Laos, Lebanon, Libya, Morocco, Romania, Saudi Arabia, Syria, Tonga, Tunisia, Turkey, Yemen and Yugoslavia. The list of countries demonstrates how the Geneva Conference has resulted in a unification of the laws based on the French and the German regulations whilst failing to attract the common law countries whose laws closely follow the English Bills of Exchange Act of 1882 which is also the source for Art. 3 of the Uniform Commercial Code of the United States.

A new initiative for the unification of the law in this field was launched in 1950 by the International Institute for the Unification of Private Law (UNIDROIT): The International Congress of Private Law convened by UNIDROIT in Rome established a sub-commission to study the possibilities of unification of the law relating to negotiable instruments. This sub-commission presented its final report in 1955, concluding that a unification of the municipal laws of the Geneva law and the common law countries could hardly be expected, but that an effort should be made to establish a unified body of rules for negotiable instruments in international commerce.

The → United Nations Commission on International Trade Law (UNCITRAL), established in 1966, decided at its first session in 1968 to include as a priority topic in its work programme the law of international payments. On the basis of a preliminary report by UNIDROIT and 93 replies from governments and State institutions from 59 countries to a detailed questionnaire on international banking practices, UNCITRAL decided to work towards a draft of uniform rules that would be applicable to special negotiable instruments for optional use in international transactions. A first Draft Uniform Law on International Bills of Exchange and Commentary was presented in 1972 and a working group was established to prepare a final draft. A revised draft which included international promissory notes was adopted by the working group in 1977. A final Draft Convention on International Bills of Exchange and International Promissory Notes was adopted in 1980. In 1982, however, the working group published a new text containing a number of alterations. The observations of governments and international organizations on this text were published in 1984.

3. Historical Evolution of Uniform Laws on Cheques

In Anglo-American law, cheques are regarded as bills of exchange, albeit of a special kind, in so far as they are drawn on a bank payable on demand. The civil law countries, on the other hand, place cheques in a different category as mere instruments for payment, whereas the typical bill of exchange is generally used as a credit instrument. This explains why separate regulations governing cheques are to be found in the civil law jurisdictions, and why the efforts to achieve an international unification are subject to difficulties.

The Hague Conference of 1912 did not achieve a convention on cheques, although it adopted resolutions concerning a draft uniform law of cheques which were intended for discussion at a later conference which never took place. The success of the 1930 Geneva Conference on bills of exchange led to a conference on cheques at Geneva in 1931. This conference adopted three Conventions which followed the pattern adopted for bills of exchange in the previous year. The number of States having ratified these Conventions is slightly smaller than in the case of the Convention on Bills of Exchange, but the pattern is the same. The United Kingdom, Australia and Ireland have ratified only the Convention on Stamp Duties. A number of countries have introduced the text of the Geneva Uniform Law on Cheques without ratifying the Convention.

At the beginning of the UNCITRAL initiative to unify the law of international negotiable instruments, cheques were not included. Only after a careful study of the necessity of a uniform regulation did the working group decide to extend its work to cheques. It suggested that in view of the different commercial uses of bills of exchange as credit instruments and cheques as payment instruments, two separate legal texts should be prepared. A first draft was completed in 1981. In 1982 the working group adopted a draft Convention on International Cheques. At its 17th session in 1984, however, UNCITRAL decided that the work on this draft should be postponed until the work on the draft Convention on International Bills of Exchange and Promissory Notes will be concluded.

4. Current Legal Situation

The present state of the law is characterized by the existence of two systems to which most countries of the world belong, i.e. the laws of the Geneva Conventions and the laws based on the English Bills of Exchange Act, including Art. 3 of the U.S. Uniform Commercial Code. The differences between the two groups have been summarized in Yntema's observation that in the Anglo-American legislation there is a tendency to admit standards of reasonableness as measured by mercantile custom and to allow judicial discretion a corresponding leeway when considering extra-statutory practices. In the civil law systems much greater stress is placed upon the vigorous application of formal requirements, and the strictness of the periods within which the acts necessary in the circulation or enforcement of an instrument and the procedures to charge secondary parties must be performed. For example, the Geneva Conventions require that the term "bill of exchange" or "promissory note" or "cheque" must be inserted in the body of the instrument and expressed in the language used; the Anglo-American laws contain no such requirement. Another difference may be seen in the admission of bearer bills in the Anglo-American laws, whereas the Geneva Conventions require the names of the drawee and of the payee to be stated on the instrument. But this is of rather theoretical importance, since the Geneva Conventions permit endorsement of such an instrument in blank so that, for all practical purposes, it may be made into a bearer instrument.

The list of formal differences could be continued, but at the risk of conveying a misleading impression of their significance. It is more important to note the extent to which the two systems demonstrate similarities in basic principles, especially where bills of exchange (as opposed to cheques) are concerned. Thus, the basic requirement in both systems is that a written document be signed by the maker or drawer which contains an unconditional promise or order to pay a certain sum of money on demand or at a specified time. If the instrument is an order to pay, the drawee may accept it, thereby creating his own obligation to pay. The problems of an unauthorized completion of an incomplete instrument are solved in the same way by both systems at least in

so far as they protect an innocent subsequent holder against the defence of lack of authority. The problems of defects of title and of defences have found different solutions in the two systems. Under the Geneva Convention the possessor of a bill of exchange is deemed to be the lawful holder if he has established his title through an uninterrupted series of endorsements, unless he has acquired it in bad faith or has been guilty of gross negligence (Art. 16). Art. 17 provides separately that personal defences founded on relations with the drawer or a previous holder can only be set up against a holder if such holder in acquiring the bill has knowingly acted to the detriment of the debtor. In Anglo-American law, the two problems are dealt with together. If a holder has acquired the instrument for value and in good faith and without notice of any defect in the title, he is a holder in due course who is free from all claims or personal defences to the instrument. Under both systems, exceptions are made for absolute defences, such as incapacity or duress. An important difference can be seen in the attitude towards forged endorsements. In Anglo-American law, the transferees of such bills must bear the risk. Under the Geneva Convention such persons, when acting in good faith, are protected and it is for the person who originally lost the bill to the forger to bear the loss.

5. The Solutions Adopted by UNCITRAL

The Draft Convention on International Bills of Exchange and International Promissory Notes (CIBE) is based on the principle that parties to an international transaction may choose the CIBE as the applicable law by inserting the words "international bill of exchange . . ." or "international promissory note . . ." in the text of the instrument. The instrument must show an international diversity existing between the country in which the instrument is drawn or made and the country of the drawee, payee, or place of payment. But the application of the Convention is not affected if such statements are incorrect. The instrument must contain an unconditional promise or order to pay a certain sum of money on demand or at a specified time to a specified person or to his order. Transfer of the instrument requires delivery and usually endorsement, unless the last endorsement is in blank. Under the influence of Anglo-American law the concept of a protected holder is used to solve the problems of acquisition of title and protection against defences. An unauthorized or forged endorsement does not prevent negotiation of the instrument to a holder who is without knowledge, but any party has against the forger and against the person who took the instrument directly from the forger a claim for any damage that he may have suffered because of the forgery. In cases of non-acceptance or non-payment a right of recourse is only given after the instrument has been duly protested for dishonour.

The first draft of Uniform Rules Applicable to International Cheques of 1981 closely follows the CIBE pattern.

6. Evaluation

In the light of the experience with previous attempts at a general unification of the law of bills of exchange and cheques, there is wisdom in UNCITRAL's decision to confine the new drafts of uniform rules to instruments used in international transactions and to give the parties an option whether they wish the uniform rules to apply. The concept of the protected holder offers a clear and workable solution for the problems of acquisition of title and of defences. The recognition of transfer of title even in the case of a forged endorsement combined with a claim for damages against the forger and the person taking the instrument directly from him avoids a chain of recourses in such cases and places the risk on the party who is in the best position to guard against it. It is to be hoped that the UNCITRAL rules will find wide acceptance.

Conférence de La Haye pour l'unification du droit relatif à la lettre de change 1910, Actes, Documents, 2 vols. (1910).

Deuxième Conférence de La Haye pour l'unification du droit en matière de lettre de change de billet à ordre et de chèque 1912, Actes, Documents, 4 vols. (1912).

Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, Geneva, June 7, 1930, LNTS, Vol. 143 (1934) 257–315.

Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory-Notes, Geneva, June 7, 1930, LNTS, Vol. 143 (1934) 317–335.

Convention on the Stamp Laws in connection with Bills of Exchange and Promissory Notes, Geneva, June 7, 1930, LNTS, Vol. 143 (1934) 337–353.

Convention providing a Uniform Law for Cheques,

Geneva, March 19, 1931, LNTS, Vol. 143 (1934) 355–405.

Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, Geneva, March 19, 1931, LNTS, Vol. 143 (1934) 407–427.

Convention on the Stamp Laws in connection with Cheques, Geneva, March 19, 1931, LNTS, Vol. 143 (1934) 7–23.

Institut international pour l'unification du droit privé, Actes du Congrès international de droit privé tenu à Rome en juillet 1950 (1951) 277–329.

For information on the work of UNCITRAL see the United Nations Commission on International Trade Law Yearbooks.

F. MEYER, Das Weltwechselrecht, 2 vols. (1909).

J. BOUTERON, De l'unification du droit relatif à la lettre de change et au billet à ordre (1912).

F. MEYER, Das Weltscheckrecht, 2 vols. (1913).

M.O. HUDSON and A.H. FELLER, The International Unification of Laws Concerning Bills of Exchange, Harvard Law Review, Vol. 44 (1931) 333–374.

A.H. FELLER, The International Unification of Laws Concerning Cheques, Harvard Law Review, Vol. 45 (1932) 668–696.

E. BALOGH, Kritische Bemerkungen zu den Genfer Übereinkommen zur Vereinheitlichung des Wechselrechts, in: Studien aus dem Gebiete der Rechtsvergleichung und des Internationalen Privatrechts (1934) 299–401.

J. HUPKA, Das einheitliche Wechselrecht der Genfer Verträge (1934).

J. PERCEROU and J. BOUTERON, La nouvelle législation française et internationale de la lettre de change, du billet à ordre et du chèque, 2 vols. (1937–1951).

P. ARMINJON and P. CARRY, La lettre de change et le billet à ordre (1938).

G. ARANGIO-RUIZ, La cambiale nel diritto internazionale privato (1946).

J.D. BRANNAN and F.K. BEUTEL, Negotiable Instruments Law (7th ed. 1948).

H.E. YNTEMA, Unification of the Law Respecting Negotiable Instruments, ICLQ, Vol. 4 (1951) 178–191.

E. VON CAEMMERER (ed.), Internationale Rechtsprechung zum Genfer Einheitlichen Wechsel- und Scheckrecht, 3 vols. (1954–1976).

M. HOLDEN, The History of Negotiable Instruments (1955).

J.D. FALCONBRIDGE, Banking and Bills of Exchange (6th ed. 1956).

E. JACOBI, Wechsel- und Scheckrecht unter Berücksichtigung des ausländischen Rechts (1956) 13–25, 987–1026.

W. SCHETTLER and H. BÜELER, Das Wechsel- und Scheckrecht aller Länder (since 1957) [loose leaf ed.].

E. RABEL, The Conflict of Laws, A Comparative Study, Vol. 4 (1958) 127–241.

G. BERNINI, The Acceptance of the Bill of Exchange and the Theory of Negotiability in Civil Law and Common Law (1961).

E.E. HIRSCH, Einheitliches Wechselgesetz oder einheitliches Wechselrecht?, Neue Juristische Wochenschrift, Vol. 14 (1961) 1089–1094.

M. CHALMERS, A Digest of the Law of Bills of Exchange (13th ed. 1964).

G. LAGARDE, Portée internationale d'une interprétation nationale de la loi uniforme sur la lettre de change et le billet à ordre, Mélanges Roger Secrétan (1964) 151–158.

O.C. GILES, Uniform Commercial Law (1970) 150–169.

B. BYLES, M. MEGRAH and F.R. RYDER, The Law of Bills of Exchange, Promissory Notes, Bank Notes and Cheques (23rd ed. 1972).

E. SCHINNERER, Zum Entwurf eines einheitlichen Gesetzes für ein Wertpapier für den internationalen Handel, Zeitschrift für Rechtsvergleichung, Vol. 13 (1972) 277–297.

M.J. BONELL, Verso la creazione de un titolo cambiario internazionale, Rivista del diritto commerciale e del diritto generale delle obbligazioni, Vol. 71 (1973) 146 et seq.

J. DOHM, Draft Uniform Law on International Bills of Exchange and International Promissory Notes, AJCL, Vol. 21 (1973) 474–530.

R. LIESECKE, Der internationale Wechsel, Wertpapier-Mitteilungen (1973) 442–459.

M. CABRILLAC, La lettre de change dans la jurisprudence (1974).

H. COING, Zur Rechtsstellung des gutgläubigen Wechselerwerbers, Der Entwurf der Kommission für Internationales Handelsrecht bei den Vereinten Nationen im Vergleich zur Genfer Wechselrechtskonvention, in: Wirtschaftsfragen der Gegenwart, Festschrift Barz (1974) 443–458.

H.S. WHITE, The Convention on the Uniform Law of International Bills of Exchange and International Promissory Notes: A Comparison to the Uniform Commercial Code, Georgia Journal of International and Comparative Law, Vol. 5 (1975) 216–247.

K. PLEYER and R. STECHER, Erfordernisse und Möglichkeiten einer internationalen Vereinheitlichung des Wechselrechts, Wertpapier-Mitteilungen (1977), Sonderbeilage 4, 3–31.

H.J. MERTENS and H.-J. PFLUG, Der internationale Wechsel, Ein zirkulationsfähiges Wertpapier?, Die Aktiengesellschaft (1978) 219–227, 260–265 and 279–285.

P. BLOCH, Projet de convention sur les lettres de change internationales et les billets à ordre internationaux, Clunet, Vol. 106 (1979) 770–792.

A.G. GUEST, Instruments Denominated in a Foreign Currency, AJCL, Vol. 27 (1979) 533–545.

N. PENNEY, The Draft Convention on International Bills of Exchange and International Promissory Notes: Formal Requisites, AJCL, Vol. 27 (1979) 515–531.

W.C. VIS, Forged Endorsements, AJCL, Vol. 27 (1979) 547–561.

W.C. VIS, Unification of the Law of Negotiable Instruments: The Legislative Process, AJCL, Vol. 27 (1979) 507–513.

D.E. ALLAN, The UNCITRAL Draft Conventions on International Bills of Exchange and International Promissory Notes, and on International Cheques, in: Tenth International Trade Law Seminar, Australian Academy of Science (1983) 313–343.

WOLFGANG FREIHERR MARSCHALL VON BIEBERSTEIN

BRITISH COMMONWEALTH, SUBJECTS AND NATIONALITY RULES

A. Historical Development

1. Origins of British Subjecthood

The status of British subject owes its origin to the duty of allegiance owed to the sovereign at common law. Until 1949 the status was not statutory, although the rules governing its acquisition and loss were in many points of detail laid down in enactments.

The territorial principle (*jus soli*) gained widespread acceptance in English law even before the Norman Conquest in 1066. It was assumed to be the basis of allegiance in Elyas de Rabeyn's case (1290, Bracton f.4276), although the only issue explicitly decided therein was that a person born overseas of an English mother was incapable of taking an inheritance in England. Acceptance of the principle of *jus soli* was also implicit in the Statute De Natis Ultra Mare of 1351 (25 Ed. III Stat. 1). This provided that a child born outside the King's dominions, to parents who owed allegiance to the King at the time of the child's birth, might inherit property within those dominions provided that the mother had her husband's consent to be abroad at the time of the confinement.

As the territorial principle became established, the practice of endenization (a primitive form of naturalization; see → Nationality) appears to have become established. The earliest extant record of that practice appears to be the endenization of Elyas Daubnay in 1295 (Rot. Parl. I, 135a).

The long-standing issue whether allegiance was owed to the sovereign in his personal or in his political capacity was considered crucial after the accession to the English throne (as James I) of James VI of Scotland. In Calvin's Case (1608, 7 Co. Rep. 1a, 2 St. Tr. 559), the Court held that those born in Scotland after the union (the *postnati*) were in England natural subjects and not → aliens, since in common with those born in England at the same date, they owed allegiance to King James in person. The same Court held that those born in Scotland before the union of the crowns (the *antenati*) were not natural subjects in English law since the status which they had acquired at birth could not be altered thereafter.

Although subsequent practice was not consistent, and judicial references were made to "Scots" and "English" subjects even after the union with Scotland in 1706, Calvin's Case established a foundation for the tradition or principle, maintained until 1983, that all those born within the King's dominions are his subjects, equal in status and for the proposition, maintained in part until 1870, that allegiance is indelible.

It was, however, essential for the operation of the first of these principles that the territory in which the birth occurs should be claimed at the material time as sovereign territory of the Crown (→ Territorial Sovereignty). For this reason in 1724 the Law Officers took the view that those born in Jamaica were not subjects of the King, in the absence at the time of any specific provision asserting British → sovereignty over that island. On the other hand, when Canada was retained after the Seven Years' War, the Treaty of Paris (1763) provided expressly for the confirmation of British sovereignty over the Dominion, with the consequence that the *postnati* became natural-born subjects of the King. (The *antenati* were accorded a right of election; → Option of Nationality.) A similar practice was followed in the case of the Capitulation of Colombo in 1776. In the case of India, provision was made in the East India Company Act of 1813 to assert the "undoubted sovereignty of the Crown of the United Kingdom" in India and thereby invest those born there thereafter with the status of British subjects.

In R. v. Eaton (1627, Lit. Rep. 23), the Statute De Natis Ultra Mare was construed so as to permit the transmission of subjecthood to the child born in Poland of a Polish mother and English father. The Court even expressed the view that transmission may be through the male or the female line, although as far as the latter is

concerned the remark appears *obiter dictum*. An enactment of 1708, the Act for the Naturalization of Foreign Protestants (or "the Act of Anne", 7 Anne, c.5), reiterated the proposition that the child born overseas of parents born within the sovereign's dominions and allegiance is to be regarded as a subject. Section 1 of the British Nationality Act of 1730 made it clear, however, that the status could be transmitted only in the male line. The British Nationality Act of 1772 enlarged the hereditary principle (*jus sanguinis*) by providing for the transmission of status to subsequent generations born overseas.

With the settlement of colonies during and after the reign of James I (→ Colonies and Colonial Régime), it was gradually but increasingly established that the legislatures of such dependencies were competent to make provision for the naturalization of foreign settlers. See e.g. the Naturalization Acts of Maryland (1666), Virginia (1671), New York (1683 and 1715), South Carolina (1693), Delaware (1700) and Pennsylvania (1700). At home, the Act of Anne made provision for the expeditious and inexpensive naturalization of Protestant → refugees. In the face of opposition, however, the provisions in the Act of Anne relating to naturalization were repealed in 1711 (10 Anne, c.5). Restrictions were imposed upon the naturalization of settlers in the colonies by the Act for the Naturalization of Foreign Protestants Settled in the Colonies of America of 1740 (13 Geo. II, c.7). When, therefore, the Naturalization Act of 1773 (14 Geo. III, c. 14) provided that the conditions for naturalization of aliens in England should be similar to those specified for the colonies, the concession was not substantial. The American Declaration of Independence charged that one of the offences of King George III was that of obstructing laws for the naturalization of aliens. Although the United States soon made provision to facilitate naturalization of foreign settlers, it was otherwise in Great Britain. Until the passing of the Naturalization Act in 1844, those seeking to become subjects of the King had in general to procure the passage of a private Act of Parliament.

The success of the American Revolution obliged the English courts to abandon the principle of indelibility of allegiance, first in the case of those born in the colonies before the War of Independence and later in the case of natural-born British subjects who acquired United States citizenship by naturalization. The first of those steps was taken in Doe d. Thomas v. Acklam (1824, 2 B. and C. 779, 2 St. Tr. (N.S.) 105), in which Abbott C.J. recognized it as a consequence of the Treaty of Versailles (1783) that those who acquired citizenship of the United States should thereby forfeit their British subjecthood. His decision was followed by the Supreme Court of the United States in Inglis v. Trustees of the Sailors Snug Harbor (28 U.S. 99, 126 (1830)). The second step was taken in the → Bancroft Conventions between the United States and the United Kingdom, incorporated into English law by the Naturalization Act of 1870.

During the 19th century it became customary for European powers to extend their protection to overseas colonies and to individuals living outside their sovereign territory, but in ports or settlements in which they exercised certain authority. In conformity with this practice, the British authorities extended their protection to the inhabitants of territories in which they exercised a degree of local jurisdiction falling short of sovereignty, to the inhabitants of territories administered by a mediate power and to the descendants of British subjects in whose favour the hereditary principle did not run (→ Protected Persons; → Protectorates). Such persons came to be known as British protected persons. The same status came to be shared by those who had been naturalized in a dependent territory, in conditions such that they were ineligible to claim the status of British subjects.

2. *The British Nationality and Status of Aliens Act of 1914*

As the older dominions, in particular Canada, sought to attract the → immigration of settlers, they were increasingly apt to regard it as a defect of the Naturalization Act of 1870 that the Act enabled the legislatures of dependencies to provide for naturalization to be effective only within the confines of the dependency. In 1901, a Departmental Committee of the Home Office recommended that the colonies and possessions overseas should be able to confer on immigrants a British subjecthood which would be a "common status" recognized throughout the Empire. Such a

system required, in the view of the Committee, a "common code" to determine the conditions under which the status would be acquired and lost (Command Paper, Cmd. 723, para. 31). At the Imperial Conferences of 1902 and 1907 agreement was reached upon the general principles to be incorporated into a code. This proved to be the basis of the British Nationality and Status of Aliens Act of 1914.

Although that statute reduced the law of British nationality to a code for the first time, it did not transform British subjecthood into a statutory status, since it provided, in Section 1(1)(a), that a person should be deemed to be a natural-born British subject if he was born within the King's dominions and allegiance. The enactment thereby restated the common law principle of *jus soli*, leaving it to common law to determine the circumstances in which a person was born within the King's "dominions" and "allegiance"; and it reiterated the well-established rule that subjecthood was attributed equally to all natives of dominions, irrespective of parentage and race. The same Act provided for the acquisition of British subjecthood *jure sanguinis*, restricting the transmission of that status to the first generation born overseas (Section 1(1)(b), interpreted in Abraham v. Attorney-General, [1934] p. 17). After World War I this condition was extended in favour of the children of persons who had become British subjects by reason of → annexation of territory or who were in the service of the crown (British Nationality and Status of Aliens Act of 1918, Section 2). Later, British subjecthood became transmissible indefinitely, subject to certain formal requirements (British Nationality and Status of Aliens Act of 1922, Section 1). Those formal requirements were relaxed by the British Nationality and Status of Aliens Act of 1943.

The 1914 Act established a new scheme for naturalization, whereby each self-governing dominion could make provision to confer British subjecthood on aliens, in accordance with common principles, such as the completion of five years' residence in the appropriate territory (Sections 2 and 8). A person so naturalized was to "be entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties and liabilities to which a natural-born subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject" (Section 3).

The third part of the Act of 1914 dealt with the national status of married women and infant children. It established the general rule (in Section 10) that the wife of a British subject shall be a British subject and the wife of an alien shall be an alien. By Section 12, where a person ceased to be a British subject, his minor children thereby ceased to be British subjects also, unless they failed to obtain any national status.

The 1914 Act did not make provision for specified rights to be enjoyed by those with British subjecthood, nor did it give statutory recognition to British protected persons.

3. The British Nationality Act of 1948

After World War II certain of the overseas dominions, led by Canada, expressed the desire for their own distinctive national status as a mark of their position as new but equal members of the → British Commonwealth. After consulting with her partners, the Canadian Parliament adopted the Canadian Citizenship Act of 1946, which provided that those having specified connections with Canada by birth or ancestry should thereafter be known as Canadian citizens, and that every Canadian citizen should by virtue of that status become a British subject.

At a conference held in London in 1947 it was agreed that the principles applied in the Canadian enactment of the previous year should be extended to the Commonwealth as a whole. Each independent country within the Commonwealth would adopt its own citizenship legislation in accordance with its own requirements; but those who acquired the citizenship of any Commonwealth country would thereby become British subjects. In short, the common code was to be abandoned but the common status retained. Such was the basis on which the British Nationality Act of 1948 was drafted. (See White Paper, The British Nationality Bill, Command Paper, Cmd. 7326.)

For the purposes of the 1948 Act, the United Kingdom and its remaining colonies were treated as a unit. A new statutory status, known as "citizenship of the United Kingdom and Colonies", was created by Section 4 of the 1948 Act.

That status was conferred on all persons born within the United Kingdom (including the → Channel Islands and the Isle of Man) or any colony, unless at the time of his birth his father enjoyed diplomatic immunity (→ Diplomatic Agents and Missions, Privileges and Immunities) or was an enemy alien (→ Enemies and Enemy Subjects). Citizenship of the United Kindgom and Colonies was to be transmissible *jure sanguinis* to the first generation born overseas, to subsequent extraterritorially-born generations in exceptional circumstances, and where the child's birth was registered at a United Kingdom consulate (→ Consuls) within one year of its occurrence. The transmission of that citizenship was, however, limited to the male line (Section 5).

Citizenship of the United Kingdom and Colonies could be acquired by those having another citizenship or nationality of origin, either as a matter of entitlement (in which case the procedure was known as registration) or as a matter of discretion (in which case it was known as registration or naturalization). Citizens of other Commonwealth countries or of the Republic of Ireland were entitled to be registered, after meeting specified requirements as to residence or Crown service; and women who had at any time been married to citizens of the United Kingdom and Colonies were entitled to be registered as such (Section 6). Aliens and British protected persons were eligible to be naturalized, on meeting specified requirements, which were more onerous than those required of Commonwealth citizens seeking registration (Section 10). Minor children were eligible to be registered as citizens of the United Kingdom and Colonies at the Secretary of State's discrétion and, in the case of those whose parents did not have that citizenship, in "special circumstances" (Section 7).

Those who had been British subjects by association with the United Kingdom or its remaining colonies immediately before the entry into force of the 1948 Act acquired citizenship of the United Kingdom and Colonies on that date (Section 12). Every such citizen and every person having the citizenship of an independent Commonwealth country or the citizenship of Southern Rhodesia (→ Rhodesia/Zimbabwe) thereby acquired the status of British subject (Section 1(1)). The term "Commonwealth citizen" was coined as synonymous with "British subject" (Section 1(2)). Those who were British subjects immediately before the entry into force of the 1948 Act and had specified connections with self-governing countries of the Commonwealth overseas were to remain British subjects even if they failed to obtain the citizenship of any such country, of the United Kingdom and Colonies, or of the Republic of Ireland (Section 13). Such persons were, therefore, known as "British subjects without citizenship".

The Act of 1948 gave statutory recognition to the category of persons known as British protected persons by providing that the King might declare by Order in Council which of the territories and States under his protection were protectorates and which were protected States (Section 30) and which persons or classes of persons were to be known as "British protected persons" by reason of their connections with protectorates, protected States, mandated or trust territories (Section 32). Accordingly, the King in Council promulgated in 1949 the British Protectorates, Protected States and Protected Persons Order (S.I. 1949 No. 140). The 1948 Act provided that for the purposes of that enactment, a British protected person should not be an alien (Section 32).

The same Act provided that the term "alien" should not apply to a citizen of Eire (known after the Ireland Act of 1949 as a citizen of the Republic of Ireland). It contained no provision to prevent a person from possessing citizenship of the United Kingdom and Colonies in conjunction with that of another State. It entered into force at the beginning of 1949 (Section 34(2)). From that date, therefore, the system was such that the term "British subject" denoted, in the law of the United Kingdom (1) a citizen of the United Kingdom and Colonies, (2) a citizen of any self-governing country of the Commonwealth overseas, (3) a person having two or more such citizenships, or (4) a person having none of those citizenships but benefiting from the transitional provisions for British subjects without citizenship. Moreover, it was impossible to define the expression negatively, as meaning a person other than an alien, since British protected persons had an intermediate status regulated by the law of the United Kingdom and citizens of the Republic of

Ireland an intermediate status regulated by the law of that Republic. While there was an aspiration that each self-governing Commonwealth country would recognize the common status of British subjects, there was no means of ensuring that this would be achieved. The common status did not long endure. The Indian Citizenship Act of 1955 provided that citizens of Commonwealth countries other than India should be known as Commonwealth citizens but it did not provide that Indian citizens should be known by the same title. The Pakistan Citizenship Act of 1951 conferred Commonwealth citizenship on citizens of Pakistan without providing expressly that the same status should be accorded to citizens of all other Commonwealth countries. The Cyprus Citizenship Act of 1967 provided that anyone not being a citizen of → Cyprus shall be known as an alien.

4. From 1949 to 1983

Between 1949 and 1981 the British Nationality Act was subjected to statutory amendments of three kinds. Firstly, it was amended by nationality legislation *stricto sensu*. The British Nationality Act of 1958 made special provisions in relation to the Federation of Rhodesia and Nyasaland and to Ghana and extended the provisions relating to registration of persons as citizens of the United Kingdom and Colonies. Two British Nationality Acts were passed in 1964, the first to facilitate the resumption of citizenship by those who had renounced it and the latter to provide, in accordance with the 1961 New York Convention on the Reduction of Statelessness, for the acquisition of citizenship of the United Kingdom and Colonies by those who would otherwise be stateless (→ Stateless Persons). The British Nationality Act of 1965 provided *inter alia* for the registration as British subjects of women married to British subjects without citizenship.

The second kind of statutory amendment of the British Nationality Act of 1948 was brought about by legislation providing for the advent of independence in former colonies and protectorates. Such legislation commonly provided that any person born in the dependency and having the status of citizen of the United Kingdom and Colonies (or that of a British protected person) should lose that status if on independence he acquired the citizenship of the new State. In certain instances, notably in the case of the Kenya Independence Act of 1963, the Uganda Independence Act of 1962, the Tanganyika Independence Act of 1961, the Zanzibar Act of 1963, the Malawi Independence Act of 1964, the automatic forfeiture of citizenship of the United Kingdom and Colonies, or of the status of British protected person, was conditional upon the birth of at least one parent in the dependency. Thus, those born in Keyna before 1963, of parents born in India, remained citizens of the United Kingdom and Colonies or British protected persons unless they obtained Kenyan citizenship by a voluntary act.

The third type of amendment of the British Nationality Act of 1948 was brought about by immigration legislation. The Commonwealth Immigrants Act of 1962, which imposed for the first time statutory restrictions on the admission of British subjects to the United Kingdom, provided that Commonwealth citizens and British protected persons should thereafter be eligible for registration or naturalization as citizens of the United Kingdom and Colonies only after five years' residence in the United Kingdom (as compared with one year previously). The Commonwealth Immigrants Act of 1968 imposed for the first time controls on the admission to the United Kingdom of citizens of the United Kingdom and Colonies holding United Kingdom → passports, when such citizens did not have qualifying connections with the United Kingdom. The Immigration Bill of 1971 was designed for the purpose, *inter alia*, of drawing more clearly the distinction between citizens of the United Kingdom and Colonies deriving that status by association (known as "patrials") and all others. Only the former were to be free of immigration control. The symmetry of the scheme was, however, upset by an amendment made to it before its entry into force, extending patriality to Commonwealth citizens having ancestral connections with the United Kingdom, but not possessing citizenship of the United Kingdom and Colonies.

B. The Current Legal Situation

1. British Subjects and Commonwealth Citizens

The British Nationality Act of 1981, which entered into force on January 1, 1983, continued the

trend towards fragmentation of British subjecthood. By Section 51(2) of that Act, the term "British subject" is no longer synonymous with "Commonwealth citizen" (save when used in statutes passed before 1983). Rather, the former denotes a British subject without citizenship. Such subjects fall into three categories: those who have obtained a similar status under Section 13 of the Act of 1948; those who had ceased to be British subjects under Section 12 of the British Nationality and Status of Aliens Act of 1914 but would have been citizens of the United Kingdom and Colonies or British subjects without citizenship but for the operation of that section; and those alien women who were allowed to register as British subjects without citizenship by reason of their marriage under the Act of 1965. It is estimated that after the entry into force of the 1981 Act, only about 50 000 persons acquired British subject status.

By Section 37 of the 1981 Act the term "Commonwealth citizen" is to denote any person who is a citizen of an independent Commonwealth country, a British subject, a British citizen, a British Dependent Territories citizen or a British Overseas citizen.

2. British Citizens, British Dependent Territories Citizens and British Overseas Citizens

The 1981 Act abolished the status of citizen of the United Kingdom and Colonies and created in its place three separate citizenships: British citizenship, which is the status of persons having specified associations with the United Kingdom; British Dependent Territories citizenship, which is the status of persons having specified associations with remaining dependencies; and British Overseas citizenship, which is the status given to those who at the end of 1982 were citizens of the United Kingdom and Colonies and failed to obtain British citizenship or British Dependent Territories citizenship upon the entry into force of the 1981 Act. Most of those in the last category acquired that status by association with former dependencies.

3. British Protected Persons

Section 38 of the 1981 Act preserves, in effect, the status of those who were British protected persons before its entry into force. It is estimated that such persons now number about 140 000. British protected persons are not, as such, Commonwealth citizens.

4. Citizens of the Republic of Ireland

The Act of 1981, like that of 1948, excludes citizens of the Republic of Ireland from the definition of an alien (Section 50). Citizens of the Republic who were formerly entitled to claim to remain British subjects but had not done so by January 1, 1983 are enabled under Section 31 of the new Act to claim to remain British subjects thereafter. Under Section 7 of the 1981 Act citizens of the Republic who were settled in the United Kingdom before the entry into force of the Immigration Act 1971, and remained so resident thereafter, are entitled to be registered as British citizens.

5. Acquisition and Transmission of British Citizenship

Upon the entry into force of the 1981 Act, all who had previously been citizens of the United Kingdom and Colonies with the right of abode in the United Kingdom automatically became British citizens (Section 11).

The 1981 Act enlarged the application of the principle *jus sanguinis* by providing that British citizenship and British Dependent Territories citizenship should thereafter be transmissible in the female line equally with the male line. The transmission of British citizenship is limited to the first generation born outside the United Kingdom, save where either parent was at the time of the child's birth engaged in Crown service under the government of the United Kingdom or in the service of an institution of the → European Communities or in other designated service.

The same Act limited the application of the principle of *jus soli* by providing that a person born in the United Kingdom after 1982 should become a British citizen only if at the time of the birth either parent was a British citizen or was settled in the United Kingdom (Section 1). A person is settled in the United Kingdom if he is "ordinarily resident" there without being subject under the immigration laws to any restriction on the period for which he may remain (Section 50).

The rules established in 1948 for the acquisition of citizenship by naturalization and registration

are in broad outline retained. In accordance with the new policy of treating the sexes equally, however, spouses of British citizens, irrespective of sex, may be naturalized after completing a residence period of three years. In other cases, the normal residence requirement is of five years (Section 7).

J.M. JONES, British Nationality Law (1956).
C. PARRY, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland (1961).
C. JOSEPH, Nationality and Diplomatic Protection: The Commonwealth of Nations (1970).
R. PLENDER, International Migration Law (1972).
L. FRANSMAN, British Nationality Law and the 1981 Act (1982).
I.A. MACDONALD and N. BLAKE, The New Nationality Law (1982).
I. STANBROOK, British Nationality: The New Law (1982).

RICHARD PLENDER

BURMAH OIL CO. v. LORD ADVOCATE

During World War II when the British forces had to retreat from Burma in 1942 in the face of the advancing Japanese Army, the General Officer Commanding, Burma, ordered the destruction of certain installations located near Rangoon and owned by the Burmah Oil Co. (Burma Trading) Ltd. In so doing he acted in pursuance of the policy of the United Kingdom Government (the Crown) and on instructions from the War Cabinet to deny resources to the enemy, to the extent possible. The destruction was carried out on March 7, 1942 and the Japanese occupied Rangoon on the following day.

In 1961 the Burmah Oil Co. (Burma Trading) Ltd., joined by three other companies of the same corporate group which had suffered similar destruction of their properties in Burma, commenced an action to recover compensation from the United Kingdom Government for the damage sustained. Since all the claimants had their registered offices in Scotland, the complaints were lodged with the Scottish Court of Session. The parties had been in agreement as to the legality of the acts of destruction by the Crown. The question to be decided was whether the Crown was bound to pay compensation for the installations which had been destroyed. In the absence of statutory grounds to this effect, the foundation for any such claim had to be based upon the common law.

On August 8, 1962, the trial judge of the Outer House of the Court of Session decided in favour of the claimants ((1962) Scots Law Times 347). This judgment was unanimously reversed on appeal to the Inner House of the Court of Session (Judgment of March 14, 1963, (1963) Scots Law Times 261). By a majority of three to two, the original finding was restored in the House of Lords on April 24, 1964 ((1965) A.C. 75).

In arguing against an obligation to pay compensation, the Crown relied upon the defence of necessity, available to the ordinary citizen, and in particular upon the defence of → military necessity, both not giving rise to a right to compensation; it further submitted that a taking – for use or destruction – under the royal prerogative would not result in a right to compensation (→ Expropriation and Nationalization); and if such a taking generally gave rise to a right to compensation, the destruction of the claimants' installations were within the so-called "battle damage" exception.

In the claimants' view, private property had been taken for the common benefit with the consequence that the owners of such property had to be held harmless for such taking; in this connection the royal prerogative was congruent with the eminent domain power, the use of which always entailed a right to compensation. The owners were not to be indemnified only where the damage was directly caused by the battle itself. However, in this particular case the destruction had not occurred during the fighting itself but had been carried out as a deliberate and precautionary measure.

As a preliminary point the House of Lords had to settle the question of the relevant law. In contradistinction to both the Inner and the Outer House of the Court of Session, the House of Lords found that the applicable law was English and not Scottish law, a view shared with different degrees of certainty by four of the Law Lords.

When the House of Lords had decided that a clear difference existed between the Crown's prerogative powers and an individual's plea of necessity, the issues remaining were whether the Crown was obliged to indemnify owners of property requisitioned in time of war under the royal

prerogative and, if the answer was in the affirmative, whether a "battle damage" exception to this rule existed and was applicable to the facts of this particular case.

Because these questions were not answered by common law precedents, the parties and the judges concerned throughout the litigation relied largely on foreign authorities, and in particular on the writings of the "civilians", the international lawyers and naturalists of the 17th and 18th centuries. On the authority of certain quotations taken from the civilians most of the judges involved in this case agreed that the Crown had to pay compensation for the taking of property on the basis of its royal prerogative – including cases of military necessity – except when the destruction of the property constituted "battle damage". The views of the judges differed only as to the applicability of this exception to the instant case.

In this context a differentiation made by de Vattel in Le Droit des Gens (Book III, Chapter 15) became crucial in the case, namely the difference between damages caused "deliberately and by way of precaution" and damages "caused by inevitable necessity". Since the majority of the Law Lords regarded the destructions of the installations as belonging within the first category because they were prompted by a deliberate precautionary decision and not caused by the fighting itself, the House of Lords decided in favour of the claimant companies.

Immediately following this judgment and as a reaction to it, the British Government introduced a War Damage Bill which after some amendments entered into force as the War Damage Act 1965. Section 1(1) of this Act stipulated that "[n]o person shall be entitled at common law to receive from the Crown compensation in respect of damage to, or destruction of, property caused . . . by acts lawfully done by, or on the authority of, the Crown during, or in contemplation of the outbreak of, a war in which the Sovereign was, or is engaged." Since the decision in the House of Lords had yet to award a specific amount in compensation and the above provision was vested with retroactive force, the claimants did not finally receive the compensation they sought.

The Burmah Oil Co. litigation did not, properly speaking, have any features and ramifications in international law since the taking of property by the British Government did not involve foreign nationals of any kind. Strictly speaking, the case is exclusively concerned with national constitutional law. Together with its legislative epilogue, this case may nevertheless gain in significance in international law as a facet of the development of → customary international law in the field of expropriation and nationalization. Furthermore, the extent to which British courts appear prepared and willing to accept foreign and international law authorities as guidelines in an area not settled by national law remains noteworthy.

Burmah Oil Company (Burma Trading) Ltd. v. Lord Advocate, Scots Law Times (1962) 347–358, (1963) 261–286, (1964) 218–249; for House of Lords decision, see also [1965] A.C. 75, [1964] 2 W.L.R. 1231, [1964] All E.R. 348.

P. JACKSON, The Royal Prerogative, Modern Law Review, Vol. 27 (1964) 709–717.

E.D. BROWN, Eminent Domain in Anglo–American Law, Current Legal Problems, Vol. 18 (1965) 169–190.

T.C. DAINTITH, The Case of Demolitions, ICLQ, Vol. 14 (1965) 1000–1011.

J.A. FROWEIN, Die Prärogative der Krone, die Autorität der Naturrechtsklassiker und die Souveränität des britischen Parlaments – Burmah Oil Company v. Lord Advocate, ZaöRV, Vol. 25 (1965) 735–746.

WOLFGANG FRITZEMEYER

CABOTAGE

Cabotage is the transport of goods or passengers from one → port or place in a State to another in the same State. Beyond that, the term has not been employed uniformly. Some writers maintain it should be applied only to maritime navigation; in this context one can distinguish between petit cabotage – transport between ports situated on the same sea (e.g. Bordeaux-Le Havre) – and grand cabotage – transport between ports situated on different seas (e.g. Bordeaux-Marseille). However, the term is also properly applied to transport between two inland points on an → international river within one State, although the term grand cabotage is sometimes incorrectly applied to transnational transport between the inland ports of different riparian States on the same waterway. River cabotage properly so called is sometimes also referred to as local

transport. Finally, the term has also been adopted to describe commercial air transport between airports situated in the same State.

The legal issue is the extent to which States are permitted by → international law to reserve cabotage to their nationals (→ Navigation, Freedom of; → Traffic and Transport, International Regulation).

In maritime law it is commonly admitted that freedom of the seas has never included a right of cabotage. Indeed, historically there is no obligation in → customary international law to open maritime ports to foreign trading vessels at all (→ Aliens). Thus it is generally accepted that as a corollary of → territorial sovereignty, coastal States are fully entitled to reserve cabotage to their nationals or, if they wish, to the nationals of other States as well, usually upon the basis of → reciprocity (→ Coastal Trade). This right of reservation includes such grand cabotage which by necessity extends beyond a State's → territorial waters (e.g. continental United States-Hawaii); it thus also includes the once lucrative merchant routes between various metropoles and their colonies (→ Colonies and Colonial Régime). The rule is expressly embodied in a long series of → treaties of friendship, commerce and navigation and is generally held to obtain even where treaties are silent. A similar régime has been adopted, *mutatis mutandis*, to regulate commercial air transport. Thus, Art. 7 of the Chicago Convention on International Civil Aviation of December 7, 1944 (UNTS, Vol. 15, p. 295) reserves to States the right to prohibit cabotage by a foreign flag carrier without the permission of the State between whose ports that right is being exercised (→ International Civil Aviation Organization; → Air, Sovereignty over the; → Air Transport Agreements).

The régime governing river cabotage is less clear cut. In Latin America and in the United States river cabotage has traditionally been reserved to nationals. But in Europe, historically the régime varies from that of maritime cabotage. The Act of Vienna which followed the → Vienna Congress of 1815 was based upon the perfect equality and reciprocity of rights and obligations of the riparian States on the → Rhine; it is absolutely silent as to the reservation of cabotage. The first unequivocal recognition of reservation was contained in the Additional Elbe Act of 1844 (CTS, Vol. 96, p. 307, Art. 3) and was by way of an express derogation – an unlikely inclusion if the provision merely stated existing law. For the rest of the century, the application of various navigational agreements indicated that limitations to freedom of navigation and commerce were exceptions which, in the absence of express stipulation, were not to be presumed.

However, attitudes shifted after World War I. The matter took up much time at the → Barcelona Conference in 1921, where it was argued that cabotage raised issues of economic relations rather than freedom of navigation: While a State situated on an international river may have a duty to allow freedom of navigation at least to other riparian States and perhaps to foreign merchant vessels as well, in the absence of international regulation such a duty does not extend to conceding the right of cabotage. Such after all was the situation which obtained in the Americas. This position was eventually incorporated into the Conference's resulting statute (LNTS, Vol. 7, p. 51, Art. 5) and has since been adopted by most European riparian States. There continued to be some support for the view that any freedom of navigation on inland waters must include commercial equality and thus the right of cabotage, but the point has never been authoritatively decided (see the 1934 decision of the → Permanent Court of International Justice in the → Chinn Case).

Cabotage in all its forms is now generally accepted as being a matter of sovereign municipal jurisdiction, quite separate from that of international transport (see e.g. Art. 2(1) of the 1978 UN Convention on the Carriage of Goods by Sea, UN Doc. A/Conf.89/13). As such it is regulated by a diverse body of national laws and a skein of various bilateral and multilateral treaties. The liberal era of European river transport of the last century has not been resumed, notwithstanding the as yet unimplemented common transport policy provisions of the treaty establishing the → European Economic Community (Arts. 74 to 84).

With the advent of → decolonization, colonial cabotage routes dwindled, but cabotage of itself continues to be an issue in air transport, not least for the International Civil Aviation Organization.

It will also be interesting to see whether a similar régime is adopted in the sphere of transport to and from oil rigs situated on the → high seas.

L.B. WEHLE, International Administration of European Inland Waterways, AJIL, Vol. 40 (1946) 100–120.
A. MEYER, Le cabotage aérien (1948).
U. SCHEUNER, Das internationale Recht der Rheinschifffahrt und der internationale Binnenverkehr (Cabotage) (1954).
B. VITÁNYI, The Question of Reservation of Local Transport (Cabotage) on International Waterways, Netherlands Yearbook of International Law, Vol. 8 (1977) 3–33.

ROBERT C. LANE

CALVO DOCTRINE, CALVO CLAUSE

1. The Doctrine

The Calvo doctrine stands out among the traditional Latin American efforts to prevent abuses of the right of → diplomatic protection of citizens abroad. The doctrine embodied the Latin American version of the principle of equality between nationals and → aliens, and was enunciated as a reaction to the abusive exercise of the right of diplomatic protection of citizens abroad. The doctrine postulated the standard of equal treatment for measuring State responsibility in lieu of the so-called "minimum international standard" (→ Minimum Standard; → Responsibility of States: General Principles). As formulated by the well-known Argentinian diplomat and jurist Carlos Calvo in his treatise Le droit international théorique et pratique (5th ed. 1896): "It is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to a protection more extended" (Vol. 6, p. 231); in his view, the rule that aliens merit higher regard and privileges more marked and extended than those accorded even to the nationals of the country in which they reside was intrinsically contrary to the legal equality of States (→ States, Sovereign Equality). Rationalizing further the principle of equality, Calvo thought that to admit the minimum international standard would amount to creating "an exorbitant and fatal privilege, essentially favourable to the powerful States and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners" (Vol. 3, p. 142). He also thought that in sanctioning such a standard, one would deal, although indirectly, a strong blow to one of the constituent elements of the independence of nations, that of → territorial sovereignty.

The Calvo doctrine has been incorporated in a number of international instruments, the first of which was the Treaty of Commerce and Navigation concluded by Latin American States at the second Lima Congress (1864–65). The doctrine was later endorsed by several inter-American conferences, beginning with the first International Conference of American States held in Washington in 1889/90 (→ Regional Cooperation and Organization: American States). At the Seventh Conference (Montevideo, 1933) the doctrine was incorporated into the Convention on Rights and Duties of States (→ States, Fundamental Rights and Duties) in these explicit terms: "Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals" (Art. 9). The Latin American position regarding State responsibility for injuries sustained during internal disturbances is, in a sense, a specific application of the Calvo doctrine. Such a position was incorporated in another inter-American instrument, the 1902 Convention Relative to the Rights of Aliens (Art. 2; → Aliens, Property).

The Calvo doctrine, whose only function was to prevent the abuse of the right of → diplomatic protection, was never a bar to those international claims based on breaches of well-established international obligations regarding the treatment of aliens. Even in one of its most far-reaching formulations, such as that of the widely known Guerrero Report prepared for the League of Nations (AJIL, Vol. 26, Special Supp. (1926) p. 177), the international responsibility of States for injuries resulting from an act or omission constituting a breach was never questioned. If, therefore, the doctrine cannot be characterized as an absolute bar to the exercise of diplomatic protection, it could hardly be construed as postulating complete, total equality between nationals and aliens. From this standpoint, the latter evidently continue to enjoy a different and somewhat priv-

ileged position as compared with the former. Once a → denial of justice or any other act or omission contrary to international law is imputable to the State, nationals and aliens cease to be legally equal; aliens may seek the protection that is reserved to them under international law, and which is not incompatible with the Latin American construction of the standard of national treatment.

2. The Clause

The Calvo clause is an outstanding Latin American contribution to the development of international law. It contrasts with the Calvo doctrine in that it aims at the elimination of the very institution of diplomatic protection. In effect, through → waiver by the alien of such protection, the clause is intended not merely to prevent its abuses, but to bar altogether the exercise of the protection, especially the international claim that the State of nationality of the alien brings before an international jurisdiction (→ International Courts and Tribunals). Thus, the clause develops and complements the doctrine to the point of perfecting the principle of equality between nationals and aliens; in other words, it is only when incorporated with the clause that the principle provides for complete, total equality. Regardless of the outcome of exhaustion of local remedies by the alien (→ Local Remedies, Exhaustion of), he will find himself in the same position as nationals.

A clause embodying the waiver by an alien of diplomatic protection may in practice take several forms. It may also take the form of a tacit stipulation of the contract (→ Contracts between States and Foreign Private Law Persons), that is to say, where a constitutional or legislative provision of the contracting State requires the waiver; in such a case the Calvo clause becomes an implied condition of the contract or → concession. It goes without saying that the clause always refers to legal relations of contractual character and therefore applies only to disputes concerning the interpretation or the execution of the contract or concession.

It is only natural that the validity of the Calvo clause, in the sense of its international legal effect, has been – and still is – widely debated. So far as the position of international jurisprudence is concerned, arbitral precedents recognizing "limited validity" – to use the term coined by Professor Shea, still the leading authority on the clause – are well known. Reference is made to the decisions of the Mexican claims commissions (→ Mixed Claims Commissions), in particular to the famous decision of the (United States-Mexico) General Claims Commission in the → North American Dredging Co. of Texas Arbitration (1926) (→ Arbitration). For present purposes, perhaps the most relevant passage of the decision is the following:

> "But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim" (RIAA, Vol. 4, p. 33.)

Accordingly, the Commission held the international claim inadmissible. Nevertheless, it did not go as far as to admit the validity of the clause in an absolute and unconditional manner.

On the contrary, the Commission was of the opinion that violations of international law or, more concretely, "the case of denial of justice", were exceptions to the inadmissibility of the international claim; in this connection it further expressed the view that the alien could not bind his government with respect to remedies for violations of international law. But the exceptions were in turn subjected to certain conditions. In effect, subsequent decisions of the Mexican commissions seem to have required that the State conduct show a certain degree of gravity. Thus, as it has been rightly remarked in the Inter-Oceanic Railway Co. Arbitration (1931) (Annual Digest, Vol. 6 (1931–1932) p. 199), the British-Mexican Claims Commission required evidence of "a more patent and flagrant denial of justice". In the Dredging decision the General Claims Commission itself, speaking of the exceptions to the validity to the Calvo clause, referred to "a large interest in maintaining the principles of international law [rather] than in recovering damages" for the injuries sustained by aliens (→ Damages; cf. → Expropriation and Nationalization).

Apart from those rather infrequent situations where the State conduct affects such "large interest", should the Calvo clause be deemed void *ab initio*, and therefore as having no effect whatsoever on the admissibility of international claims? The argument which is repeatedly invoked to deny the validity of the clause is that the alien lacks legal capacity to waive the right of diplomatic protection of the State of his nationality. This argument loses much, if not all, of its weight when contrasted with the reasoning of the Dredging decision. In effect, as stated by the Commission itself, the refusal of recognizing that a private person may "to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with the corresponding developments in the field of international law and does not tend to promote goodwill among nations". If a claims commission could go as far as it did on the basis of the international law of the 1920s, one may well go somewhat further to avoid being inconsistent with the law at the present stage of its development.

3. *Current Significance*

What bearing does the postwar development of international law have upon the validity of both the Calvo doctrine and the Calvo clause? As regards the doctrine, the international recognition of → human rights has evolved sufficiently to justify the view that the principle of equality, as well as the minimum international standard, have been superseded. The two traditional standards are based on the distinction between nationals and aliens; the general and regional instruments recognizing human rights ignore altogether such a distinction. In the case of the clause, the current inclination towards the strengthening of the principle of national jurisdiction for the settlement of disputes arising out of private → foreign investments obviously supports the validity of the clause. It is true that such an inclination is not always warranted. However, it seems perfectly justifiable in so far as the clause is concerned and in the light of the contractual nature of the relations and interests involved. The recognition of the full – not only the "limited" – validity and effect of the waiver of diplomatic protection is not incompatible with the still well-established obligation of settling inter-State disputes through international means. But disputes of that character do not even arise, for the commitment embodied in the clause makes technically impossible the presence of a "denial of justice", whatever the results of the exhaustion of local remedies by the private individual or foreign corporation may be. In the light of contemporary evolution of legal thinking, whether such a commitment is internationally valid should no longer be questioned. The law of international claims is changing, and this certainly is one of the directions in which it is moving.

C. SEPÚLVEDA, La Responsabilidad Internacional del Estado y la Validez de la Cláusula Calvo (1944).

K. LIPSTEIN, The Place of the Calvo Clause in International Law, BYIL, Vol. 22 (1945) 130–145.

A.V. FREEMAN, Recent Aspects of the Calvo Clause and the Challenge to International Law, AJIL, Vol. 40 (1946) 121–147.

M.R. GARCÍA-MORA, The Calvo Clause in Latin American Constitutions and International Law, Marquette Law Review, Vol. 33 (1951) 205–219.

D.R. SHEA, The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy (1955).

D.E. GRAHAM, The Calvo Clause, Its Current Status as a Contractual Renunciation of Diplomatic Protection, Texas International Law Forum, Vol. 6 (1971) 289–308.

F.W. GARCÍA-AMADOR

CAPITAL MOVEMENTS, INTERNATIONAL REGULATION

1. *IMF Articles of Agreement*

The basic principle of → international law on the regulation of capital movements is contained in the Articles of Agreement of the → International Monetary Fund. The principle, influenced by the destabilizing effects of flows of "hot money" between the two world wars, is that members of the Fund are free to control capital transfers without the necessity for approval by the Fund, provided that controls are not exercised in a way that unduly delays or otherwise restricts payments and transfers for current international transactions. This principle is in contrast to the obligation of members to avoid restrictions on

these latter payments and transfers unless they are authorized by the Articles or approved by the Fund (→ Economic Law, International; → Monetary Law, International).

Neither the First Amendment of the Articles nor the Second made substantive changes in the provisions relating to capital, although the possibility of giving the Fund more jurisdiction was discussed in the Fund's Committee on Reform of the International Monetary System (Committee of Twenty), which reported in 1974. The Technical Group on Disequilibrating Capital Flows, appointed by the Deputies of the Committee, submitted a searching report on the topic indicated in its title. The Group recognized that capital controls are employed by countries for many purposes other than to influence disequilibrating capital flows, for example to achieve objectives for the structure of the balance of payments, to protect national ownership of particular industries or sources of raw materials, and, especially in the case of → developing States, to retain domestic savings. This range of purposes helps to explain the retention by countries of authority to control capital transfers.

The importance attached by members to the principle of their freedom to control capital transfers is shown by the Fund's interpretation of the provision of its Articles that prohibits discriminatory currency arrangements if not approved by the Fund. Although the provision is formulated in general language, the Fund has decided that it does not apply to capital controls. Furthermore, the Executive Board has refrained for many years from deciding whether a similar interpretation should apply to the equally general prohibition of multiple currency practices, although the staff has advised that a member is required by the Articles to obtain the approval of the Fund for a special exchange rate that applies exclusively to capital transfers. The absence of a decision is particularly important in connection with the practice of dual markets, under which one market is established exclusively for capital transfers. In effect, therefore, members are able to engage in discriminatory currency arrangements or multiple currency practices for the purpose of restricting capital transfers without the exercise of jurisdiction by the Fund to approve or disapprove of these measures.

The Articles, in recognizing the freedom of members, do not distinguish, for example, between measures of a direct administrative character and policies to influence capital transfers indirectly, or between controls on inward and outward movements, between equilibrating and disequilibrating movements, between capital transfers through the channels of trade, including leads and lags, and the banking system, or, except for multiple currency practices, between controls applied to the volume and to the cost of capital transfers.

The Articles do not define what is meant by "such controls as are necessary to regulate international capital movements" (Art. VI(3)). The approach is to define what is meant by payments for current international transactions for the purposes of the Articles, and, by implication, to regard all other payments and transfers as capital transfers. The former payments and transfers are defined as those that are not for the purpose of transferring capital, and include, without limitation:

"(1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;

(2) payments due as interest on loans and as net income from other investments;

(3) payments of moderate amount for amortization of loans or depreciation of direct investments; and

(4) moderate remittances for family living expenses" (Art. XXX(d)).

The phrase "without limitation" enables the Fund to establish further categories of payments for current international transactions, but, by the end of 1981, it had not added any. If questions arise with respect to the classification of specific transactions, the Fund must find that they are not for the purpose of transferring capital, and therefore a working rule is necessary. It is that a transaction is a capital transfer if it establishes a claim to foreign currency that is not a claim to prompt payment for goods or services. The Fund may make a determination, after consulting the members concerned, if there is a difference between them on the classification of a specific transaction.

The inclusion of payments connected with nor-

mal short-term credit facilities in category (1) above and payments in category (3) within the definition of payments for current transactions is not in accordance with standard economic analysis. The intention was to encourage capital transfers that promote trade or productive purposes by prohibiting the restriction of these payments without the approval of the Fund.

Although the Fund has no authority to require a member to withdraw capital controls, the Fund can request a member to impose them to prevent the use of the Fund's general resources to meet a large or sustained outflow of capital. If a member fails to exercise appropriate controls after receiving such a request, the Fund may declare the member ineligible to use the Fund's general resources. Up to mid-1984, the Fund had never made such a request, which can be taken to imply its attitude to controls. The greater freedom of movements of short-term capital because of the spread of convertibility and free exchange markets at the end of the 1950s made the Fund more willing to accept uses of its resources for balance of payments or reserve problems caused by capital transfers, in addition to deficits on current account for which the resources were primarily intended originally. The Fund also became more willing to find that outflows of capital were not large or sustained within the meaning of the Articles. A practical reason for this attitude in the new conditions of market convertibility was that it was not always possible to determine whether a member's problem was caused by developments in the current or in the capital account until too late to enable the Fund to give timely assistance. To reduce the need to make a distinction or to find that an outflow of capital was large or sustained, the Fund, in 1962, negotiated the General Arrangements to Borrow (GAB) with ten of its main industrial members, among which short-term flows of capital were most likely to occur, to supplement the Fund's resources to meet their requests for assistance, and in effect recycle the flows in the new conditions of the time.

The GAB is still in existence and provides the legal basis for the Group of Ten, which has taken on an identity for international monetary purposes in addition to lending to the Fund. At the end of 1983, the GAB was revised to enlarge the amounts available under it and to enable the Fund to borrow under it for the benefit of members other than the Ten in addition to the Ten. Furthermore, Switzerland, a non-member of the Fund, has become a party to the GAB instead of adhering to the former arrangement under which she associated herself with the GAB and lent directly to members of the Ten but not to the Fund itself.

In so far as disequilibrating capital flows are not deterred by controls or other measures to influence them, they need to be financed. Such capital flows were among the reasons for the GAB, but the GAB is designed to supplement the Fund's resources for normal use and not for short-term financing. Other international arrangements have been made for this latter purpose, notably the network of swap agreements, mainly between the major developed countries and the Federal Reserve Bank of New York, and credit mechanisms of the → European Communities.

The importance attached to the principle of freedom to control capital transfers is illustrated by Art. VIII(2)(b) of the Fund's Articles. Under it, members collaborate by ensuring that their courts do not enforce certain contracts if they are contrary to the exchange control regulations of another member, provided that the regulations are consistent with the Articles. The provision applies to regulations whether they control payments for current transactions (when approved or authorized) or capital transfers. The provision also authorizes members to cooperate in other ways to make each other's regulations more effective. The promotion of cooperation on capital controls was a major motive for this authorization.

The original Articles contained no express direction to the Fund and members on what their attitude should be to policies with respect to capital controls. The probable explanation is that there were differences among the main negotiators on the desirability or inevitability of capital controls over the long run. Art. IV of the Second Amendment, which became effective on April 1, 1978, provides, however, that members, "[r]ecognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries", undertake certain obligations relating to their exchange arrange-

ments. The "recognizing" clause is hortatory rather than mandatory, but the Fund must oversee the compliance of members with their obligations relating to exchange arrangements. To fulfil this function, the Fund must exercise "firm surveillance" over the exchange rate policies of members and must establish specific principles, which it may adapt from time to time, for the guidance of all members with respect to these policies.

The Fund's decision on the initial principles, which were still in effect at mid-1984, sets forth certain developments as among those that may suggest the need for special discussion with a member on its observance of the principles. Among these developments are: the introduction or substantial modification for balance of payments purposes of restrictions on, or incentives for, the inflow or outflow of capital; the pursuit, for balance of payments purposes, of monetary and other domestic financial policies that provide abnormal encouragement or discouragement to capital flows; behaviour of the exchange rate that appears to be unrelated to underlying economic and financial conditions including factors affecting competitiveness and long-term capital movements. The emergence of these developments does not authorize the Fund to require the removal of capital controls, but the Fund may use its influence for this purpose.

An objective of programmes of adjustment supported by the Fund with its resources under stand-by or extended arrangements is normally the attraction of capital from abroad. Therefore, the Fund may withhold the use of its resources unless members endeavour to eliminate conditions, policies, or practices that encourage the disequilibrating outflow of capital or deter the inflow of productive capital. The Fund's support of a programme often has the effect of promoting capital inflow from other sources, but the Fund, unlike the World Bank, does not participate in co-financing (→ International Bank for Reconstruction and Development). After the serious problem of external debt emerged in the early 1980s, the Fund used its influence, however, to encourage commercial banks to restructure outstanding debt and to go on lending for the benefit of members for which the Fund was prepared to support adjustment programmes.

The Fund publishes an Annual Report on Exchange Arrangements and Exchange Restrictions, which includes, for each country, a general description of its special arrangements for, or limitations attached to, international receipts and payments in respect of capital items, as well as the main changes in these matters during the year.

2. OECD and Regional Arrangements

The freedom of members to control capital transfers includes freedom to enter into international agreements not to exercise controls. The 24 countries that have become members of the → Organisation for Economic Co-operation and Development (OECD) may take such an action by adhering to the Code of Liberalization of Capital Movements, adopted by the OECD Council on December 12, 1961 and amended often since then. OECD members that adhere to the Code are bound to abolish progressively, and to endeavour to avoid the introduction or intensification of, restrictions among them on capital movements to the extent necessary for effective economic cooperation, and they must endeavour to extend measures of liberalization to all members of the Fund. Members must grant any authorization they require for the transactions and transfers set out in lists annexed to the Code, but members may lodge specified reservations, take actions they consider necessary for public order and security, and avail themselves of specified derogations. For example, a member need not take all the measures of liberalization if justified by its economic and financial situation, and a member may temporarily suspend measures of liberalization already taken if serious adverse developments emerge in its balance of payments. Liberalization, and derogations from it, must be without discrimination among other members, subject to an exception in favour of fellow-members of a special customs or monetary system.

Members of the OECD must follow prescribed procedures in taking various actions required or authorized by the Code. The OECD administers the Code and supervises compliance with it, particularly when derogation clauses are invoked. These functions are performed in the first instance by the Committee for Invisible Transactions, which reports its proposals to the Council. Any

member may withdraw from the Code. Canada has not adhered; special temporary exemptions have been granted to Greece, Iceland and Turkey.

One of the basic assumptions of the common market is that the market system will ensure the optimal use of capital (→ European Economic Community). The main provision on capital movements in the EEC Treaty, Art. 67, states that, to the extent necessary to ensure the proper functioning of the common market, members of the European Community shall progressively abolish all restrictions between them on the movement of capital belonging to their residents. The limitation of the principle of Art. 67 by reference to the proper functioning of the common market means that the provision does not have direct effect under the treaty. Under Art. 71, members shall endeavour to avoid introducing new, or intensifying existing, restrictions, and members declare their readiness to go beyond the liberalization provided for in so far as their economic situation, in particular their balance of payments, permits. The words "shall endeavour" show that members do not have an unconditional obligation on which individuals can rely. Under both the Articles and the Treaty of Rome members may exercise controls to ensure that unauthorized movements of capital are not taking place, provided that payments are not impeded by these controls.

Capital is not defined by the treaty. Two directives of the EEC Council of Ministers (Directive of May 11, 1960 and Directive 63/21 of December 18, 1962) implementing Art. 67 divide capital transactions into four categories and attach minimum liberalization norms of different degree to three categories and no norms to the fourth category. This last category includes short-term financial transactions, which have special importance for domestic monetary policy. It can be assumed that the Council intended to cover the whole field of capital.

Other provisions of the Treaty (Arts. 70, 73, and 107 to 109) and the directives establish broad escape clauses enabling members to derogate from normal obligations so as to overcome economic difficulties and crises. Members can act under these clauses with prior, or sometimes subsequent, approval of a Community body. A member may act to influence capital movements if, for example, the functioning of its capital market is disturbed by capital movements or the member is in balance of payments difficulties. A third directive (Directive 72/156 of March 21, 1972) has called on members to have in readiness harmonized capital controls to neutralize the undesirable effects of speculative capital flows on domestic liquidity. Under Community law as a whole, members have more leeway to control the free movement of capital than they have to control the free movement of goods, services, and persons, which represent the other three fundamental liberties of the Community.

Art. 67 requires the progressive abolition of any discrimination among capital movements within the Community based on the → nationality or residence of the parties or on the place where capital is invested.

Other regional or subregional arrangements, such as those that govern relations among various groups of countries in Latin America (→ Latin American Integration Association; → Latin American Economic Cooperation), provide for the free movement within the region of capital of regional origin. The motivations for the treatment of capital movements in regional arrangements may be not only to promote development and integration of the region but also to limit foreign intervention in its economy.

3. Capital Markets

Understandings among countries on capital movements have been reached outside the treaty process. Both the convertibility of currencies and the imposition at various times of capital controls or other financial regulations by the United Kingdom and the United States have contributed to the growth of huge international capital markets in "Eurocurrencies", i.e. currencies that are deposited, lent, or borrowed outside the country of issue. (The International Banking Facilities of New York City (IBF, NY) however, permit transactions in US dollars as well as foreign currencies.) International agreement to regulate these markets does not exist, and they are not subject to the jurisdiction of any central authority.

In 1971, the central banks of the Group of Ten and Switzerland, fearing that the Euromarkets were contributing to the growth of inflation and

the instability of currencies, agreed not to place increases in their reserves in these markets, but the agreement appears not to have been fully observed even though it was renewed in 1979. The same central banks at the end of 1974 established within the framework of the → Bank for International Settlements (BIS), a standing Committee on Banking Regulations and Supervisory Practices. The Committee does not exercise formal supervisory authority and its conclusions are not intended to have legal force. A "Concordat" was reached in 1975 on principles of cooperation in the supervision by parent and host authorities of foreign banks doing business within the territories of the authorities, whether in Eurocurrencies or in the domestic currency of the *situs* of the bank. The liquidity and solvency of these banks are primary concerns of the Concordat. The Committee has also recommended consolidated reporting by banks so as to prevent the redirection of business through foreign branches and subsidiaries in order to escape supervision by the authorities of the *situs* of the parent bank. The Concordat was revised in May 1983 to take account of changes in the market and of consolidated supervision. Agreement has not been reached on a US proposal to impose uniform minimum reserve requirements on Eurocurrency liabilities on a world-wide consolidated basis. It has been said that an objective of the IBF, NY is to strengthen the negotiating position of the United States in this matter. Within the European Communities, a Groupe de Contact performs functions similar to those of the Committee that meets within the BIS. The Basle Committee maintains relations with other national and international supervisory bodies throughout the world.

If monetary authorities conclude that capital movements are responsible for unwanted changes in exchange rates, they can choose between influencing the supply of or demand for foreign exchange by administrative regulation or by intervention in the exchange market. Understandings have been reached on coordinated intervention between or among monetary authorities. These understandings are compatible with one of the Fund's guidelines on exchange rate policies, which urges members to take into account in their intervention policies the interests of other members, including the interests of the countries in whose currencies they intervene. The European Monetary System (EMS) (→ European Monetary Cooperation) contains rules on intervention in the currencies of members, as well as provisions under which harmonized policies on intervention in the currencies of non-members are an objective. The US dollar is the principal non-member currency affected by this objective. Cooperation on intervention among central banks has been undertaken from time to time under auspices other than the EMS.

The Joint Ministerial Committee of the Boards of Governors of the Fund and the World Bank on the Transfer of Real Resources to Developing Countries has sought to promote the access of developing countries to national capital markets (→ International Law of Development). In 1976 the Committee announced agreement that capital market countries would endeavour, as far as their balance of payments situation permitted, to move progressively toward greater liberalization of capital movements, particularly in relation to capital outflows, and that, when regulations on outflows were maintained for unavoidable reasons, certain forms of preferred treatment would be accorded to developing countries among foreign borrowers. The Fund, in the course of its periodic consultations with the main capital exporting countries, inquires about the steps taken to give effect to this understanding, and reports its findings to the Development Committee. In addition, participants in the Conference on International Economic Cooperation in Paris pledged themselves in May 1977 to support efforts to expand the access of developing countries to capital markets. Respect for the principle of nondiscrimination, however, tends to deter authorities from discriminating directly in favour of developing countries. There is greater sympathy for the general elimination of impediments to access to domestic capital markets.

4. Conclusions

Some general conclusions can be drawn from law and experience in the international regulation of capital movements: (1) The right of countries to control capital movements is a basic postulate. (2) The agreements that modify this postulate in the interest of freedom for capital movements include objectives that are subject to qualifica-

tions and obligations or exhortations that are subject to escape clauses. (3) Progress toward the objectives of these agreements is slow because capital movements are closely connected with domestic money markets and are considered part of national economic policy. Capital controls can be employed to achieve a wide range of national purposes. Escape clauses in international agreements on liberalization make national interests, including the functioning of the domestic capital market, the ultimate determinant of policy in relation to capital transfers. Greater freedom for capital transfers depends on a greater concordance of national economic policies, but this concordance, even when expressed as an aim, has not been made obligatory. (4) The international regulation of capital movements takes place not only under international agreements of a traditional character but also under more or less precise understandings among central banks that do not constitute international agreements in this sense. (5) The basic postulate includes freedom to discriminate in applying capital controls. Efforts are made to encourage discrimination in favour of developing countries, but parties to specialized arrangements usually agree not to discriminate among themselves. (6) It is difficult to draft a detailed code of conduct on capital controls even when the code is to apply to a group of countries with similar economies and close economic relationships. (7) Similarly, definitions of capital are difficult and are avoided. Instead, payments for current international transactions are defined or categories of capital transactions are listed for working purposes.

IMF, International Monetary Reform: Documents of the Committee of Twenty (1974).

J. GOLD, International Capital Movements under the Law of the International Monetary Fund, IMF Pamphlet Series, No. 21 (1977).

M. SEIDEL, Escape Clauses in European Community Law with Special Reference to Capital Movements, CMLRev., Vol. 15 (1978) 283–308.

R.S. RENDELL (ed.), International Financial Law (1980).

J. GOLD, The Multilateral System of Payments, IMF Occasional Paper 6 (1981).

SIR JOSEPH GOLD

CARTELS *see* Antitrust Law, International

CASH AND CARRY CLAUSE

The outbreak of → war entails certain trade restrictions on neutral States: in particular, a prohibition of trade in arms (→ Arms, Traffic in), ammunition and other war implements (→ War Materials) with belligerents, and a duty not to discriminate against one belligerent in favour of others (→ Neutrality, Concept and General Rules; → Neutral Trading). However, there is neither a duty to refrain from trade in other goods with belligerents nor an obligation to prohibit private trading in war materials. These principles are clearly enunciated in Conventions V and XIII of the Second Hague Peace Conference of 1907 (→ Hague Peace Conferences of 1899 and 1907) and are still valid, although there is some discussion about their modification *de lege ferenda*.

A neutral State may, however, go beyond its obligations under international law by reasons of national policy. This happened in 1935 when the United States changed her long-standing attitude not to regulate the private trading of her nationals with belligerents and prohibited by the Neutrality Act of 1935 any export of arms and war materials from American territory (→ Neutrality Laws). This reflected both a tendency towards → isolationism as well as the will to curtail any private profit made from foreign wars. The Neutrality Act of 1936 went even further, prohibiting private credit to governments of belligerent States. When the possibility of a new war in Europe emerged, the United States feared any involvement in → contraband or → blockade disputes with belligerents similar to those which had led to the American entry into World War I. Since the lists of conditional contraband were likely to be enlarged without any foreseeable limitations, Congress, in the Neutrality Act of 1937 (AJIL, Vol. 31, Sup. (1937) p. 147), conferred on the President the power to prohibit the exportation on American vessels of certain goods – other than war materials – as determined by him. He was also empowered to prohibit the exportation of goods belonging to United States nationals on foreign vessels. But even after such a proclamation, it remained possible for belligerent States or private persons acting on their behalf to buy these goods in cash, have ownership, title and

interest transferred to them and carry them away on vessels not flying the American flag. This regulation was the first version of the "cash and carry clause", which remained entirely within the limits of neutrality obligations since it did not contain any type of formal discrimination against one of the belligerents. However, by the conditions of export – cash valuta and transport facilities – it in practice favoured Great Britain.

The United States sympathy for Great Britain and her allies in Europe became obvious after the outbreak of World War II. The continuous → aggression by Germany and her disregard for neutral rights caused a shift of export policy away from the arms → embargo. The Neutrality Act of 1939 (AJIL, Vol. 34, Supp. (1940) p. 44) thus included arms and war materials in the cash and carry policy. As a deregulation of private arms export it was still within the limits of international law, but there is serious doubt as to the legality of the exemption of trade with certain world regions from the cash and carry principle, including parts of the British Empire. One might consider that exemption to be a violation of the duty of impartiality. This duty was finally violated when the United States abandoned her neutrality and began actively to support Great Britain. The cash and carry restriction was formally lifted in 1941 and replaced by the "Lend-Lease Act" (AJIL, Vol. 35, Supp. (1941) p. 76) which authorized the United States Government to furnish arms and war materials to foreign belligerent governments. Private arms export was subsequently deregulated, notwithstanding formal requirements of export licences.

J.W. GARNER, The United States Neutrality Act of 1937, AJIL, Vol. 31 (1937) 385–397.

P.C. JESSUP, Neutrality Legislation 1937, AJIL, Vol. 31 (1937) 306–313.

C.G. FENWICK, American Neutrality: Trial and Failure (1940).

C.G. FENWICK, Neutrality on the Defensive, AJIL, Vol. 34 (1940) 697–699.

P.C. JESSUP, The "Neutrality Act of 1939", AJIL, Vol. 34 (1940) 95–99.

E. ATWATER, American Regulation of Arms Exports (1941).

C. GUISE, Die Neutralität der Vereinigten Staaten (1946).

P. MONNIOT, Les Etats-Unis et la neutralité de 1939 à 1941 (1946).

D.F. DRUMMOND, The Passing of American Neutrality 1937–1941 (1955).

R.A. DIVINE, The Illusion of Neutrality (1962).

W. SCHLAUCH, Rüstungshilfe der USA an die Verbündeten im zweiten Weltkrieg (1967).

I.F. WALLAS, Die völkerrechtliche Zulässigkeit der Ausfuhr kriegswichtiger Güter aus neutralen Staaten, Thesis, University of Hamburg (1970).

J. KÖPFER, Die Neutralität im Wandel der Erscheinungsform militärischer Auseinandersetzungen, Thesis, University of Munich (1975).

WERNER MENG

CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

1. Historical Background

The idea of a legally binding Charter of Economic Rights and Duties of States was first suggested in 1971 by President Echeverria of Mexico. The → United Nations Conference on Trade and Development (UNCTAD), in its Resolution 45(III) of May 18, 1972, stressed the urgency of establishing generally accepted norms to systematically govern international economic relations and established a working group of governmental representatives to draw up a draft Charter. The membership in the working group was increased by → United Nations General Assembly Resolution 3037(XXVII) of December 19, 1972 to 40 States. The working group held four sessions between February 1973 and June 1974 which led to agreement on 26 out of 34 articles. The report of the working group (UNCTAD Doc. TD/B/AC. 12/4 and Corr.) was subsequently examined in the UNCTAD Trade and Development Board upon the recommendation of which further informal consultations were held. In November 1974, Mexico officially introduced in the General Assembly's Second Committee a draft Charter which, for those instances where previous agreement had not been possible, was based on draft texts from Less Developed Countries (LDCs). After various amendments proposed by member States of the → Organisation for Economic Co-operation and Development (OECD) were rejected by majority votes, including a proposal to prolong the hasty negotiations "with a view to submitting a completed and generally accepted draft Charter" (UN

Doc. A/9946, at p. 20) the draft Charter was voted on article by article in the Second Committee (ILM, Vol. 14 (1975) p. 263). On December 12, 1974, the General Assembly adopted Resolution 3281(XXIX) on the Charter with 120 States in favour, 6 against (Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom, and the United States), and 10 abstentions (Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain). Whereas Resolution 3201(S-VI) on the "Declaration on the Establishment of a New International Economic Order" and 3202(S-VI) on the "Programme of Action on the Establishment of a New International Economic Order" of May 1, 1974 had previously been adopted by → consensus, notwithstanding reservations registered by developed States (ILM, Vol. 13 (1974) p. 744), the rejection of or abstention from Resolution 3281(XXIX) by 16 States, including 15 major OECD States accounting for over two-thirds of world trade and development aid, demonstrated unequivocal dissent and divergent group attitudes.

2. *Content*

The Charter consists of a → preamble and 34 articles organized into four chapters. The 13 paragraphs in the preamble contain uncontroversial statements with the exception of the fourth and seventh paragraphs which in the Second Committee attracted abstentions and negative votes respectively. The fourth paragraph declares "that it is a fundamental purpose of the present Charter to promote the establishment of the new international economic order based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems" (→ Interdependence; → States, Sovereign Equality). The seventh paragraph adds the promotion of "collective economic security for development, in particular of the developing countries" to the list of the Charter's objectives. Other paragraphs, by aiming at the "acceleration of the economic growth of developing countries with a view to bridging the economic gap between developing and developed countries" (para. 5(e)) and the "strengthening of the economic independence of developing countries" (para. 6(c)), reflect the main focus of the Charter as an instrument of change in favour of LDCs.

Chapter I on "Fundamentals of international economic relations" sets out 15 principles which "shall" govern "economic as well as political and other relations among States". Some of these principles form part of → customary international law but most of them are "simply one of several formulations of what is considered necessary to promote international economic cooperation" (statement by India, UN Doc. A/PV.2316, pp. 3–5). The mandatory "shall" and the principles on "peaceful coexistence", "remedying of injustices which have been brought about by force", and "free access to and from the sea by land-locked countries" met with abstentions or negative votes in the Second Committee (→ Coexistence; → Land-Locked and Geographically Disadvantaged States).

Chapter II on "Economic Rights and Duties of States" comprises 28 articles dealing with: → sovereignty and → foreign investment (Arts. 1, 2, 7 and 16); shared resources (Art. 3); international trade (Arts. 4 to 6, 14, 18, 19, 27 and 28); preferential treatment of LDCs (Arts. 18, 19, 21, 25 and 26); international organizations (Arts. 10 and 11); regional economic groupings (Arts. 12, 21, 23 and 24); east-west economic relations (Arts. 4, 20 and 26); → technology transfer (Art. 13); → foreign aid (Arts. 17, 22 and 25); general obligations to further economic development and cooperation (Arts. 7 to 9, 11 and 17); → disarmament (Art. 15), and → decolonization (Art. 16). Art. 2, which enunciates every State's right to "freely exercise full permanent sovereignty . . . over all its wealth, natural resources and economic activities" and deals with foreign investment, → transnational enterprises, → expropriation and nationalization, compensation and settlement of foreign investment disputes, remained the most controversial provision. The major OECD States dissented or abstained in the voting on Art. 2 *inter alia* on the grounds that it deviates from existing international law, as reflected in General Assembly Resolution 1803(XVII) of December 14, 1962 on "Permanent sovereignty over natural resources", by unduly extending the scope of State sovereignty, thereby casting doubt on the obligation under customary international law to pay "appropriate compensa-

tion" in the event of nationalization, excluding all reference to international law and restricting the freedom of choice of applicable law and forum. That the implications of "permanent sovereignty" remained a matter for dispute among the LDCs also was illustrated by more than 30 abstentions and votes against Art. 3 on cooperation in the "exploitation of natural resources shared by two or more countries" which was opposed by some LDCs as impinging on a State's permanent sovereignty over its natural resources (→ Natural Resources, Sovereignty over).

Around half of the articles in Chapter II deal with various aspects of trade, thus reflecting the predominant interest of LDCs in trade rather than aid as a source of foreign exchange. The objective of "increasing expansion and liberalization of world trade" (Art. 14) is complemented by the call for preferential treatment of LDCs (Arts. 18, 19 and 21) and for stabilization and indexation of commodity prices (Arts. 6 and 28). Among the trade provisions, only those on non-discrimination in international trade (Arts. 4, 20 and 26), promotion and protection of "organizations of primary commodity producers" (Art. 5), commodity agreements (Art. 6) and price indexation in relation to terms of trade (Art. 28) met with abstentions and dissenting votes in the Second Committee.

The two articles of Chapter III on "Common responsibilities towards the international community" incurred abstentions but no negative votes. Art. 29 recognizes and specifies the concept of the "common heritage of mankind" with regard to "the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area" (→ Sea-Bed and Subsoil). Art. 30 sets out regulations for "the protection, preservation and enhancement of the environment" which is recognized to be "the responsibility of all States".

Chapter IV contains "Final provisions" dealing with the duty of all States "to contribute to the balanced expansion of the world economy" (Art. 31) and to refrain from political and → economic coercion of other States (Art. 32). Pursuant to Art. 33, "the provisions of the Charter are interrelated and each provision should be construed in the context of the other provisions". The "systematic and comprehensive consideration of the implementation of the Charter" is to be an agenda item of the General Assembly every five years from its 30th session (1979) onwards (Art. 34).

3. Legal Effects of the Charter

The legal effects of General Assembly resolutions depend on the competence of the General Assembly, the intentions of the declarant States, the degree of consent and the contents and actual observance of the rules proclaimed. The General Assembly's lack of legislative competences and the presumption that its resolutions are legally non-binding recommendations, with the exception of certain binding resolutions on organizational issues, have been recognized in findings by the → International Court of Justice (e.g. ICJ Reports (1971) p. 50; → South West Africa/Namibia (Advisory Opinions and Judgments)) and in "the teachings of the most highly qualified publicists of the various nations" (→ International Organizations, Resolutions). Such resolutions may nevertheless be persuasive evidence of the existence and interpretation of rules of international law, and can contribute to the formation of new rules, influence the practice of States and organizations, and legitimate their claims and justifications in international economic relations.

The legally non-binding nature of the Charter has been recognized by most legal commentators and has also been confirmed in international → arbitration awards (e.g. ILM, Vol. 17 (1978) p. 29 (→ Libya-Oil Companies Arbitration); Vol. 21 (1982) p. 1033). While this does not preclude individual Charter provisions having legal effects, the drafting history and in particular the voting circumstances behind the Charter clearly indicate a lack of *opinio juris communis* at least on the part of the dissenters and abstainers, which included the main addressees of many of the Charter demands for trade reforms and development aids.

As an expression of *opinio juris*, majority resolutions can, however, be evidence of a derogation from existing law. Thus Art. 2 can be construed as evidencing a majoritarian rejection of the traditional customary law obligation to pay "prompt, full and effective" compensation to → aliens whose property has been expropriated, even if the lack of consent by all the major groups of affected States does not allow Art. 2 to be

considered as declaratory of new customary law (→ Aliens, Property). The evidentiary value of many Charter provisions does, however, appear doubtful in view of recent State practice and arbitration awards (e.g. ILM, Vol. 17 (1978) p 30; Vol. 20 (1981) p. 53; Vol. 21 (1982) p. 1033) which contradict the assertion that "full permanent sovereignty" (Art. 2) permits governments to unilaterally modify internationalized contracts at will or that Art. 2 has led to a derogation from the international law obligation to grant "appropriate compensation" to aliens whose property has been expropriated. While the *quid pro quo* considerations underlying the ca. 200 post-war investment promotion agreements with property protection clauses often similar to the "Hull rule" make it difficult to evaluate this treaty practice as evidencing a general *opinio juris* and generating customary law, the necessary accommodation of a responsibly defined principle of "full permanent sovereignty" to the principles of → *pacta sunt servanda*, → good faith and "appropriate compensation" requires a more equitable balancing of interests than is proclaimed in Art. 2 in order to become acceptable to all major affected States.

4. *Evaluation*

An appraisal of the Charter depends on the evaluation criteria applied. As the "fundamental purpose of the Charter" is declared in the preamble to be the promotion of a "New International Economic Order" (see → International Economic Order), the Charter can be examined in the first place in terms of the dependence of any "order" on a consistent system of objectives, legal principles, instruments, institutions and conflict-solving procedures. Since the function of international rules is to coordinate and support national legal and economic orders, the requisite compatibility of the Charter provisions with the "constitutional principles" of international and national law (e.g. State sovereignty, human rights) sets specific legal standards. The worldwide need for increasing economic efficiency further calls for an economic analysis of the Charter.

From the "world order" policy point of view, the Charter contains serious omissions and an unbalanced emphasis on rights for LDCs and duties for developed countries: Important problem areas such as the international monetary order, restrictive business practices or the supply of food have scarcely been dealt with. The proposed variations of the basic legal principles of freedom, equality and solidarity do not add up to a balanced synthesis. "Permanent sovereignty" is stated too absolutely (e.g. Art. 2) without accommodation to the applicable international law or to the principles of "interdependence" and "collective economic security" (preamble) which recognize that numerous transnational problems can no longer be satisfactorily solved by individual States without international cooperation. The principles of "mutual and equitable benefit" (Chap. I) and the necessity to take into account other countries' interests (e.g. Arts. 12 and 24) have hardly been translated into concrete reciprocal rights (→ Reciprocity), nor have the duties and liabilities arising out of disadvantageous external effects of national policies been made clear. The freedom of association of States is recognized for "primary commodity producers" but not for consumer countries which are also to be prohibited from protecting themselves against producer cartels (Art. 5). For the stipulated obligations to grant development aid (e.g. Art. 22) or to cooperate in the control of transnational corporations (Art. 2) to become legally acceptable they would have to be supplemented by → guarantees for the proper use of aid and for due process. The Charter also pays little or no attention to the legal steering instruments, institutional reforms and conflict-solving procedures necessary to achieve the Charter's objectives. Being confined to rights and duties of States, the Charter provides no directly applicable rights and obligations for enterprises and individuals even though these are the main actors in international trade, finance and investment, thereby neglecting the fact that the ultimate objective of the international economy is the well-being not of governments but of the greatest possible number of individuals.

From a legal point of view, the Charter's emphasis on sovereign equality and its call for rules applicable irrespective of the divergent national economic and political systems seems to reflect the decentralized structure of the international system and the need for a common denominator of universally applicable rules. Its call for preferential treatment of LDCs and for "common

responsibilities" (Arts. 29 and 30) mirrors trends in international economic law (→ Economic Law, International) as well as the necessity of supplementing the classical principles of freedom and formal equality by principles of substantive equality and solidarity in order to make market competition workable and socially acceptable. Universal acceptability of the Charter would, however, require greater compliance with the principle of "interest realization", i.e. the essential interests of all major groups of States must be taken into account. In its present form, various Charter provisions are neither compatible with existing international law nor acceptable *de lege ferenda*.

From an economic perspective, the Charter's commitment to the "liberalization of trade" (Art. 15) seems to imply a recognition of the beneficial effects of liberal trade (→ World Trade, Principles) and the belief that an efficient division of labour between more than 170 States and over 10 000 transnational corporations is not achievable without self-regulatory market mechanisms as a vehicle for information processing and continuous coordination and adjustment. The fact that various Charter proposals do not appear to be "first best" policy measures in terms of economic theory confirms again that the Charter can hardly be considered a suitable basis "to evolve a substantially improved system of international economic relations". The envisaged periodical "systematic and comprehensive consideration of the implementation of the Charter" will therefore have to focus on "improvements and additions which might become necessary" (Art. 34).

Charter of Economic Rights and Duties of States, December 12, 1974, UN GA Res. 3281(XXIX); ILM, Vol. 14 (1975) 251–265.

J. CASTAÑEDA, La Charte des droits et devoirs économiques des Etats, AFDI, Vol. 20 (1974) 31–56.

J.C. VANZANT, Charter of Economic Rights and Duties of States, Georgia Journal of International and Comparative Law, Vol. 4 (1974) 441–462.

M. VIRALLY, La Charte des droits et devoirs économiques des Etats, AFDI, Vol. 20 (1974) 57–77.

D. YIANNOPOULOS, Premiers efforts pour une Charte des droits et devoirs économiques des Etats, RevBelge, Vol. 10 (1974) 508–538.

C.N. BROWER and J.B. TEPE, The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?, IntLawyer, Vol. 9 (1975) 295–318.

R.P. CHANDRATSEKHARA, The Charter of Economic Rights and Duties of States, Indian JIL, Vol. 15 (1975) 351–370.

D. COLARD, La Charte des droits et devoirs économiques, Etudes internationales, Vol. 6 (1975) 439–461.

G. FEUER, Réflexions sur la Charte des droits et devoirs économiques des Etats, RGDIP, Vol. 79 (1975) 273–320.

G.W. HAIGHT, The New International Economic Order and the Charter of Economic Rights and Duties of States, IntLawyer, Vol. 9 (1975) 591–604.

A.G. ROBLES, The Charter of Economic Rights and Duties of States, ProcASIL, Vol. 69 (1975) 225–246.

I. SEIDL-HOHENVELDERN, Die "Charta" der wirtschaftlichen Rechte und Pflichten der Staaten, Recht der Internationalen Wirtschaft, Vol. 21 (1975) 237–239.

S.A. TIEWUL, The U.N. Charter of Economic Rights and Duties of States, Journal of International Law and Economics, Vol. 10 (1975) 645–688.

C.N. BROWER, The Charter of Economic Rights and Duties of States and the American Constitutional Tradition, IntLawyer, Vol. 10 (1976) 701–709.

R.R. FERRER (ed.), Exégesis de la Charta de derechos y deberes económicos de los Estados (1976).

A. ROZENTAL, The Charter of Economic Rights and Duties of States and the New International Economic Order, Virginia Journal of International Law, Vol. 16 (1976) 309–322.

C. TOMUSCHAT, Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten, ZaöRV, Vol. 36 (1976) 444–491.

K. WALDHEIM et al., Justice économique internationale (1976).

H. GROS ESPIELL, The Charter of Economic Rights and Duties of States as a Driving Force for the New International Economic Order, Labour and Society (1977) 183–190.

K. WELLENS, Handvest van Economische Rechten en Pflichten van Staten (1977).

E.-U. PETERSMANN, The New International Economic Order: Principles, Politics and International Law, in: R.St. Macdonald (ed.), The International Law and Policy of Human Welfare (1978) 449–469.

R.F. MEAGHER, An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States (1979).

A. AKINSANYA, The U.N. Charter of Economic Rights and Duties of States, RevEgypt, Vol. 36 (1980) 51–100.

K. HOSSAIN (ed.), Legal Aspects of the New International Economic Order (1980).

R. DOLZER, New Foundations of the Law of Expropriation of Alien Property, AJIL, Vol. 75 (1981) 553–589.

R.-J. DUPUY (ed.), The New International Economic Order, Workshop, Hague Academy of International Law (1981).

P. VERLOREN VAN THEMAAT, The Changing Structure of International Economic Law (1981).

International Law Association, Report of the 59th Conference 1980 (1982) 263–311.

E.-U. PETERSMANN, International Economic Theory and International Economic Law, in: R.St. Macdonald (ed.), The Structure and Process of International Law (1983) 227–262.

ERNST-U. PETERSMANN

CHEQUES, UNIFORM LAWS *see* Bills of Exchange and Cheques, Uniform Laws

CHILEAN COPPER NATIONALIZATION, REVIEW BY COURTS OF THIRD STATES

1. The Facts

Copper mining in Chile had been in the hands of American companies since the beginning of this century. In 1964 the Chilean authorities took a first step towards recovering control by acquiring majority holdings in the mining companies, and finally in 1971 the Allende Government expropriated and nationalized all foreign property (→ Expropriation and Nationalization).

The law of July 15, 1971 which carried out this measure accepted the principle of compensation but laid down restrictive conditions for assessing it. It provided, in particular, that the compensation to be paid to the expropriated companies should be reduced by the amount of excess profits they had obtained through their operations. This amount was to be fixed by the Head of State. When these provisions were applied in the case of one of the companies concerned, the Braden Copper Corporation, it was not only refused any compensation but was held to owe the Chilean State a sum of about $300 million.

Refusing to accept this, the Braden Copper Corporation, after exhausting the different Chilean procedures of appeal (→ Local Remedies, Exhaustion of), brought actions in the courts of Paris and Hamburg to obtain recognition of its rights over Chilean copper imported by French and German companies.

In France, the Corporation acting in its own name obtained an order attaching the proceeds of the sale of copper delivered to two French importers. In Germany, the Corporation was represented by its Chilean subsidiary, Sociedad Minera El Teniente (SMETSA), which obtained the sequestration of ore intended for a German processing company. The importers and the Chilean producer, Corporación del Cobre (CODELCO), having filed opposition, the Braden Copper Corporation brought actions in the Paris *Tribunal de grande instance* and the Hamburg *Landgericht*, alleging that since no compensation had been paid, the Chilean nationalization measure could not strip the legitimate owner of its rights over the copper mined in its former mines. Once again the courts of a third State were asked to determine the extraterritorial effects of nationalization, the legality of which was disputed (→ International Law and Municipal Law: Conflicts and Their Review by Third States). The actions raised two main questions: The first concerns the admissibility of such actions and the second is whether a domestic court has jurisdiction to settle a dispute which has only a tenuous link with the law of the forum.

2. The Admissibility of the Actions

To counter the measures taken against it, CODELCO argued that it was a central organ of the Chilean State, endowed with the prerogatives of public power, and that it could therefore invoke immunity from jurisdiction and execution under the rules of international law on State → sovereignty (→ State Immunity). The Paris court rejected this argument, noting the existence of contradictions in the evidence relating to the exact nature of CODELCO (national institution formally distinct from the central power of the State, commercial activity of a private nature but action "in the name and on behalf of the Chilean State for the management and development of the nationalized domain"). The court rejected the plea of immunity in what was only an interim and provisional examination of the matter. The Hamburg court also rejected the plea of immunity, thereby affirming its jurisdiction to decide the matter. In fact it based its jurisdiction more on the → act of State doctrine than on that of immunity, although the two questions were not clearly separated.

CODELCO argued that the court had no jurisdiction to judge acts of State. The court replied that such lack of jurisdiction is limited to cases where the foreign State is "sued directly for an act

which by its nature is to be considered a sovereign act". This was not the case here, because the defendant was an enterprise distinct from the State and the acts by which State monopolies "participate in economic life are not considered sovereign acts" (Hamburg Decision of March 13, 1974).

Apart from these questions about immunity from jurisdiction, the Hamburg court ruled upon the capacity of SMETSA to bring an action before the court. Following the nationalization SMETSA was dissolved and replaced by another company with the same name. To the question whether the company still had the capacity to sue, the court replied in the affirmative, following the theory of the "split company" according to which a corporation, although terminated in the expropriating State, is recognized as continuing abroad.

3. *The Decisions relating to the Main Issue*

The consideration of the main issue raised difficult problems for the court since, in addition to its very pronounced political character, the dispute over the validity of the Chilean nationalization measure brought directly into play the complex relationships between → international law and municipal law.

The French and the German courts followed the same line of reasoning in recognizing that they have no jurisdiction to enforce international law and both considered the case from the point of view of a possible violation of internal public policy (→ Ordre public (Public Order)).

The refusal to rule upon the validity under international law of the Chilean nationalization was implicit in the French decision but plainly stated by the German court. It relied upon the "internationally recognized principle of territoriality", according to which "an expropriation effected in the course of nationalization or socialization measures remains an internal matter of the foreign State as long as it does not cover property located outside its boundaries" and therefore "must in principle be recognized as formally valid". The court also stated that in "modern international law there is no generally recognized principle that the foreign court is obligated under international law to consider as null and void from the very start a foreign act of sovereignty which is in violation of international law".

To be recognized by foreign courts, an expropriation must comply with the requirements of internal public policy. A foreign court may accordingly refuse to give effect to a nationalization carried out in a discriminatory manner or unaccompanied by reasonable compensation. This last point was especially difficult since it was the first time that the theory of excess profits had been invoked in international practice. Consequently the Paris court proceeded with care: Although it admitted "the principle of a claim in favour of Braden", it appointed an expert with the mission, *inter alia*, "to appraise the conflicting affirmations of the parties as to the existence of an equitable indemnity". At the same time the court ordered the cancellation of the garnishments previously ordered on the condition that CODELCO keep for itself the sums granished and produce them in the event that it should be judged as being the debtor. The court therefore gave only a provisional answer to the main question and did not settle the dispute.

The decision of the German court was more clear-cut, at least as to the underlying principles, since it lifted the temporary measures which had been taken against CODELCO. The court considered that the Chilean nationalization was defective and therefore violated the principles of German law. First, the nationalization was not accompanied by reasonable compensation since, unlike the French court, the Hamburg court was doubtful about the validity of a system which led in fact to a "negative indemnification". Secondly, it was carried out in a discriminatory manner, since it was "directed specifically against foreigners". Thirdly, the nationalization violated "the principles of contractual legality which govern every legal system". Finally, it led to a miscarriage of justice since the Chilean court before which Braden had brought its case decided that it had no jurisdiction to question the amount of excess profits fixed in a discretionary manner by the Head of State. This severe condemnation remained, however, without practical consequences. The Hamburg court considered that it could refuse to apply a foreign law "only if the German legal system is substantially affected by the violation of public policy and thus a close

relationship between what has been done and German interests is created". The German defendant in the case had only to carry out a processing contract and had no ownership relationship with the copper delivered to it. In the absence of significant contacts with the forum, the court considered that it could not refuse to apply the Chilean nationalization law; the attachment order was therefore cancelled.

The American companies were compensated out of court after the fall of the Allende Government (Agreements of July 24 and October 24, 1974), thus ending all pending legal proceedings.

Tribunal de grande instance de Paris, Corporación del Cobre c. Société Braden Copper Corporation et Société le Groupement d'Importation des Métaux, 29 novembre 1972, Clunet, Vol. 100 (1973) 227–238; [English translation:] ILM, Vol. 12 (1973) 182–189.

Landgericht Hamburg, Chile-Kupfer-Streit, Urteil vom 22.1.1973, Außenwirtschaftsdienst des Betriebs-Beraters (AWD), Vol. 19 (1973) 163–165; Urteil vom 13.3.1974, AWD, Vol. 20 (1974) 410–413; [English translation:] ILM, Vol. 12 (1973) 251–289; ILM, Vol. 13 (1974) 1115–1120.

P. BEHRENS, Rechtsfragen im Chilenischen Kupferstreit, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 37 (1973) 394–435.

F. ORREGO-VICUÑA, Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile, AJIL, Vol. 67 (1973) 711–727.

I. SEIDL-HOHENVELDERN, Chilean Copper Nationalization Cases before German Courts, AJIL, Vol. 69 (1975) 110–119.

PROSPER WEIL
PATRICK RAMBAUD

CLEARING AGREEMENTS

1. Notion

The clearing agreement is a device for facilitating the collective settlement of pecuniary claims between creditors and debtors in different currency areas, without resort to the use of foreign exchange reserves. The typical clearing agreement is bipartite. It generally provides that debtors need no longer fulfil their liabilities *vis-à-vis* the foreign creditor in the latter's currency, but may pay the counter-value in their national currency to a central clearing office. Similarly, the debtors in the other signatory State make payments in their national currency to the central clearing office in the amount of their liabilities to creditors in the first country (→ Monetary Law, International; → World Trade, Principles). From the funds thus received, each central clearing office satisfies the creditors within its own jurisdiction by remitting to those creditors the amounts in domestic currency equivalent to what the debtors have paid to their own central clearing office. The functions of the central clearing office are usually attributed to the national central bank. The local currency payments to it are credited to a general account maintained in favour of the central bank of the other country.

Clearing operations may be carried out either in one currency at one of the central banks only, or may be effected in two separate accounts of which each central bank maintains one in its own currency. For the conversion of the two currencies, an agreed exchange rate is used which is either fixed in advance or determined according to the official foreign exchange quotations. After discharging the claims of creditors with the funds paid by debtors, the surplus, if any, must be turned over to the clearing bank of the other country for the settling of the balance, generally in gold. Yet, frequently payment is avoided by additional exports of the debtor country, by credit transactions, or by other suitable means. Ordinarily, only debts resulting from imports (commercial debts) are covered by the clearing agreement. Notwithstanding exchange controls existing in one or both of the countries, such an arrangement provides payment facilities enabling the export and import requirements of the signatory States to be satisfied to some extent, without recourse to exchange reserves except for the offsetting of an unsettled remainder.

2. Emergence and Evolution

In the wake of the world economic crisis of the 1930s, free international trade and payments suffered far-reaching restrictions and even suspension in European countries, with the exception of Switzerland. The purpose of these barriers to cross-border monetary movements was to maintain each national balance of payments concerned in a state of equilibrium. At first, such restrictions were introduced by several States as unilateral

measures. Clearing agreements were an improvement over such measures of exchange control, as they facilitated the transfer of funds from one country to another and thus permitted the return to an, albeit limited, international trade without reducing scarce exchange reserves. This was achieved by avoiding the transfer of means of payment across the currency frontier and eliminating transactions in and utilization of foreign exchange.

It seems that the first clearing treaty was concluded in 1931 between Czechoslovakia and Hungary. Thereafter and up to the end of World War II, such arrangements were used on a large scale, in particular by Germany and Switzerland, but also, for instance, by the United Kingdom in its dealings with Italy, Romania, Spain and Turkey. Switzerland resorted to the clearing system in order to provide payments facilities for its exports as well as its imports, with a view to reducing the inconvenience ensuing from exchange controls elsewhere. Germany's initiatives were motivated by the large percentage of its foreign trade that was subject to restrictions as well as by the consequences of having to pay → reparations (→ Dawes Plan; → Young Plan).

The German measures, which a → League of Nations report described as a completely equipped model of currency control, were copied by a large number of European States. The "Proposals for an International Clearing Union" (British Command Paper, Cmd 6437, also known as the Keynes Report; → Bretton Woods Conference (1944)), submitted in 1943 by the British Government in the negotiations preceding the setting-up of the → International Monetary Fund, conceived a multilateral clearing agreement as the legal basis of the post-war international monetary system. The conjunction of an offsetting mechanism and credit facilities obtainable from settlements accounts was designed to make international liquidity available in order to promote world trade. The project was not implemented.

Nonetheless, the European Payments Union (EPU; → European Monetary Cooperation), established under an agreement of September 19, 1950, was derived from ideas which had inspired the International Clearing Union suggested by Keynes on a much larger scale in 1943. The member States of the Organisation for European Economic Co-operation (OEEC), by which the EPU was operated, participated in it from 1950–1958. The EPU provided for the full and automatic settling of all bilateral surpluses and deficits incurred by each participating State with the others, whether for current or for capital transactions. Compensation took place once a month on the basis of a uniform unit of account, with the → Bank for International Settlements (BIS) acting as agent for the OEEC. In that function, the BIS determined the net deficit or surplus incurred by each participant during the month. This method of clearing was coupled with the automatic granting of credits within specified limits which were in the nature of drawing rights on the EPU Fund. As a result, all Western European currencies became transferable with each other. Incentives for such a multilateral system of payments had decreased by the end of 1958 when most OEEC members returned to external convertibility of their currencies with the United States dollar, which entailed the replacement of the EPU by the European Monetary Agreement (EMA) of August 5, 1955. Until its extinction in 1972, the EMA offered settlements for balances not cleared through the market through which, however, under the prevailing régime of convertibility most balances could be cleared at more advantageous rates. Like its predecessor, the EMA should be seen as a method of clearing, because it also provided for a multilateral system of settlements.

The currencies of members of the → Council for Mutual Economic Assistance (Comecon) not being convertible, the transfer of funds among them requires a bilateral or multilateral scheme of settlement by means of offsetting. Clearing was operated under bipartite payments agreements until 1963, when Comecon members implemented multilateral clearing by resorting to the International Bank for Economic Cooperation in Moscow as central clearing office. The "convertible ruble" serves as unit of account for the offsetting of claims and liabilities, with commercial and non-commercial payments being converted at different rates. The remaining balances may be cleared only by additional deliveries of goods, so that the scheme has been appropriately classified as one of "commodity convertibility".

Similarly, payments between Comecon mem-

bers and → developing States are generally carried out by recourse to clearing arrangements. Given the frequently negative trade balances incurred by these nations *vis-à-vis* Comecon members, it merits note that, for example, the agreement between Comecon and Iraq provides for the settlement of balances in convertible currencies and that the agreement between Laos and the German Democratic Republic requires the delivery of raw materials at world market prices.

Bilateral clearing agreements are widely in use among developing nations. Multilateral conventions have also been concluded among States of comparable economic structure (e.g. the Central American Clearing House under an agreement of July 28, 1961, the multilateral clearing system among members of the Latin American Free Trade Association under an instrument signed on September 22, 1965 (→ Latin American Economic Cooperation), the West African Clearing House under an agreement signed on March 14, 1975 (→ Economic Community of West African States), and the Asian Clearing Union).

Where exchange control by international cooperation is deemed necessary, the trend from bipartite to multilateral arrangements has been significant since World War II. This takes care of an essential disadvantage of bilateral clearing, namely that, in principle, the balance between the two contracting States must be at any given time mutually and entirely settled. With a view to facilitating further expansion of trade relations and encouraging flexibility, payments agreements have been concluded which provide for drawing rights on clearing accounts. The settling of balances can be eased if a State under exchange controls lifts its restrictions to allow a limited outflow of money to the other signatory State for the payment of debts. Transfer rather than payment being the real issue, the term "transfer agreement" would indeed seem more appropriate.

Finally, in a growing number of instruments, the currency of a contracting party or a third country is replaced by a contractually defined unit of account in terms of which the settlement is carried out. The decline in the number of bipartite payments agreements with and without clearing mechanisms (by 46 per cent from 322 to 174 between 1964 and 1978) demonstrates the declining weight of exchange control in international trade. Since 1975 efforts tending to bring about the demise of clearing mechanisms have lessened in the wake of multifold balance of payments problems suffered by many countries.

3. Scope of the System

The range of claims coming within the purview of a clearing agreement depends upon the economic circumstances of the States participating and/or upon the political aims pursued. At any rate, the main pillar of the clearing scheme is provided by the claims arising from the traffic in goods between the signatories concerned. Its volume as a rule is contingent on the export capacity of the contracting party having the least foreign exchange. Initially, clearing agreements rested on the principle of pure commodity clearing, the only claims qualifying for inclusion in the system being those arising from the supply of goods actually originating in the one or the other of the two participants. Under the so-called total clearing system, on the other hand, all payments, whatever their source, are channelled through the clearing machinery.

Between commodity clearing at one extreme and total clearing at the other there are numerous intermediate variations. Mixed clearing schemes have been used which, while not including all payments, have made provision for certain categories of payment in addition to those relating to deliveries of goods, such as payments in respect of transit traffic, services, insurance, travel, licence fees, patents, copyright and other entitlements ensuing from intellectual property. Payments of that kind are generally subordinated to the discharge of claims from delivery of merchandise, at least under total clearing or mixed clearing arrangements. Finally, under a comprehensive system of exchange control, payments for imports may be credited to blocked accounts in the name of the foreign exporter who may be prohibited, at least for a time, from freely drawing on such accounts.

The agreements define their territorial scope as well. Accordingly, a regular feature of the clearing obligation consists in the requirement that the creditor and the debtor must be domiciled in the respective territories of the signatory States. The limitation applies as well to legal entities, in par-

ticular corporations, having the required factual and legal links to those territories. Frequent are provisions designed to prevent the avoidance of clearing obligations. Such evasion may be prohibited, for example, by retaining within the purview of the bilateral offsetting scheme the payment for merchandise originating in one signatory State but sold to the resident of another one in the territory of a non-signatory.

4. *Special Legal Issues*

Internationally, a clearing agreement establishes a system for the collective settlement of claims originating in the currency areas of the signatories. "The Articles of Agreement of the International Monetary Fund . . . leave the member States' sovereign rights in regard to exchange control to a substantial extent intact" (Mann, 1982, p. 522). Indeed, though clearing agreements stipulate payments restrictions, they need not be incompatible with the IMF Articles of Agreement. True, Art. I(iv) aims at the elimination of foreign exchange restrictions which hamper the growth of world trade, a canon implemented by Art. VIII, section 2(a), which precludes the imposition of restrictions on current payments; but convenient exemptions from these statements of principle are also included. Thus clearing agreements may be authorized by the IMF in order to protect a particular currency if it finds that a general scarcity of that currency is developing (Art. VII, sections 2 and 3). Moreover, IMF members entitled to invoke Art. XIV (at present close to 90 out of a total of less than 150 members) still maintain restrictions by virtue of that provision, and even the remaining 54 members may receive approval to enact fresh restrictions. Accordingly, there is room for further international regulation, not only multilaterally, but also by means of bilateral clearing agreements. As to capital movements, however, Art. VI, section 3 specifies that members may exercise such controls as are necessary to regulate them (→ Capital Movements, International Regulation).

Under municipal law, the clearing agreement entails the obligation of the debtor, enforceable if need be by administrative coercion, to make payment to the central clearing office in the amount of the countervalue in national currency corresponding to the creditor's claim. The commitment *vis-à-vis* the central clearing office remains unaffected if the liability has been otherwise settled. Generally, the obligation is enforceable under penal law as well. Like exchange control as a whole, the implementation of a clearing agreement is primarily a matter of public law. Yet due to the abolition of free exchange market operations and unrestricted payments facilities, the insertion of a central clearing office between creditor and debtor entails a considerable number of private law issues. Clearing agreements therefore usually contain provisions addressed to private persons who effect payments for the benefit of recipients in the other contracting State. In particular, the agreement should stipulate the moment at which payment to the creditor is completed and should specify the allocation of risk between the parties in cases of delayed discharge owing to the time needed for offsetting. In the absence of such an understanding, it stands to reason that performance can be considered to have been made only when the money is made available to the creditor by the clearing office by remitting to him the countervalue in his national currency. By providing that the debt is discharged through the debtor's payment to his clearing office, a number of agreements thus exclude his default *vis-à-vis* the creditor as from the time of such payment. Attachment, assignment and offsetting are considered unobjectionable under a clearing treaty only on condition that none of these will alter the debtor's obligation to make payment to the clearing bank, since otherwise the funds available for the clearing would be depleted. In principle, the garnishment of payments is not possible as long as the central clearing office continues to be entitled to the amount or amounts in question. However, at least in the United Kingdom there is judicial authority that a credit balance standing in the books of a bipartite clearing office in London was "property, rights or interests" of the foreign exporter for whose benefit the amount at issue had been remitted (Mann, 1982, p. 501).

Agreements between the parties which are inconsistent with the clearing agreement are void at least to the extent that they are in violation of that agreement. Provisions of clearing law are compulsory as the judiciary has to apply them even if the transaction generally is subject to

another law which may well have been chosen by the parties. Such prevalence at any rate is due to compensatory arrangements concluded by the territorially pertinent State of residence or domicile but also to instruments entered into by two foreign States if the law of one of them is the proper law of the transaction and compatible with public order. Account has to be taken of Art. VIII, section 2(b) of the IMF Articles of Agreement as far as its members are concerned. Though the exact significance of that provision has remained in debate, so far its authoritative interpretation by the Fund on June 14, 1949, and the opinion of the majority of writers, indicate that clearing agreements among IMF members may not be disregarded by national courts or administrative agencies on the ground that they are contrary to the public order of the forum or that the agreement is not part of the applicable law (Mann, 1982, pp. 372–400; → Ordre public (Public Order)).

Before World War II, settlements under clearing agreements were mostly carried out in the currencies of the signatory States. In view of relatively frequent fluctuations in exchange rates, the absence of value maintenance considerably hampered the functioning of the settlement schemes. Accordingly, after the war, resort to a stable third currency (generally the United States dollar) as the clearing currency became a widespread feature of intergovernmental arrangements. However, if they remained faithful to the currencies of the signatory States as measurements of clearing, protection against modifications of their parity was sought by a gold clause or a third currency clause establishing the obligation to revalue claims and liabilities on the basis of the (then stable) official gold price or by reference to a stable third currency as money of account. Within the system of fixed exchange rates provided for in the original IMF Articles of Agreement, recourse to a third currency did not offer protection against the latter's changes of parity, as such changes did not entail at the same time a formal revaluation or devaluation of the signatories' currencies. These, however, were as a rule the prerequisite for the unleashing of the protective device. After the demise of the system established at the Bretton Woods Conference and its fixed exchange rates, the insertion of a contractually defined unit of account would seem advisable in drafting clearing agreements. This may be done by making recourse to a currency basket administered and adapted from time to time by intergovernmental organizations, such as the Special Drawing Rights of the IMF or the ECU in the European Monetary System or by reference to a unit of account such as the Asian Monetary Unit created in the framework of the Asian Clearing Union.

F.A. MANN, Money in Public International Law, RdC, Vol. 96 (1959 I) 7–128.
J. GOLD, The International Monetary Fund and Private Business Transactions (1965).
V. KRULJ, De l'interprétation des clauses monétaires dans les accords de "clearing", Revue critique du droit international privé, Vol. 59 (1970) 401–425.
D. CARREAU, T. FLORY and P. JUILLARD, Droit international économique (2nd ed. 1980).
K.W. DAM, The Rules of the Game (1982).
F.A. MANN, The Legal Aspect of Money (4th ed. 1982).

HUGO J. HAHN

COERCION *see* Economic Coercion; Use of Force

COMMERCIAL ARBITRATION

1. Definition

International commercial → arbitration is a form of dispute settlement by which the parties grant to one or more neutral third parties the power to decide a commercial dispute. It should be distinguished from → conciliation and mediation, in which the solution suggested by the conciliator has no legally binding effect until it is agreed to by the parties. By contrast, the parties to an arbitration are bound by the decision of the arbitrator once, by way of contract, they grant him the necessary decision-making powers. Arbitration also differs from litigation, where the decision-making process does not derive from the agreement of the parties, but rather is an obligatory means of dispute settlement commenced by one party before a national court.

International commercial arbitration refers to the determination of disputes of a commercial nature falling within the scope of private law, and not arbitration between States exercising their sovereign powers. Commercial arbitration is in-

ternational not because sovereign nations participate, but because the parties, the facts or the legal effects of the dispute extend beyond a single jurisdiction (→ Private International Law).

Arbitration is often chosen because it permits parties to avoid national courts and to substitute in their stead procedures and persons better adapted to settling the type of disputes likely to arise in an international setting. In order to minimize costs and to maximize the neutrality, privacy, and efficacy of arbitration, parties can generally determine such variables as the venue, the applicable law, the qualifications of the arbitrator, the language to be used and the nature of the proceedings.

2. *International Treaties*

From the initial agreement to arbitrate to the ultimate enforcement of an award, international commercial arbitration may take place and produce effects in various national jurisdictions and is, therefore, potentially subject to numerous and very different national legal systems. Fortunately, many nations have taken steps towards the creation of a uniform international regulatory framework for arbitration. Two international agreements signed in Geneva, the Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927, sought to bring some order to an otherwise chaotic situation. However, these → treaties proved inadequate and have been denounced by those States which have adhered to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of June 10, 1958 (UNTS, Vol. 330, p. 38). The latter has been adhered to by over 55 States, among them the world's major trading nations. The New York Convention establishes uniform and exclusive grounds upon which national courts may deny the enforcement of foreign arbitration awards (→ Recognition and Execution of Foreign Judgments and Arbitral Awards).

The complementary European Convention on International Commercial Arbitration of April 21, 1961 (UNTS, Vol. 484, p. 364) creates uniform rules for the regulation of the arbitration agreement and subsequent proceedings. It also delimits which national courts are competent to set aside an award, upon which grounds, and the effects that this will produce when enforcement is sought in a co-signatory nation. The European Convention, meant to facilitate commercial arbitration between Eastern and Western European nations, has been adhered to by only a limited number of countries.

3. *Current Legal Situation*

(*a*) *Arbitration agreement*

Through the arbitration agreement the parties commit themselves to arbitration according to the agreement's terms and waive their rights to bring the dispute before a national court (→ Waiver). Agreements to arbitrate may be reached either before or after a dispute has arisen; most frequently, parties insert an → arbitration clause in their commercial contract and thereby agree to submit future disputes arising from the contract to arbitration. Both the New York and European Conventions recognize the validity of agreements in writing (including an exchange of letters or telegrams), between competent parties, to settle those disputes which are capable of being arbitrated. Questions of competence and arbitrability continue to be regulated by national law. The arbitration agreement may provide for either *ad hoc* or institutional arbitration. In *ad hoc* arbitration the parties retain nearly complete control over the arbitration procedure. In the case of institutional arbitration, however, the parties submit their dispute to the administration and procedural rules of a specific institution. These institutions have been established by private businessmen (e.g. → International Chamber of Commerce), professional and commercial organizations, national governments, as well as by international treaties.

(*b*) *Applicable law*

The parties usually agree on the law applicable to their dispute. However, a distinction must be made between the substantive law applicable to the dispute and that which is applicable to the arbitration itself. Most nations recognize the parties' right to choose the applicable substantive law as long as it has some reasonable connection with the contract and its application does not contravene public policy. The parties may agree upon a particular national law or, instead, may grant

the arbitrator the power to decide on the basis of equity or → general principles of law. When the parties fail to choose the applicable substantive law, the arbitrator must determine the proper law under the applicable rules of conflict of laws.

Traditionally, the recognition and enforcement of foreign awards depended on the conformity of the arbitration procedure with the dictates of the law of the jurisdiction where the arbitration took place (see → Sapphire Arbitration). However, according to Art. V(1)(d) of the New York Convention, the arbitration procedure need only conform to that which has been agreed upon by the parties; failing an agreement, the procedural law of the place of the arbitration will apply. The prevailing view is that this permits the parties to avoid the procedural dictates of any national law so long as the award complies with the other requirements of the Convention.

(c) *Enforcement*

When the losing party fails to comply with the terms of an arbitration award, the winning party must petition a national court to enforce the award. Though usually a single procedure, some nations require two separate steps: the assimilation of a foreign award to that of a domestic court judgment (recognition), and the use of the coercive powers of the State to compel the losing party to satisfy the petitioning party's award (enforcement).

The New York Convention lays out the only grounds upon which a court of a signatory nation may refuse recognition and enforcement. These include invalidity of the arbitration agreement, inability of a party to present its case, award on issues not submitted by the parties to the arbitrator's jurisdiction, appointment of the arbitrator or the arbitral procedure not in accordance with the parties' agreement, award not yet binding on the parties or set aside in the country where it was rendered and contravention of the public policy of the enforcing country. Parties seeking enforcement of awards in countries which have not adhered to the New York Convention or another relevant treaty will be subject to the peculiarities of that country's procedural law.

4. *Special Legal Problems*

(a) *Nationality of the award*

Before considering a petition for enforcement of an arbitration award, a national court will usually determine its national status. If the award is considered domestic, it will be subject to the requirements of the internal arbitration law. If non-domestic, the award will be given a national status and, depending on that status, may be subject to a particular treaty or to the forum's procedural law. Unfortunately, States use different criteria in determining the award's nationality. Some determine the award's nationality based on where the arbitration took place while others look to the law regulating the arbitration procedure. This lack of uniformity has been the source of considerable confusion and contradiction. So far, attempts to unify these criteria or to establish a category of "international awards" have proved unsuccessful.

(b) *Sovereign immunity*

The post-World-War-II increase in → foreign investment carried out by contracting between national governments and private foreign investors has raised the particularly difficult question of sovereign immunity (→ State Immunity; see also → Contracts between States and Foreign Private Law Persons). Most foreign investors, in the event of a dispute, prefer arbitration to litigation in the host State's courts. However, national governments may try to impede arbitration proceedings or the enforcement of unfavourable awards by pleading their sovereign immunity. Though this plea has little foundation before a non-national arbitral tribunal, it may prove effective when the assistance of a national court is called upon. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (UNTS, Vol. 575, p. 159; → Investment Disputes, Convention and International Centre for the Settlement of) creates a centre and a procedural framework for arbitration between foreign investors of signatory States and governments of other signatory States, whereby the adhering States recognize their obligation to comply with awards rendered under its auspices. With the exception of the Latin American countries (see → Calvo Doctrine, Calvo Clause), the Convention has received widespread international acceptance and a number of → developing States even require submission to such arbitration in their → investment codes or → concession agreements.

5. Evaluation

International commercial arbitration has played and will continue to play an important role in the field of international business transactions. Its importance lies in its flexibility and suitability as an alternative to proceedings before national courts. Nonetheless, continued progress is needed in the development of a uniform international regulatory framework. The New York and European Conventions, which have marked considerable advances, will hopefully serve as stepping stones to the future elaboration of a more universal and coherent international regulation.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, UNTS, Vol. 330 (1959) 38–82.

European Convention on International Commercial Arbitration, April 21, 1961, UNTS, Vol. 484 (1963–1964) 364–379.

United Nations, Register of Texts of Conventions and Other Instruments concerning International Trade Law, Vol. 2 (1973) 5–121.

International Commercial Arbitration, Documents and Collected Papers, 6 looseleaf binders (since 1974).

H. COING, The Substantive Law and the Law of Arbitration Procedure, in: International Commercial Arbitration, Collected Papers (1974) 96–111.

R. DAVID, L'arbitrage dans le commerce international (1981).

P. BOUREL, Arbitrage international et immunités des Etats étrangers, Revue de l'arbitrage, Vol. 2 (1982) 119–146.

H. STROBACH, Towards an International Arbitral Award, in: The Art of Arbitration (1982) 305–310.

See also Yearbook Commercial Arbitration, Vol. 1 (1976) – Vol. 10 (1985).

BERNARDO M. CREMADES

COMMERCIAL TREATIES

1. Notion and Objects. – 2. Historical Review: (a) From ancient to mercantilist times. (b) The period of free trade. (c) World War II to the present. – 3. Multilateral Arrangements and Bilateral Treaty Practice: (a) The growing multilateral network. (b) Scope of bilateral treaties. – 4. Main Types of Bilateral Commercial Treaties: (a) Treaties of friendship, commerce and navigation. (b) Global trade agreements. (c) Sectoral or otherwise specific trade agreements. (d) Payments and clearing agreements. (e) Investment promotion and protection treaties. (f) Industrial, scientific/technical and economic cooperation agreements. – 5. Evaluation.

1. Notion and Objects

Commercial → treaties are bilateral or multilateral treaties (→ Treaties, Multilateral) of public → international law concerning trade or other commercial activities. They are normally concluded by States since, in the absence of a generally accepted or customary *jus commercii*, it lies within the domain of State → sovereignty to grant access and regulate commercial exchanges across their → boundaries. However, other → subjects of international law (e.g. intergovernmental organizations) may also be contracting parties, depending on their constituent instruments.

The provisions of a commercial treaty may be of a general nature (laying down the framework of long-term commercial relations) or of a more specific character (regulating in some detail conditions of particular branches of trade or other commercial transactions) or even geared to an individual project (e.g. guarantee agreements). The subject-matters covered in commercial treaties are as varied as commerce itself. The traditional object is transnational trade, including payments and → clearing agreements. More recent objects are, for example, services, invisibles, loans and various forms of economic cooperation. These and other topics may be dealt with in bilateral treaties, whether combined or in separate agreements, but also in multilateral arrangements for the purpose of generalizing the regulatory effects and, in some cases, as a step towards economic or even political integration. Commercial treaty provisions may also be incorporated in treaties of more general scope.

The objective of a commercial treaty is generally to strengthen the economic ties between the contracting parties by facilitating specific commercial activities. This may be achieved by positive promotional measures and, above all, by removing or reducing national obstacles to transnational commercial activities, particularly tariff and non-tariff barriers. Liberalization is sought on the basis of non-discrimination. The most common standards employed (cumulatively or alternatively) in respect of certain activities are most-favoured-nation treatment (→ Most-Favoured-Nation Clause) and national treatment. Most-favoured-nation treatment accords to the other party, and indirectly to its nationals engaged in the respective commercial activity, a treatment

which is not less favourable than the one accorded to any other "nation". As between the two contracting parties, it does not preclude the granting of more favourable conditions. The standard is relative and flexible in that it establishes a link to the treatment of another (the "most-favoured") State which, unless a standstill clause is added, may be altered by the party granting such treatment. National treatment is designed to establish a comparative link with the treatment of nationals, including domestic activities and objects, of the granting party and to accord the same treatment to the foreign counterparts governed by the other contracting party.

To secure mutual and equal protection of the commercial interests of the contracting parties, these standards are traditionally granted on the basis of → reciprocity, sometimes generalized by a multilateral network which enhances the generalizing effect inherent in the standards themselves (in particular the most-favoured-nation clause). However, the increasingly felt need for protecting and fostering the economic development of → developing States, in particular the least developed countries, led to bilateral and multilateral arrangements in which economically stronger States or groups of States recognize the existing "disequilibrium" and grant favourable treatment on a non-reciprocal basis, often according preferential access to their markets.

2. *Historical Review*

(a) *From ancient to mercantilist times*

Commercial treaties are almost as old as commerce between States or empires itself. Their ancient purpose was to establish a framework for commercial relations which would, in particular, guarantee merchants a more favourable treatment than the arbitrary one accorded to → aliens. Early examples are the treaties of commerce between Rome and Carthage and, to illustrate also the frequent practice of including commercial provisions in treaties normalizing relations after years of → war, the peace treaties of 532 and 562 between Persia and Byzantium (→ History of the Law of Nations).

Medieval practice developed the bilateral regulation of the rights of merchants to enter foreign countries, to engage in commercial activities and to leave with their wealth. Trading privileges and → safe-conducts were granted, often on the basis of reciprocity, by royal and other rulers in most parts of Europe. Groups of city-States such as the "Hanse" and the Italian City-States benefitted from such privileges and established commercial treaty networks which contributed to their flourishing trade and other commercial activities.

A new chapter was opened when States started to regulate systematically commercial activities within their territories and to administer commercial exchanges across their borders. Commercial treaties dealt with the entry and exit of persons, goods and ships, with a view to eliminating or reducing trade barriers such as prohibitions, port charges, monopolies, quotas and tariffs. Auxiliary matters were, for example, the protection of property, the right of succession, access to courts, and → consular relations.

Such treaties granting special privileges to carefully selected parties were particularly important during the era of mercantilism, although the essential features of commercial treaties have their roots in the pre-mercantilist period. Rights of entry or establishment and similar privileges were sometimes accorded on the basis of equality with the citizens of the granting State (national treatment). The most-favoured-nation clause emerged out of a reference to a named third State and developed into the vital standard of parity with the unnamed most-favoured nation. Yet another standard, still applied today, was the absolute standard used for particular types of goods or specific tariff reductions.

(b) *The period of free trade*

Refining these elements, the "classic" type of commercial treaty reflects the spirit of liberalism and free trade of the second half of the 19th century. Starting with the British-French Cobden Treaty of 1860 as a model for a great number of treaties on friendship (or amity), commerce (or cooperation), and navigation (→ Treaties of Friendship, Commerce and Navigation), it has become the prototype of an agreement which lays down on a long-term basis the framework for global trade and other commercial relations. One important feature, sometimes regulated in a separate treaty on establishment, was on a reciprocal basis to grant to foreigners rights of entry, com-

mercial establishment, protection of property, access to courts and recognition of foreign legal persons. Other common features were to allow entry of ships, import and export and transit of goods, and to reduce customs tariffs and other levies impeding trade. Such treaties provided a "constitutional framework of liberalized trade" and were thus generally not concerned with the actual trade volume or regulatory details such as quotas.

This situation changed rapidly in the years of economic crisis before World War II. States took unilateral protectionist measures (e.g. import quotas and export subsidies) to improve their balance of trade and mitigated the adverse effects of the monetary crisis to their currency and balance of payments by foreign currency exchange control. In this economic environment, commercial treaties laid down short-term arrangements for specified exchanges of goods and the payments for them, including barter and set-off techniques.

(c) *World War II to the present*

The years after World War II were marked by a gradual return to trade liberalism and by a strong trend towards multilateral arrangements. The most ambitious project was the (largely abortive) → Havana Charter out of which emerged through concurrent negotiations the → General Agreement on Tariffs and Trade (1947). Building on traditional standards of non-discrimination (most-favoured-nation and national treatment) and the principle of reciprocity, GATT developed them into a widely accepted and influential global trade system.

A related feature of multilateral arrangements was to establish an international organization for matters which could not satisfactorily be dealt with on a bilateral basis. Prominent examples in the increasingly important fields of monetary order (→ Monetary Law, International) and financial assistance are the → International Monetary Fund, the → International Bank for Reconstruction and Development ("World Bank") and the → International Development Association.

Yet another object of multilateral arrangements was the coordination or association between States, often with the aim of economic cooperation in the form of → free trade areas or → customs unions. While not unknown in the 19th century (e.g. the → Zollverein (German Customs Union)), the formation of → economic organizations and groups by States with the same or similar economic system became so widespread that today the majority of States are members of one or more such arrangements (see the articles on → Regional Cooperation and Organization).

Yet another direction of the multilateral trend was the conclusion and adherence to conventions laying down a common legal basis for certain commercial and related matters (→ Unification and Harmonization of Laws). In addition to subjects already addressed before the turn of the century (e.g. telecommunications, postal services (→ Postal Communications, International Regulation) publication of customs tariffs (→ Customs Law, International), protection of intellectual property (→ Industrial Property, International Protection)), almost any branch of commercial law or practice became the subject of unification of law efforts (e.g. transport of goods and passengers by air, sea, rail or road (→ Traffic and Transport, International Regulation); sales contracts (→ Sale of Goods, Uniform Laws), commercial agency; facilitation of customs procedures, including classification of goods and certificates of origin; negotiable instruments (→ Bills of Exchange and Cheques, Uniform Laws); dispute settlement procedures, including recognition of arbitral awards and court decisions (→ Recognition and Execution of Foreign Judgments and Arbitral Awards)). In addition to traditional formulating agencies of more limited membership (e.g. the → Hague Conventions on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT)), various international organs with global representation became increasingly instrumental in this respect, e.g. specialized organizations such as the → International Maritime Organization (IMO) and the → World Intellectual Property Organization (WIPO) as well as organs of the → United Nations such as the → United Nations Commission on International Trade Law (UNCITRAL) and the → United Nations Conference on Trade and Development (UNCTAD).

3. *Multilateral Arrangements and Bilateral Treaty Practice*

(*a*) *The growing multilateral network*

The current legal situation and treaty practice in international commerce is primarily shaped by multilateral arrangements which in turn often influence the scope and contents of bilateral commercial treaties. In addition to the above mentioned basic multilateral commercial agreements of the post-war era, a great number of multilateral treaties have been concluded, either as supplementary agreements or separately in new fields where the collective approach seemed necessary or desirable.

The most prominent example of continuous supplementation of a basic arrangement are the manifold trade agreements emanating from negotiations at various "rounds" within the framework of GATT. Their original emphasis has on bipartite tariff reductions for specified products which were guaranteed and extended to the other contracting parties by virtue of the unconditional most-favoured-nation clause. The emphasis has shifted to a more generalized approach on customs tariffs and, in particular, to the reduction or elimination of non-tariff barriers through multilateral trade negotiations (e.g. quantitative restrictions, technical standards, import surcharges, countervailing duties, "buy national" policies in government procurement, export subsidies).

Sectoral trade agreements on a multilateral basis have been concluded for semi-processed or manufactured goods (e.g. textiles) and, in particular, raw materials and foodstuffs (e.g. tin, jute, oil, uranium, sugar, coffee, cocoa; → Commodities, International Regulation of Production and Trade). Such commodity agreements aim at price stabilization by way of producer cartels, supply and price guarantees by producer and consumer States, or by establishing "buffer stocks". The need for a collective approach was also felt in a variety of other commercial contexts. Examples of historic dimensions are the provisions on deep-sea mining and economic zones formulated in the United Nations → Conferences on the Law of the Sea (→ Sea-Bed and Subsoil; → Exclusive Economic Zone). Finally, to illustrate another type of multilateral treaty, the agreements on economic assistance extended by the → European Economic Community to the African, Caribbean and Pacific Group of States under the terms of the → Lomé Conventions liberalize, without requiring reciprocity, the import of industrial and many agricultural products and grant preferential access for other goods and to the capital resources of the Community.

(*b*) *Scope of bilateral treaties*

Multilateral arrangements have an impact on bilateral treaty practice in a variety of ways. Where organized or institutionalized economic cooperation leads to the creation of new subjects of international law, these organizations or entities are new contracting parties rather like individual States (e.g. as in a "World Bank" loan or guarantee agreement with a State; or an association treaty or trade agreement between the European Economic Community and a non-member State; → European Economic Community, Association Agreements). On the other hand, the fact of membership in a certain economic community leads to reservations or exceptions in bilateral commercial treaties granting most-favoured-nation treatment to a non-member.

More important are the effects of global or sectoral multilateral trade arrangements on bilateral treaty practice. This is particularly true with regard to GATT and its supplementary agreements, though not to the extent that bilateral commercial treaty practice would decline or even become obsolete as some had predicted. Firstly, there are a considerable number of Eastern European and developing States which are neither *de jure* nor *de facto* members of GATT. Secondly, where both parties are GATT members, there is a wide range of issues to be covered by bilateral treaties, although certain traditional provisions need no longer be included in view of their general treatment by the GATT rules. The object of bilateral regulation may be to put into concrete language or figures the often vague GATT principles or to take advantage of the various possible exceptions, safeguards and escapes, to provide exceptional preferences or to deal with a trade aspect not expressly regulated. It is known that some such (occasionally secret) agreements are not easily reconciled with the spirit and principles of GATT (e.g. "voluntary" export restrictions and "orderly marketing agree-

ments"). Finally, there are a host of commercial activities outside the scope of GATT which is primarily concerned with the production and trade of products and the reduction of tariff and non-tariff barriers in that field on the basis of non-discrimination. Thus, there remain important areas such as the provision of services, transport and communication, establishment and investment, taxation, currency and payments, industrial and other economic cooperation. These and many other subject-matters can be found in separate treaties or, in varying combinations, in one instrument. Thus, while any rigid classification of bilateral commercial treaties would prove inappropriate, six major categories may be identified.

4. *Main Types of Bilateral Commercial Treaties*

(*a*) *Treaties of friendship, commerce and navigation*

The classic type of a commercial treaty prevalent during the free trade era is still in existence. As a treaty of establishment, it often deals in general or very general terms with the non-discriminatory treatment of each country's nationals, whether natural or legal persons, and the legal protection of their property and rights to engage in business (→ Aliens, Property). Another traditional and still viable feature is non-discriminatory treatment of → merchant ships, including their right of access to → ports, to load and discharge cargo and passengers, and to hire new crew members. With a minimum of State intervention, a framework is provided for liberalized trade and other commercial activities. Apart from the legal protection granted, the mere conclusion of such a treaty and its commitment to friendly relations may constitute an important political signal stimulating commercial exchanges. New elements are the often manifold exceptions and reservations resulting from membership in multilateral agreements. The scope of such a treaty has been enlarged by a marked shift of emphasis from the rights of merchants to the rights of → migrant workers and others providing services as well as to the protection of capital investments. However, these areas may also be dealt with in separate agreements, like the field of trade itself.

(*b*) *Global trade agreements*

To provide a framework for trade in goods (and often the provision of services), global trade agreements are concluded on a long-term basis, usually starting with a "goodwill" clause encouraging, facilitating and progressively liberalizing trade. The core provision is a reciprocal commitment to grant non-discriminatory (i.e. most-favoured-nation and national) treatment as regards customs duties and regulations and specified non-tariff matters. However, in the context of "trade and aid", reciprocity may not be required and special and differential treatment may be accorded to the least developed States in particular. Other typical provisions relate to quantitative import restrictions, quotas and licences, and safeguards against market disruptions such as countervailing duties against export subsidies. Also to be found are provisions on certificates of origin, protection of patents, copyrights and trademarks, on the mode and currency of payments, exchange of statistical information, establishment of business representations, or on organs and procedures for review and adjustment of the treaty and for dispute settlement, or sometimes on restrictive business practices. While global trade agreements may differentiate between certain types or groups of goods, more detailed rules for specific products or sectors are usually dealt with in special trade agreements.

Legal problems may ensue from the often vague wording which makes it difficult to ascertain the exact contents of the commitment of each contracting party. A related problem, though not limited to global trade arrangements, is the uncertainty in the application of a parity standard, in particular a most-favoured-nation clause, to a concrete market situation where the precise identification of the *tertium comparationis* may prove to be extremely difficult. Still other legal problems arise out of conflicts or unclear relationships between the bilateral treaty provisions and any governing multilateral arrangement adhered to by either or both parties (→ Treaties, Conflicts between).

(*c*) *Sectoral or otherwise specific trade agreements*

For a variety of purposes, special trade agreements may be concluded either supplementing or

substantiating bilateral or multilateral global trade agreements or in the absence of any such framework. They may be restricted to a special sector of trade. This allows detailed rules to be tailored to the specific characteristics of the product in question (e.g. country quotas, safeguard ceilings or supply guarantees for textiles or automotive parts). They may be so specific that they come close to approximating an international sales contract except that a given contracting State will not itself sell the goods (e.g. as in the U.S.-U.S.S.R. grain agreement). However, special trade agreements may also cover a range of products but in a certain specific way. The more common purpose is to regulate the import and export of a number of products, often listed in an annex to the agreement, by laying down limits and general conditions usually for a short span of time (e.g. one or three years). A more specific objective may be to lift "buy national" restrictions and to allow government procurement contracts with nationals and companies of the other State. Yet other objectives may be a division of labour within economic groups or defence production sharing within military → alliances. The exact nature of the commitment undertaken by a contracting party may depend on its type of economy. For example, an obligation to performance itself is more desirable and feasible for centrally planned economies because of the role played by economic plans and foreign trade monopolies; the State commitment in market economies tends to be confined to granting licences and to possible support measures (e.g. export guarantees). Other potential sources of uncertainty are the effects of a special trade agreement on the legal position and rights of an individual or company and the effects of expiration or termination of the treaty on private contracts concluded under it but not yet performed.

(*d*) *Payments and clearing agreements*

If one or both parties to a trade agreement have a non-convertible currency or maintain exchange controls, the trade agreement is often supplemented by a payments or clearing agreement. Both techniques have in common that they segregate the funds involved in transactions between the two States from the general foreign exchange earned by other means and that they aim at balancing imports against exports. Under a payments arrangement, foreign exchange is in fact transferred but earmarked for, and in the ideal case exactly matched by, a flow of funds in the opposite direction. A clearing arrangement, on the other hand, minimizes the need for foreign exchange by a set-off mechanism. Importers pay and exporters receive only local currency, by means of a clearing account established in each of the two States. Only where a trade deficit exceeds the "swing" (i.e. the overdraft allowed) may the creditor State, depending on the individual clearing agreement, demand convertible currency (or gold or goods) for the excess amount or limit its trade by means of controls. Another "remedy", found in many other commercial treaties as well, is to submit the problem to a joint commission of representatives of both parties.

(*e*) *Investment promotion and protection treaties*

Protection of property and investments has been an object of multilateral treaty efforts (e.g. the Organisation for Economic Co-operation and Development Draft Convention on the Protection of Foreign Property), of → codes of conduct and of traditional bilateral treaties on establishment or on friendship, commerce and navigation. During the last three decades, special bilateral treaties dealing exclusively with investment promotion and protection have become increasingly common. These treaties regularly deal with the general treatment of → foreign investments and investors, using traditional standards such as national and most-favoured-nation treatment. They also deal with the important issues of → expropriation and nationalization and the obligation to pay compensation, laying down dispute settlement procedures, and often providing for → arbitration under the rules of the International Centre for Settlement of Investment Disputes (→ Investment Disputes, Convention and International Centre for the Settlement of). Additional provisions may regulate the transfer of capital, investment-related funds, earnings, and fees, or may cover loss or damage due to war, revolution or similar events. Yet another contingency often provided for is the case where an investor realizes a guarantee granted by his State against non-commercial risks and for that purpose has to assign to his State his right to damages or reim-

bursement. Under such treaty provisions, a contracting party would recognize any such subrogation in relation to political risk insurance. While protection of investments itself is an important means of promoting investments, these agreements often provide for additional positive measures and incentives to attract investments.

(*f*) *Industrial, scientific/technical and economic cooperation agreements*

Provisions on industrial or economic cooperation have sometimes been included in trade or investment treaties. However, in recent years it has become more common to deal with the various forms of cooperation in special agreements. While often containing regulations and standards typical of trade agreements, cooperation agreements, in emphasizing particular areas of cooperation, constitute a category of their own. Industrial, technical or economic cooperation may include coordination or concerted action in production and distribution, sharing in research and development, transfer of "know-how" and licensing. An agreement may cover a number of industrial or business sectors or relate only to one large project involving long-term planning and the mobilization of considerable funds. Loans and other means of financing are dealt with in detail, whereby contracting States may undertake to provide or at least guarantee the necessary credit or merely to allow and encourage the provision of funds by banks in their territory. Sometimes a tripartite cooperation agreement is concluded to tap the financial or technological resources of a third State. Whether an agreement focuses on industrial, scientific/technical or economic cooperation, it will tend to contain provisions on the regular exchange of information, personnel training programmes, and procedures and organs for review and adjustment as well as for dispute settlement. Beyond that, the specific provisions vary widely due to the manifold forms and degrees of cooperation and the equally wide range of its objects.

5. Evaluation

In international commercial treaty practice, there is a clearly discernible and encouraging trend towards multilateral action. Nevertheless, bilateral treaties continue to play an important role – despite their potential for facilitating disintegration and protectionist abuse – by supplementing general agreements and adequately allowing for individual relations. The contents and the value of commercial treaties largely depend on the ever-changing economic situation and its assessment by the contracting parties. Their positive features include the wide acceptance of the principle of non-discrimination, their stabilizing effect on long-term planning of economic policy, and their use in assisting developing States in improving their economic position. In this respect, commercial treaties – which constitute a fundamental part of international economic law (→ Economic Law, International) – may contribute to the evolving → international law of development and meet some of the demands for changes in the → international economic order, as enunciated in the → Charter of Economic Rights and Duties of States.

H.C. HAWKINS, Commercial Treaties and Agreements (1951).

U. SCHEUNER, Zweiseitige Handelsverträge und multilaterale Handelsvereinbarungen, Friedens-Warte, Vol. 52 (1954) 97–115.

G. SCHWARZENBERGER, The Principles and Standards of International Economic Law, RdC, Vol. 117 (1966 I) 1–89.

E. LEUBE, Völkerrechtliche Rahmenverträge mit privatrechtlichen Ausfüllungsgeschäften (1967).

G. VERBIT, Trade Agreements for Developing Countries (1969).

H. MOSLER, The International Society as a Legal Community, RdC, Vol. 140 (1974 V) 259–282.

R. BURNETT, Negotiation of International Agreements in the Field of Commerce and Investment, Journal of World Trade Law, Vol. 9 (1975) 231–265.

H. RUDOLPH, H. STROHBACH et al., Grundriss: Die rechtliche Regelung der internationalen Wirtschaftsbeziehungen der DDR zu Partnern im nichtsozialistischen Wirtschaftsgebiet (1982) 87–103.

E. PETERSMANN, Protektionismus als Ordnungsproblem und Rechtsproblem, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 47 (1983) 478–501.

GEROLD HERRMANN

COMMODITIES, COMMON FUND

The Common Fund is an international financial institution provided for in the Agreement Estab-

lishing the Common Fund for Commodities of June 27, 1980 (ILM, Vol. 19 (1980) p. 896) (cf. also → Commodities, International Regulation of Production and Trade). The Agreement will enter into force once 90 States have deposited their instruments of ratification, acceptance or approval, provided that at the same time certain financial targets (two-thirds of obligatory contributions, 50 per cent of voluntary contributions) have been met. As of March 31, 1982, the date originally envisioned, only 25 States accounting for 23.03 per cent of obligatory contributions had expressed their binding consent. Although agreement could be reached on deferring the closing date, the prospects of the Common Fund becoming reality remain doubtful.

1. Notion and Historical Background

For buffer stock operations, one of the principal market regulation techniques employed in commodity agreements for the stabilization of prices, substantial financial resources are required. In the past, developed nations on the whole have been reluctant to assume a share of the costs involved. The general idea underlying the concept of a common fund was to provide adequate financing through the participation of developed nations, reducing, at the same time, the necessary amounts by pooling the available funds instead of financing separately each one of the buffer stock arrangements established for a given commodity. It was assumed that, since prices of commodities would not all evolve according to the same cyclical pattern, a common fund covering a wide range of commodities would permit the most efficient use of the capital provided by the States concerned.

The feasibility of a central fund for all commodity agreements was for the first time explored more fully in connection with the second meeting of the → United Nations Conference on Trade and Development (UNCTAD) in New Delhi in 1968. However, the creation of such a fund became a pivotal issue only after the Group of 77 had convened in Manila (January/February 1976) to prepare the fourth UNCTAD conference. Within the framework of a suggested Integrated Programme for Commodities, a primary role was attributed to a common fund for the financing of international commodity stocks or other necessary measures. At the UNCTAD conference (Nairobi, May 1976), although Resolution 93(IV) approved the Integrated Programme for Commodities, agreement could only be reached on starting → negotiations. After several difficult negotiation rounds, the "Fundamental elements of the Common Fund" were adopted by → consensus in March 1979. When these principles had been translated into draft articles, the Agreement was adopted by a negotiating conference convened under the auspices of UNCTAD on June 27, 1980.

2. Main Legal Characteristics

(a) Objectives

The Common Fund is defined as an instrument to attain the objectives of the Integrated Programme for Commodities embodied in UNCTAD Resolution 93(IV), being entrusted with the task of facilitating the conclusion and functioning of international commodity agreements. For that purpose, the Common Fund is to operate through two totally separate accounts. A first account is designed to support international buffer stocks and internationally coordinated national stocks established by International Commodity Organizations which have become associated with the Common Fund, provided that they rest on joint financing by producers and consumers. A second account is to serve for the financing of commodity development measures, such as research, productivity improvements, etc. In addition, the Common Fund is called upon to act as a centre of coordination and consultation of commodity policies.

(b) Financing

The capital of the Common Fund would mainly derive from four sources. Originally, the Group of 77 and the UNCTAD secretariat had planned to raise a global amount of 6000 to 10 000 million US dollars. The actual financial dimensions of the Common Fund are considerably less ambitious.

The agreement provides for obligatory contributions by members amounting to 470 million US dollars ("directly contributed capital"), divided into 37 000 paid-in shares and 10 000 payable shares. Each State party will be obligated to make a basic contribution by subscribing 100

paid-in shares of 10 000 US dollars each. In addition, according to general economic parameters, most States are required to subscribe additional shares (for instance, the Federal Republic of Germany 1819 paid-in shares, 831 payable shares; the United States 5012 paid-in shares, 2373 payable shares; the Soviet Union 1865 paid-in shares, 853 payable shares). For the effective payment of paid-in shares the Agreement sets forth an elaborate timetable. Payable shares constitute only a reserve asset for the event that the Fund is unable otherwise to meet its financial liabilities in respect of borrowings for its first account. While 400 million US dollars thus raised are attributed to the first account, States parties may allocate a part of their subscription (aggregate volume of 70 million US dollars) to the second account.

The second account is to be built up mainly from a second source of capital, voluntary contributions, with the sole exception of the amount of 70 million US dollars to which each State party may contribute from its obligatory subscription. The target volume for initial voluntary contributions has been fixed at 280 million US dollars.

Payments from International Commodity Organizations associated with the Common Fund or from members of such organizations will provide the third source of capital. Each International Commodity Organization is required to deposit in cash, upon its association, one-third of its maximum financial requirement. An International Commodity Organization that has exhausted its financial resources by purchasing stocks may instead pledge the Common Fund stock warrants of equivalent value. In addition, the States members of the relevant International Commodity Organization shall provide guarantee capital to the Common Fund in an amount of two-thirds of the maximum financial requirement of that International Commodity Organization.

Finally, the Common Fund is authorized to borrow capital not only from States parties and international financial institutions (→ Financial Institutions, Inter-Governmental), but also, with respect to first account operations, in the capital markets.

(c) *Operations*

Within the framework of the first account, associated International Commodity Organizations have the right to withdraw their cash deposits in order to meet stocking costs. For that same purpose, the Common Fund may also grant loans at rates as low as financially bearable. Loans may not exceed two-thirds of the relevant maximum financial requirement.

With regard to second account operations, no formal association relationship is required. Any international commodity body qualifies as a recipient provided that it operates on a world-wide basis and that it comprises producers as well as consumers. Producers' alliances, therefore, are not eligible to benefit from operations of the Common Fund.

(d) *Institutional structure and voting*

All powers of the Common Fund are vested in the Governing Council, the plenary organ on which all members are represented by one Governor and one alternate. While the Governing Council is obligated to make a number of essential determinations itself, it may delegate any implementing function to the Executive Board, made up of 28 Executive Directors, which the Agreement itself charges with responsibility for the operation of the Common Fund. Finally, the Managing Director, assisted by appropriate staff, is entrusted with conducting the ordinary business of the Common Fund.

Voting in the Governing Council and in the Executive Board, whose voting pattern reflects that of the Governing Council, rests on a combination of two principles (→ Voting Rules in International Conferences and Organizations): Equality of States is taken into account in that each State party holds 150 basic votes. According to principles of → weighted voting as applicable in other financial institutions and in International Commodity Organizations, an additional number of votes is distributed on account of the magnitude of a country's stake in the directly contributed capital, and one vote is granted for each 50 000 US dollars of guarantee capital a State party has provided to the Common Fund in respect of its membership in all International Commodity Organizations associated with the Common Fund. The comprehensive voting structure resulting from the first two criteria, as reflected in schedule D annexed to the Agreement, which is based on the assumed participation of 163 States,

gives 47 per cent of votes to the Group of 77, 42 per cent to Western countries (Group B), 8 per cent to Group D (socialist States), and 3 per cent to China. However, this distribution is susceptible to modifications through the impact of votes allocated on account of the provision of guarantee capital. Effective treaty participation is another factor of uncertainty. The Agreement specifies that decisions, whenever possible, shall be taken without vote. Otherwise, the basic rule is that all matters shall be decided by a simple majority. However, for important decisions the Agreement generally prescribes a qualified majority (two-thirds) or a highly qualified majority (three-fourths).

(e) *Position within the UN system*

It is foreseen in the Agreement that the Common Fund, by concluding an agreement with the → United Nations Economic and Social Council, should become a → United Nations Specialized Agency.

3. *Special Legal Problems*

(a) The Agreement admits intergovernmental organizations of regional economic integration which exercise competences in the fields of activity of the Common Fund as members, exempts them, however, from any financial obligation. As a counterpart, such organizations are denied any voting rights. It is noteworthy that the Agreement specifies that no State party incurs any financial responsibility from activities of the Common Fund itself.

(b) With a view to strengthening the creditworthiness of the Common Fund as a borrowing institution, the Agreement specifically admits suits brought against the Common Fund by lenders of funds and by buyers or holders of securities issued by it. To that extent, the Agreement also renounces the general immunity of the Common Fund from execution (→ International Organizations, Privileges and Immunities).

4. *Evaluation*

Even if the Agreement should enter into force, it would remain to be seen whether International Commodity Organizations are really prepared to enter into association agreements with the Common Fund. To be sure, all recent International Commodity Agreements contain an association clause. But International Commodity Organizations might fear that the Common Fund, in spite of an express provision to the contrary, could try to interfere with their substantive policies. Furthermore, International Commodity Organizations may find it of little advantage to deposit one-third of their maximum financial requirement immediately in cash.

Draft Agreement Establishing the Common Fund for Commodities, ILM, Vol. 19 (1980) 896–937.

D. AVRAMOVIĆ, Common Fund: Why and of What Kind? Journal of World Trade Law, Vol. 12 (1978) 375–408.

J.B. PARAGAMIAN, The Common Fund: Development, Mechanics and Forecasts, Law and Policy in International Business, Vol. 11 (1979) 1193–1211.

J.-D. GERBER, Der Germeinsame Rohstoff-Fonds, Außenwirtschaft, Vol. 35 (1980) 355–371.

P.M. EISEMANN, Le Fonds commun pour les produits de base, AFDI, Vol. 27 (1981) 568–586.

G. PHILIPP and H. RUDOLPH, Zum Abkommen über den Gemeinsamen Rohstoffonds, Staat und Recht, Vol. 30 (1981) 430–441.

B. STECHER, Der "Gemeinsame Rohstoff-Fonds", Gestärkte Entwicklungsländer-Position oder Pyrrhus-Sieg?, Europa-Archiv, Vol. 36 (1981) 57–64.

R.T. TAIT and G.N. SFEIR, The Common Fund for Commodities, George Washington Journal of International Law and Economics, Vol. 16 (1982) 483–538.

CHRISTIAN TOMUSCHAT

COMMODITIES, INTERNATIONAL REGULATION OF PRODUCTION AND TRADE

1. *Economic Background*

Commodities, i.e., primary commodities or raw materials, provide even today the most important source of export earnings to the great majority of Third World countries (→ Developing States). On the other hand, prices for commodities vary considerably according to rather unpredictable cyclical patterns. Countries heavily relying on such income are therefore gravely handicapped in their efforts to conceive and carry out long-term economic programmes. The international regulation of production and trade of commodities aims at modifying the free play of market forces through appropriate mechanisms suited to coun-

ter erratic fluctuations (→ Economic Law, International; → International Economic Order).

2. *Historical Evolution*

The history of commodity agreements can be traced back to the 19th century. In 1864, an agreement was concluded between Belgium, France, Great Britain and the Netherlands which provided for the prohibition of excessive drawbacks on sugar exports from signatory States. The world economic crisis of 1929 stimulated increased recourse to stabilizing mechanisms, which were established for sugar, rubber, tea, tin and wheat in the early 1930s. While during those first years of commodity arrangements a partial attempt was made to act through private cartels or government-supported private cartels (tin, sugar, tea), it soon turned out that the most appropriate form of action was the conclusion and operation of inter-State agreements. After World War II such agreements were concluded for wheat (1949), sugar (1953), tin (1954), coffee (1962) and olive oil (1963), each one followed by subsequent agreements after its expiration.

A new stage was reached with the creation of the → United Nations Conference on Trade and Development (UNCTAD). Since its inception in 1964, UNCTAD made the formulation of a new international commodity policy a pivotal element of its aims. Mainly through its insistence the International Cocoa Agreement was concluded in 1972. At its Nairobi conference in May 1976, UNCTAD adopted Resolution 93(IV) providing for an Integrated Programme for Commodities in which agreements for 18 products (bananas, bauxite, cocoa, coffee, copper, cotton and cotton yarns, hard fibres and products, iron ore, jute and products, manganese, meat, phosphates, rubber, sugar, tea, tropical timber, tin, vegetable oils) were proposed. Although the Integrated Programme had been adopted by → consensus, its practical impact was at first weak. UNCTAD Resolution 124(V) of June 1979, therefore, urged governments to implement the Integrated Programme with greater speed. In that same year, the International Natural Rubber Agreement was concluded. It was followed in 1982 by the International Agreement on Jute and Jute Products. With respect to tropical timber, a negotiating conference was convened in 1983. As far as the remaining commodities are concerned, → negotiations are dragging on. It has emerged that the producers of a number of minerals (in particular, phosphates, manganese, bauxite) have no real interest in entering into binding treaty commitments.

3. *Categories of Commodity Mechanisms*

The first category of commodity mechanisms comprises arrangements which confine themselves to consultative functions, acting as a clearing centre for the mutual exchange of information and experience and as a focus for research, market development and promotion. Almost all agricultural commodities are today covered by intergovernmental study groups functioning within the framework of the → Food and Agriculture Organization of the United Nations (FAO) and working under the aegis of the FAO Committee on Commodity Problems. Study groups of a similar character have been set up by UNCTAD for a number of non-agricultural commodities (e.g. tungsten); an International Meat Council operates within the framework of the → General Agreement on Tariffs and Trade. Analogous functions are discharged by a number of autonomous international organizations (International Cotton Advisory Committee, International Wool Study Group, International Lead and Zinc Study Group). Essentially, the International Olive Oil Agreement of 1979, like its predecessors, has to be classified as a mechanism for information, consultation and promotion, since it lacks powers for action on market conditions. The same holds true with respect to the International Agreement on Jute and Jute Products. Since 1971 the arrangements relating to wheat, which earlier had always provided for a régime of market regulation, have also been deprived of any regulatory mechanisms. The same fate had befallen the organizations established for coffee and sugar during some periods of their existence. The establishment of commodity organizations lacking market intervention powers may be stimulated in the future by the prospect of gaining access to the second account of the Common Fund (→ Commodities, Common Fund).

Among market regulation schemes there likewise exists a wide range of organizational structures. Without possessing any substantive legal

basis, a number of FAO intergovernmental groups (tea, hard fibres) tried for a number of years to operate informal export quota arrangements. Among legally binding agreements, a sharp dividing line separates producers' alliances from commodity agreements *stricto sensu* (commodity control agreements, or "ICCAs"). Producers' alliances, the most generally known example of which is the → Organization of Petroleum Exporting Countries (OPEC), rest on exclusive membership of producing and exporting States (other examples are the International Bauxite Association and the Union of Banana Exporting Countries). In contrast, ICCAs are based on cooperation between producing and consuming countries, providing for equal voting rights of both groups. According to the abortive → Havana Charter, such a standard of parity was to be compulsory whenever a commodity agreement involved the regulation of production, quantitative control of exports or imports, or the regulation of prices. Of the agreements presently in force, those dealing with cocoa, coffee, rubber, sugar and tin qualify as ICCAs.

4. *Main Legal Characteristics*

(*a*) *Objectives*

All formal agreements set forth explicitly the aims to be attained through the operation of their provisions. Producers' alliances emphasize first and foremost the interests of producing nations. As far as commodity agreements providing for the participation of consumers are concerned, it is now the common practice to refer to UNCTAD Resolutions 93(IV) and 124(V) in order to stress the interrelationship with the Integrated Programme for Commodities. Among the specific aims of ICCAs, the first place is normally attributed to attaining an equilibrium between supply and demand. With regard to prices, the relevant texts point on the one hand to fair and remunerative prices to producers while stressing, on the other, that prices to consumers should also be fair and reasonable. Commodity agreements, according to these general formulae, should not be seen as instruments designed to bolster prices, but rather as mechanisms for the purpose of stabilizing them without obstructing long-term market trends. Finally, emphasis is placed, in the interest of consumers, on reliability and continuity of supplies.

(*b*) *Market regulation techniques*

Producers' alliances have up to now refrained from providing for sophisticated market regulation schemes. Rather, they serve as an institutional framework providing a meeting place where national policies can be coordinated with a view to attaining the objectives defined by the agreement concerned. Specific measures are determined on a case by case basis through conference resolutions.

For the purpose of attaining the objectives of ICCAs based on cooperation between producing and consuming nations, a certain number of techniques have evolved which can be found, with slight variations, in all relevant agreements.

The most prominent mechanism among market intervention techniques is the buffer stock. Buffer stocks are presently provided for in the agreements on cocoa, rubber and tin. Generally, the buffer stock enters the market as a buyer at times of depressed prices, reselling the quantities thus acquired at times of high prices. The number of commodities suited for this specific method of market regulation is limited for obvious physical reasons. Only such commodities may be chosen as can be stored at relatively low cost and for which a homogeneous market with well-defined and generally recognized grades of quality exists. Furthermore, the success of a buffer stock is to a large extent dependent on its size. The greater its volume, the better its chance to counteract at least short-term price pressures. Generally, the formation of prices is left primarily to market forces. As long as prices are moving within a predetermined price range, the buffer stock remains passive. Only if prices have exceeded that range will intervention become permissible and/or mandatory, according to whether a first or even a second threshold has been surpassed. An important variation of the buffer stock technique was brought about by the International Sugar Agreement, 1977, which provided for nationally held coordinated stocks ("special stocks").

Export quotas constitute a further device for the purpose of market regulation. Export quotas may be combined with a buffer stock in order to support its operation (e.g. tin; as regards cocoa,

this was expressly provided for in the 1972 and 1975 agreements, but only indirectly mentioned in the 1980 agreement as an additional measure) or combined with nationally held stock (sugar). Alternatively, they may be the only mechanism for influencing the supply side (coffee). Generally, export control measures have as their starting point national basic quotas or basic export tonnages determined on the basis of the volume of average exports in a number of preceding years. Before the beginning of each quota year, the competent council adopts a comprehensive estimate as to prospective world demand and distributes the global quantity thus calculated among members in proportion to their basic quotas, thereby fixing the annual quota or quotas in effect. With respect to coffee, the fixing of quarterly quotas is foreseen in order to avoid seasonal fluctuations. Furthermore, different price ranges have been set up for various types of coffee.

It is obvious that a régime of export quotas depends largely on the extent to which it encompasses the actual world trade in the commodity concerned. Without any special precautions, quotas could easily have as their sole effect the benefitting of non-member producing countries. To counter such adverse effects, standard clauses have been evolved. In some, the importing States undertake not to permit the entry from non-members of a quantity higher than the annual average imported during a number of preceding years. Others provide for the reduction of imports from third countries if export quotas have been introduced.

The holding of stocks of such a magnitude that market conditions can be efficaciously influenced requires important financial means. Although the stabilizing of prices is beneficial to both producers and consumers, until recently the latter had always refused to assume a share of the financial burden involved. The first step in a new direction was taken by the decision of the → International Monetary Fund in 1969 to create a specific buffer stock facility. In the International Cocoa Agreement of 1972, consuming countries undertook for the first time to participate in financing a buffer stock by contributions. Such financial participation of consumers is also one of the central features of UNCTAD's Integrated Programme for Commodities. In recent agreements, UNCTAD's position has always prevailed. Thus, the costs of the buffer stock for rubber are to be shared equally between the two groups of countries. The same holds true for tin under the Sixth International Tin Agreement. In the case of cocoa, participation of consuming countries is ensured through a trade levy charged on all shipments of cocoa. After the coming into force of the Agreement Establishing the Common Fund, international commodity organizations which provide for joint financing by producers and consumers will be able to avail themselves of the resources of the Fund.

Under the multilateral contract scheme, as exemplified by the 1949, 1953, 1956 and 1962 Wheat Agreements, importing members undertake to purchase a given quantity (or a specified percentage of their import needs) of the commodity concerned at prices moving within an agreed range. Since the International Wheat Agreement of 1971 did not contain market regulatory powers, this scheme is no longer in operation, however.

Commodity agreements generally recognize that structural imbalances cannot be combatted successfully by acting on market conditions alone, but that production and consumption should be influenced as well. However, the relevant agreements all abstain from providing effective tools, confining themselves to stating that member countries recognize the need to keep production in reasonable balance with consumption. As far as consumption is concerned, all agreements on crops proclaim the necessity of expansion. However, because consumption cannot be imposed, the mechanisms provided for are rather modest in scope (publicity campaigns, promotional programmes, research projects). The Sixth International Tin Agreement, although it covers a non-renewable commodity, also refers to increases in consumption. At the same time, however, it mentions the need to improve efficiency in the use of tin as an aid to the conservation of world tin resources.

(c) *Structure and voting*

Since agreements of producers' alliances generally abstain from setting forth predetermined mechanisms for market control, it is logical that binding decisions should be taken by unanimity.

This rule is valid, for instance, with regard to the conferences of OPEC, CIPEC (Conseil intergouvernemental des pays exportateurs de cuivre) and the International Bauxite Association. A different procedure prevails for the conference of the Union of Banana Exporting Countries.

All commodity agreements based on cooperation between producers and consumers provide first for a plenary organ on which all members are represented (the council); some of them establish in addition an organ with reduced membership (the board or executive committee). All powers of the organization concerned are vested in the council. The distribution of votes is characterized, first, by parity between producing/exporting and consuming/importing countries (→ Voting Rules in International Conferences and Organizations) and, second, by making the allocation of votes within the two groups of countries dependent on the relative economic weight of members (→ Weighted Voting). Normally, each group disposes of 1000 votes altogether. Each member is entitled to a certain number of basic (or initial) votes (with a maximum of five). The remaining votes are then distributed in proportion to imports or exports during a given period of reference. The importance of a country's import or export volume is considerably diminished by the existence of the basic or initial votes to the benefit of smaller members, "economic giants" are not admitted according to their real strength. All of the agreements set an upper limit, which varies between 200 and 450 votes. With respect to coffee, for instance, the relevant figure has been and is 400 votes. This means, in particular, that the United States, as the greatest importer of coffee, taking nearly one-half of world production, can not fully exploit its economically leading role within the coffee organization.

The general rule is that the adoption of decisions by the council requires a simple distributed majority, i.e., a majority among exporting members as well as among importing members. In important matters, however, which the agreements mention specifically, decisions have to be taken by a distributed two-thirds majority vote. Well-informed observers have reported that unanimity is normally sought, the general feeling being that recourse to majority decisions could jeopardize the existence of the respective organization.

The board or executive committee (provided for in the cocoa, coffee and sugar agreements) can be described more or less as a reflection of the council with reduced dimensions. Its members are not individuals, but States determined by election, each group of either importing or exporting countries choosing an equal number of members (in most cases eight). Each board member is entitled to cast the number of votes it received upon election. Decision-making rules prescribe generally the same majorities as applicable for analogous action by the council itself.

An executive director (chairman, secretary) is entrusted with taking care of the daily business of the organization concerned. In appropriate cases, a buffer stock manager is appointed. In addition, there exist subsidiary bodies charged, in particular, with observing market conditions or promoting consumption.

(*d*) *Standard clauses*

Since the effectiveness of the ICCAs requires control of a large segment of the relevant trade volume, all agreements, besides prescribing a minimum number of participating States, also provide that those States have to account for a certain minimum percentage of the trade in the commodity concerned. Usually, an agreement has to be accepted by governments accounting for substantially more than 50 per cent of the tonnages involved, taking into consideration all countries that have participated in the negotiating conference (International Rubber Agreement: 80 per cent of net exports and of net imports; International Cocoa Agreement, 1980: five producing countries accounting for 80 per cent of exports and consuming countries accounting for 70 per cent of imports).

Since experience has shown that governments have encountered considerable difficulties in their endeavours to obtain the necessary approval of commodity agreements by the competent parliamentary bodies, it is generally foreseen that such agreements may enter into force provisionally. For that purpose, → notifications to the effect that the agreement will be applied provisionally are equated with definitive instruments of ratification, acceptance or approval (→ Treaties, Conclusion and Entry into Force). Because of the slowness of parliamentary proceedings in some countries, it may even happen that a State applies

an agreement provisionally for its entire duration.

According to the present practice, ICCAs are mostly concluded for a period of five years; exceptionally, the International Cocoa Agreement of 1980 provides for a duration of only three years, while the International Coffee Agreement of 1983 will remain in force for six years. These time limitations stem from the general awareness that world economic conditions evolve at a rapid pace, so that after a rather short period it will normally be necessary to review the agreement concerned in the light of the new situation and of the experiences garnered in its application (→ Treaties, Revision).

A certain amount of flexibility is ensured by provisions which empower the competent council to extend the agreement for periods whose maximum duration is normally set at two years. However, occasionally further extension may be granted on condition that negotiations for the elaboration of a subsequent agreement have not yet been completed or that a new agreement has not yet entered into force. Such decisions always require a qualified majority.

Flexibility is further enhanced by rather liberal rules on withdrawal. Many ICCAs provide that a member may at any time notify its intention to withdraw without having to specify any reasons, the withdrawal normally taking effect after as short a period as 90 days or even only 30 days (International Sugar Agreement, 1977). Exceptionally, certain substantive conditions are set forth (1967 Wheat Trade Convention). Other agreements (e.g. tin) impose financial disadvantages upon a State which terminates its membership on short notice. Some of the most rigid rules can be found in agreements which do not contain any substantive economic rules (e.g. olive oil).

With a view to alleviating exceptional economic hardship, all ICCAs set forth that in such circumstances a contracting party may be relieved of certain of its obligations.

5. *Evaluation*

Economic effectiveness is the yardstick by which the usefulness of ICCAs has to be judged. At the legal level, effectiveness depends in the first place on the number of participating States and the market share which they represent. Obviously, it is the fixing of the relevant prices which constitutes the most controversial centrepiece of negotiations in the relationship between producers and consumers. Producing nations, on the other hand, tend to disagree about the relevant quotas to be allotted to them. The United States, one of the greatest consumer nations, has generally viewed efforts in the field of commodity regulation with a fair amount of scepticism (e.g. refusing to join the 1980 Cocoa Agreement, which it felt was too cumbersome and rigid). The → European Economic Community did not join the International Sugar Agreement of 1977 because of divergences of opinion over its export quota.

Treaty enforcement causes great difficulties, in particular in cases where export quotas are introduced. Almost inevitably, the temptation arises to circumvent the rules in force, offering on the market those quantities which have actually been produced and which cannot be sold on the home market.

Generally, experience seems to show that ICCAs are instruments well-suited to counter short-term fluctuations, in particular in situations characterized by a transitory weakness in demand. Structural market disequilibria, however, cannot be cured simply by remedies which only act on supply and demand.

No producers' alliance other than OPEC has had any significant success. Cooperation between producers and consumers seems to be indispensable if the commodity concerned does not enjoy a *de facto* monopoly, not being replaceable by other products. It is also a general weakness of producers' alliances that to date they have not succeeded in establishing an appropriate set of mechanisms for implementing their policies.

E.P. HEXNER, International Cartels (1946).

U. WENZEL, Das Recht der internationalen Rohstoffabkommen (1961).

H. WALKER, The International Law of Commodity Agreements, Law and Contemporary Problems, Vol. 28 (1963) 392–415.

J. KNOTE, Internationale Rohstoffabkommen aus der Nachkriegszeit (1965).

J.W.F. ROWE, Primary Commodities in International Trade (1965).

J.E.S. FAWCETT, The Function of Law in International Commodity Agreements, BYIL, Vol. 44 (1970) 157–176.

C.R. JOHNSTON, Law and Policy of Intergovernmental Primary Commodity Agreements, 2 vols. (1976) [looseleaf].

P.D. REYNOLDS, International Commodity Agreements and the Common Fund (1978).
W.G. SCHIRMER and G. MEYER-WÖBSE, Internationale Rohstoffabkommen (1980).
P.T.B. KOHONA, Some Legal Problems Relating to the Implementation of International Commodity Agreements, Indian JIL, Vol. 21 (1981) 546–562.
N. LUSSON-LEROUSSEAU, Les accords de produits de base, instruments de régulation des marchés, RGDIP, Vol. 85 (1981) 38–98.
A. CORET, Les accords internationaux de produits, Sécurité et insécurité juridique, Clunet, Vol. 109 (1982) 346–373.
P.M. EISEMANN, L'organisation internationale du commerce des produits de base (1982).
K. KHAN, The Law and Organization of International Commodity Agreements (1982).

CHRISTIAN TOMUSCHAT

CONCESSIONS

1. Notion and Terminology

In spite of a lack of consensus on the notion and the uniform application of the term, a comparison of the world's major legal systems shows that a concession in the wider sense may be defined as a synallagmatic act by which a State transfers the exercise of rights or functions proper to itself to a private person, State-owned enterprise or a consortium which, in turn, participates in the performance of public functions and thus gains a privileged position *vis-à-vis* other private law subjects within the jurisdiction of the State concerned (see also → Contracts between States and Foreign Private Law Persons). It may either be of a national (municipal concession) or of an international (international concession) character, depending upon the nationality of the concessionaire. Only the international concession is of relevance to international law. Currently, its characteristics are in the process of changing in favour of → developing States; its terms and conditions as well as the question of its stability (→ Expropriation and Nationalization; → Natural Resources, Sovereignty over; → Pacta sunt servanda) are central issues in international economic law (→ Economic Law, International) and also play a decisive role in the construction of a new → international economic order.

Not included in the above definition are territorial rights granted through → treaties by one State to another, as may in the past be observed in → China's practice in relation to a number of Western powers, by virtue of which the latter obtained some limited jurisdiction over certain Chinese territories called "treaty ports". A concession in that sense was, according to an official definition, "a definite area of land in a treaty port which has been leased in perpetuity by the Chinese authorities to a foreign Government", and thus had a purely territorial meaning. In view of China's unilateral termination – following World War I – of all treaties establishing such "concessions" (→ Unequal Treaties; → Treaties, Termination), their purely territorial and inter-State aspect has become obsolete. The term "concessions" is no longer applied to modern bi- or multilateral treaties (→ Treaties, Multilateral) with similar objects and purposes, such as the establishment of military bases (→ Military Bases on Foreign Territory; → Servitudes).

Contemporary concessions have many names: concession agreement, concession contract, economic development agreement, service contract, exploration and production sharing agreement, mining convention, joint venture agreement, master agreement, technical assistance agreement, agreement on foreign capital investment, establishment convention (*convention d'établissement*), etc. The terminology used in a specific instrument may be an indicator not only of the particular type of concession (see section 3 *infra*), but also of the status of the legal relationship as such: the use of the term "contract", for instance, rather than that of the neutral "agreement" in the title of the instrument may imply that the grantor State's municipal law is the governing law of the transaction.

(a) Constituent elements of concessions

Above all, the synallagmatic character (→ Reciprocity) is an essential element. The State's objectives may consist of obtaining services for the public, such as railways, airlines, gas and electricity supply, etc.; the exploration, development and exploitation of natural resources; the maximization of revenues derived therefrom; the acquisition of modern technology (→ Technology Transfer); or, in general, the economic development and improvement of the

State's international position in world trade and commerce as a whole. The concessionaire's objectives, on the other hand, are primarily the profitability of his venture and, in case of a certain type of concession (see section 3 *infra*), steady commodity supply. The increase of the concessionary State's "take" is characteristic of current developments.

A State may exercise its sovereign right, the concession granting power, in two ways: either directly through central organs (head of State, government as a whole or its individual members, such as the minister of commerce, mining, energy, etc.), or indirectly through a national (i.e. State-owned) company. Moreover, also territorial sub-divisions, such as states in a federal system (→ Federal States), may also exercise concessionary powers, as in the cases of Australia and the United States.

The concessionary subject matter always relates to functions proper to a particular State which it is not able or not willing to perform itself. A concession relates to some form of enterprise or activity excluded from the private sector. It is not in fact possible to exclude *a priori* any subject matter from the possible sphere of a concession. By its nature the → State is capable of asserting an exclusive competence in any sphere of activity not denied to it by a rule of international law, as a slave trade concession would be today. While historically concessions related, *inter alia*, to the discovery of new territories, to postal services, to the construction and operation of railways, canals, etc., the principal subject matter of the modern concession consists of exploration, development and exploitation of mineral resources. Due to the capital and technology intensive character of such activities, the State very often is not capable of fulfilling these functions itself and thus establishes a system of cooperation with the private or statal entrepreneur, using the concession as the legal vehicle.

The concessionaire may either be a physical or legal person, the latter case prevailing today. The legal person, in turn, may either be a private or a State-owned entity of the State granting the concession or of a foreign State. If a concession is granted simultaneously to more than one entity as concessionaire, a consortium concession is established, giving rise to collective rights and obligations in the relationship: State grantor – consortium.

The privileged position thus gained by the concessionaire within the national legal system of the concessionary State is primarily founded upon the latter's desire to utilize the concessionaire's capital and services for a considerable period of time, and the concessionaire's interest in utmost stability of the relationship with the State grantor, and the undisturbed exercise of its functions. Tax exemptions, customs privileges, prevalence of the terms of the concessions over the municipal law of the concessionary State (consistency clause), international machineries for the settlement of future disputes arising out of the concession, etc. are expressions of the special position of the concessionaire and, simultaneously, of the concession as a legal institution as such, compared with other statal transactions, such as loan, sale, barter, etc.

(*b*) *Legal form of the concession*

The legal garment clothing a concession may vary. Two basic solutions are conceivable: A concession may take the form of a (unilateral) administrative act or of a contract, or it may be a combination of both.

The various theories of the administrative act (*Verwaltungsakttheorien*), as developed in the late 19th century administrative doctrine of Germany, Switzerland and Italy, and subsequently also adopted by the Austrian theory of administrative law, emphasize the predominant role of the State grantor, and culminate in the latter's right to unilateral revocation of the administrative act, leaving, however, the concessionaire with the right to claim some kind of compensation from the State.

This unilateral concept of the concession, which can only operate, if at all, in an atmosphere of mutual understanding and full confidence in the value of the States' pledged word and the working of its legal machinery, has obvious shortcomings which the contract theories purport to overcome. These concepts prevail in French legal theory in the form of the *contrat administratif* and in the common law systems as State contracts. The contractual form of the concession reduces the superior position of the State either by raising the concessionaire to the level of the State by enter-

ing into a public law contractual relationship with the latter, or by the State's agreeing to waive its dominant position and to descend to the level of a private law subject. In contrast to the administrative act, a kind of legal equality between State grantor and concessionaire is reflected in this construction.

The theories of the *acte mixte* as also developed in French administrative doctrine combine both of the above models. In addition, they seek to explain the legal nature of those elements of concessionary rights and obligations less as arising from → negotiations but more as being unilaterally established by the State. This is the case with the *cahier des charges* (book of charges, *Lastenheft*). This part of the concession in general also confers rights upon third persons, such as the users of a particular public service and is also to be regarded as an *acte administratif* to that extent.

While municipal concessions – unlike such private law transactions as sale, barter, lease, etc. – are not essentially linked to any particular legal form but may wear the legal garment of a contract or of a → unilateral act of the concessionary State, or both, the contemporary international concession in most cases assumes a contractual character. This form offers the best way to reconcile the mutual, very often divergent, interests in a comprehensive and individually negotiated instrument which sometimes is even expressly declared by the parties to have the force of law (e.g. Art. 2(1) of the Papua New Guinea Ok Tedi 1981 Agreement (Fischer and Wälde, Vol. 3, p. 312)). Through its element of coordination, the contractual form corresponds to the actual situation in this area of international relations as the common denominator between, as Bülck has aptly put it, "öffentlichem Machtreichtum und privater Reichtumsmacht" (a wealth of public power and private power through wealth).

2. *History*

The modern term concession is derived from the Latin *concessio*, indicating in Roman law specific grants by public authorities to individuals, including that of immunity from employment on public works. In the Middle Ages, the hitherto unknown economic element appeared in the *concessio* through its application to the disposition over *jura regalia*, or rights enjoyed by a sovereign by virtue of his prerogatives. *Regalia minora*, such as the right to levy tolls (*jus telonii*), or to extract minerals (*jus soli*), were leased to individuals in return for a certain stipulated sum. Hand in hand with these grants by secular rulers, the various Popes also used the *concessio* for the administration of territories against the payment of annual rents. Such territorial grants were of feudal character (*feuda ecclesiastica*) and related in particular to the lands of infidels, on the basis of a dormant papal overlordship over the territories invaded by Islam. An early example is provided by the *epistola* of Pope Gregory VII to the Princes of Spain, dated April 30, 1073, from which it appears that a concession to occupy heathen lands and to take possession of them had been granted to a Spanish grandee named Evolus de Roceio (Fischer, Concessions, Vol. 1, p. 31). The transfer of the exercise of *jura regalia* and territorial feudal grants may, therefore, be considered as the two principal medieval roots of modern concessions.

The medieval concession also served as an instrument for the promotion of international trade and commerce. Merchants from Venice and other City-States in Upper Italy were granted extensive trading privileges in the Byzantine Empire and in the Crusader States. The first document of this kind is the *chrysobull* of the Byzantine Emperors Basil II and Constantine VIII, dated March 991, by virtue of which the merchants of Venice received the right to trade throughout the Empire without being subjected to any taxes or customs duties (ibid., Vol. 1, p. 15). This concession was subsequently renewed and extended by the grant of a quarter (*embolum*) in Constantinople for dwelling and trading (ibid., Vol. 1, p. 39). At the same time, a similar concessionary practice can be observed in Western Europe: the grant by Henry II of England, dated 1157, of royal protection to the merchants of Cologne (ibid., Vol. 1, p. 161) constitutes the first known document showing the existence of a German trading post in London, the later Steelyard, which formed the nucleus of the subsequently powerful organization of Hanseatic merchants. Contractual concessions also appear at that time, such as the agreement between Prince Yaroslav Vladimirovich of Novgorod and German merchants, signed sometime between 1189 and 1199 and providing, *inter alia*,

unhindered transit, immunity from arrest, etc. (ibid., Vol. 1, p. 263).

Towards the end of the 15th century, concessions to adventurers (Columbus 1492, Cabot 1496, Vespucci 1508, etc.), who were licensed to discover and take possession of overseas territories on behalf of the concessionary State, appear. At the same time, enterprises comparable in size and economic power with modern transnational corporations (→ Transnational Enterprises) emerged which likewise offered their services to the sovereigns: Numerous metal agreements for the exploitation of the Tyrolian, Spanish and Hungarian silver and copper resources were entered into between the Augsburg enterprises of the Fuggers, Welsers, Paumgartners, etc., and the respective sovereigns. The Western European postal system, as was operating for centuries, was also based on concession agreements.

From the 17th century onwards, concessions were used for the colonization of overseas territories by the European powers. Chartered companies, such as the British East India Company, the two Dutch Indian Companies – East and West –, the French Compagnie Royale, and others, often obtained through concessions from local rulers extensive trading and even jurisdictional privileges which, in turn, led to a subsequent political domination of those local rulers by the home State of the concessionaire (flag following trade). Precisely because of its historic function as an instrument of colonization (→ Colonies and Colonial Régime) many developing States still mistrust this legal institution (see section 3(b) *infra*).

The 19th century, with its new technologies, is the classic period in the history of international concessions. Continents were opened up on the legal basis of railway and other concessions for the conveyance of passengers and goods; the → Suez Canal Concession of 1854 and the → Panama Canal Concession of 1878 formed the basis for the construction of waterways unique in history; and telephone and telegraph concessions were frequently granted in and outside Europe. Starting with the Persian D'Arcy Agreement of 1901, the petroleum industry took advantage of this legal device. Oil concession agreements still play a predominant role in this field but have, like other mineral agreements, in recent years undergone some important changes. Due to the concessionary State's desire to increase its share in the revenues and in the control over the concessionary activities, new variations of concessions have emerged (→ International Law of Development).

3. Types of Concessions

Although, by definition, the exercise of any right or function of a State may be transferred to an individual entity and may thus become the subject-matter of a concession, the practice of more than a thousand years reveals that States have concentrated their concession-making power on basically two areas: on public utilities, such as postal matters, telephone and telegraph services, railways, airlines, gas and electricity supply, lighthouse services, etc., and on the exploitation of natural resources, such as fishing, forestry, mining, etc. The public utility concession is primarily designed to invest the concessionaire with administrative functions belonging to the State, offering a direct service to the public without necessarily providing the State with an additional source of revenue. The natural resources concession, on the other hand, primarily emphasizes the fiscal aspect and recently also that of the transfer of technology; the public benefits are emphasized only indirectly, if at all.

In the past, both types of concessions were equally common in international relations. The gradual improvement of the infrastructure in many of the concessionary States, mainly developing States, as well as widely taken governmental decisions to reduce foreign control over public utilities, led to the termination of most of these concessions and, furthermore, to the closing of the public utility sector to → foreign investment (→ Investment Codes). The predominant type of the contemporary international concession, therefore, relates to natural resources, in particular to the extraction of minerals. Since this type has, in turn, undergone some fundamental structural changes during the past two decades, a further distinction must be made between "concessions" (in the narrow sense) and "contracts". The difference basically lies in the amount of control by and of revenues due to the State grantor (or its national company).

(*a*) *Concessions in the narrow sense*

The traditional concession is in the first instance characterized by the transfer of a comprehensive set of principal and accessory rights to the concessionaire over which hardly any control is subsequently exercised by the State grantor. The rights extend over a very large concession area, sometimes covering the whole territory of the State or a large portion of it which the concessionaire is then often not capable (or willing) to develop. This was the case with the "classic" Middle East oil concessions granted before World War II. Furthermore, the agreements had a lifetime of 60 to 75 years and hardly contained any mechanisms for taking future changes of circumstances into account. The government revenues are based on royalties payable on gross production, on surface rents, and on taxes on the concessionaire's net income; rates range from below 50 per cent to 85 per cent in oil concessions with OPEC members (→ Organization of Petroleum Exporting Countries). Older agreements frequently contained elements which are normally characteristic of treaties: They were signed by the competent minister and required ratification by the head of State after being approved by the legislative body, and were published in the official gazette. Clauses dealing with the settlement of disputes through international tribunals, the State's → waiver on applying its national law to the concession, and reference to → international law or → general principles of law were likewise not infrequent.

(*b*) *Contracts*

Although international concessions are contractual transactions and "contracts" are concessions if they fulfil the conditions described above, the term "contracts" is currently used to denote a new variation of concessions which was developed by the oil industry in the 1960s and is characterized by the predominant role of the State grantor; the foreign investor merely acts as contractor, a "hired hand", on behalf of the State against the payment of a fee. The State is not directly involved but always acts through a national company. In line with the concept of permanent sovereignty over natural resources, ownership of the minerals very often remains vested in the State even after extraction. Passing of title takes place at a later stage, in general at the "point of export" or after performance of the "sale". Management control over operations lies with the national company. Any link to the "colonialistic" concession is also avoided in the use of terms: the State's partner is the "contractor" operating in the "contract area". The contractor's financial obligations, if any, are termed "payments" or "fees", thus avoiding the expression "royalties" or "surface rent". The contractor is often obliged to offer technical information to the national company and to conduct training and development courses for its personnel (e.g. Arts. 3 and 6 of the Venezuelan Creole Contract 1976; Fischer and Wälde, Vol. 2, pp. 291 and 296). International elements are rarely used in the more recent instruments. Local law is in general the applicable law; national courts are given competence to decide disputes between State and contractor (→ Calvo Doctrine, Calvo Clause). These "contracts", which are often entitled contract agreements, run for an average of 25 to 35 years.

The "contracts" can be divided into the categories of service and work contracts – as developed in Indonesia – and production-sharing contracts in which, following deduction of cost recovery, the production is divided between the contractor and the national company according to formulas ranging in the oil industry from 81 per cent State/19 per cent contractor (Libya) to 85 per cent State/15 per cent contractor (Egypt onshore), free of tax.

In spite of these basic conceptual differences "concessions" may in practice – for political and other reasons – wear the garment of "contracts" and the boundaries between both types are often blurred.

(*c*) *Joint ventures*

In contrast to widely held views, joint ventures are not a separate type of concession but constitute partnership arrangements in various, often complex forms which are used in concessions as well as in contracts (→ Joint Undertakings). Here the State, either directly or through its national company, receives an equity or ownership in the rights and obligations of a concession or a contract. It can either be established in the original concession, or later be included in the concession-

ary relationship. This, in turn, is achieved voluntarily or through partial nationalization (enforced participation), as in the case of oil concessions throughout the world.

4. Stability of Concessionary Relationships

In spite of far-reaching adaptations of the terms and conditions of concessions to the often legitimate demands of developing States – through revision of "old" concession agreements or development of new patterns as described above – the latters' interference with such instruments, based on their sovereign power, for instance, to nationalize foreign property, can never be ruled out. A number of devices are used in the attempt to counter this ever present threat: So-called internationalization clauses – including the State's promise not to apply any future changes in its fiscal and other legislation to the agreement (stabilization-of-rights clause); the agreed prevalence of the concession *vis-à-vis* inconsistent national law (consistency clause); choice-of-law clauses pointing to international law or general principles of law; and recourse to international arbitration including ISCID facilities (→ Investment Disputes, Convention and International Centre for the Settlement of).

Contracts of this kind have given rise to a comprehensive doctrinal debate over their nature leading to the following basic theories: (a) Such contracts come under a specific legal order created by the contract itself and are ultimately based on general principles of law (Verdross, Domke, Ray, Bourquin); (b) like all contracts, such contracts derive their binding force from the national law of some State, because the individual is not a → subject of international law (Sereni, Brehme, Rigaux); (c) such clauses are reflections of the State grantor's intention to recognize its private partner as an equal entity for the purpose of the concessionary relationship, the contract thus falling within the international legal order (Böckstiegel, Fischer, Cohen-Jonathan, Seidl-Hohenveldern).

The decisive practical question arising therefrom, namely whether the general principle of law *pacta sunt servanda* also applies to concession contracts of this character, thus disallowing unilateral termination by the State, was answered in the affirmative by the arbitrators in the three recent Libyan Nationalization cases (→ British Petroleum v. Libya Arbitration, 1973, Texaco/Calasiatic Arbitration 1977 (→ Libya-Oil Companies Arbitration) and → LIAMCO-Libya Concession Arbitration 1977). By nationalizing the foreign concessions, Libya had in all cases violated her obligations towards the concessionaires. The consequences drawn from such breaches of concessions were, however, different: While in the BP and LIAMCO arbitrations the arbitrator granted compensation to the companies, thus implying that a State, however illegally, may breach its contractual obligations of this kind (priority of national sovereignty *vis-à-vis* concessions), the Texaco/Calasiatic case resulted in the decision that "Libya is legally bound to perform these contracts" and thus the companies were granted *restitutio in integrum* (priority of concessions *vis-à-vis* national law). This conclusion was reached by accepting, in this case, that private enterprises may also be endowed with a limited capacity and quality as subjects of international law (→ Individuals in International Law).

In view of the fact that international law is all but clear on issues such as unilateral termination of concessions, these Libyan cases constitute important precedents for the further development of the relevant rules.

5. Evaluation

As may be observed throughout their history, international concessions are legal vehicles for the achievement of crucial national objectives and currently play an important role in the North/South relationship. By its very nature, this institution gives rise, however, to the now almost classic conflict between national sovereignty on the one hand, and contract stability on the other. Negotiations and, failing that, international arbitration have in some cases led to a settlement (→ Commercial Arbitration). Recent practice, however, reveals that the number of internationalized contracts is sharply declining, which is certainly due to the concept of a new international economic order reflected here in the "contract" type of concession. Since international procedures for conflict solutions are available only to a limited extent, resort is made to other devices for future conflict avoidance and settlement, embodied in recent instruments. Joint venture struc-

tures, renegotiation and revision clauses are viewed as possible ways to avoid future confrontations. But as in inter-State treaty relationships, workable economic relationships cannot be built upon breached agreements but must likewise be governed by the principles of → good faith and stability of concessions. That this legal institution will also be resorted to in the future is confirmed by the fact that, even where nationalizations took place, the nationalizing State and the former (nationalized) concessionaire sometimes find it necessary to establish a new *modus vivendi* for their continuing relationship in the post-nationalization period.

G.H. BARROWS (ed.), Petroleum Legislation, Basic Oil Laws and Concession Contracts (1960–).

OPEC, Selected Documents of the International Petroleum Industry, 7 vols. (1966–1973).

P. FISCHER (ed.), A Collection of International Concessions and Related Instruments, 11 vols. (1976–1983).

P. FISCHER and T.W. WÄLDE (eds.), A Collection of International Concessions and Related Instruments, Contemporary Series, 3 vols. (1981–1983).

A. VERDROSS, The Status of Foreign Interests Stemming from Economic Development Agreements with Arbitration Clauses, Österreichische Zeitschrift für öffentliches Recht, Vol. 9 (1958–1959) 449–462.

A.P. SERENI, International Economic Institutions and the Municipal Law of States, RdC, Vol. 96 (1959 I) 129–239.

M. BOURQUIN, Arbitration and Economic Development Agreements, Business Lawyer, Vol. 15 (1960) 860–872.

G. RAY, Some Reasons for the Binding Force of Development Contracts between States and Foreign Nationals, Business Lawyer, Vol. 16 (1961) 942–958.

M. DOMKE, Arbitration between Governmental Bodies and Foreign Private Firms, Arbitration Journal, Vol. 17 (1962) 129–144.

G. COHEN-JONATHAN, Les concessions en droit international public (1966).

G. BREHME, Souveränität der jungen Nationalstaaten über Naturreichtümer (1967).

K.-H. BÖCKSTIEGEL, Der Staat als Vertragspartner ausländischer Privatunternehmen (1971).

T. FARER, Economic Development Agreements, Col-JTransL, Vol. 10 (1971) 200–241.

P. FISCHER, Historic Aspects of International Concession Agreements, Grotius Society Papers 1972, 222–226.

P. FISCHER, Die internationale Konzession, Theorie und Praxis der Rechtsinstitute in den internationalen Wirtschaftsbeziehungen (1974).

I. SEIDL-HOHENVELDERN, The Theory of Quasi-International and Partly International Agreements, RevBelge, Vol. 11 (1975) 567–570.

D. SMITH and L.T. WELLS, JR., Negotiating Third-World Mineral Agreements (1975).

J. VERHOEVEN, Contrats entre Etats et ressortissants d'autres Etats, in: Le contrat économique international (1975) 115–150.

P. FISCHER, Das internationale Bergrecht im Lichte historischer, gegenwärtiger und zukünftiger vertraglicher Rechtsgestaltung, Zeitschrift für Bergrecht, Vol. 117 (1976) 74–112.

C. KIRCHNER et al., Rohstofferschließungsvorhaben in Entwicklungsländern, Vol. 1 (1977).

T. WÄLDE, Lifting the Veil from Transnational Mineral Contracts: A Review of Recent Literature, Natural Resources Forum, Vol. 1 (1977) 277–290.

F. RIGAUX, Des dieux et des héros: Réflexions sur une sentence arbitrale, Revue critique de droit international privé, Vol. 67 (1978) 435–459.

E. SCHANZE et al., Mining Agreements in Developing Countries, Journal of World Trade Law, Vol. 12 (1978) 135–173.

S. ASANTE, Restructuring Transnational Mineral Agreements, AJIL, Vol. 73 (1979) 335–371.

K. HOSSEIN, Law and Policy in Petroleum Development, Changing Relations between Transnationals and Governments (1979).

T. WÄLDE, Transnational Investment in the Natural Resources Industries, Law and Policy in International Business, Vol. 11 (1979) 691–774.

G.H. BARROWS, Special Report on World Petroleum Concessions, Petroleum Economist (1980) 426–431.

P. FISCHER, Bemerkungen zur Lehre von Alfred Verdross über den "quasi-völkerrechtlichen Vertrag" im Lichte der neuesten Entwicklung, in: Ius humanitatis, Festschrift zum 90. Geburtstag von Alfred Verdross (1980) 379–401.

P. FISCHER, Das transnationale Unternehmen als Phänomen in der Völkerrechtsgeschichte, in: Völkerrecht und Rechtsphilosophie, Internationale Festschrift für Stephan Verosta (1980) 345–370.

E. SCHANZE, Forms of Agreement and the Joint Venture Practice, in: Mining Ventures in Developing Countries (1981) 20–67.

Legal and Institutional Arrangements in Minerals Development (1982).

E. SCHANZE, Joint Ventures zwischen Gatstaat und Investor im Bergbau, Glückauf, Vol. 118 (1982) 550–555.

J. STOLL, Vereinbarungen zwischen Staat und ausländischem Investor, Rechtsnatur und Bestandsschutz (1982).

P. FISCHER, Die Heiligkeit der Verträge zwischen Souverän und ausländischer Privatperson im Zeitalter Machiavellis, in: Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen, Festgabe für Wolfgang Preiser (1983) 45–61.

PETER FISCHER

CONFISCATION *see* Expropriation and Nationalization

CRIMES AGAINST HUMANITY

1. *Notion and Historical Evolution*

The notion of crimes against humanity stems from the history of international law, humanitarianism (→ Human Rights and Humanitarian Law) and international criminal jurisprudence (→ International Crimes). Its roots can be traced to the ethics of Socrates, Plato and Aristotle and the ideas of → natural law and justice espoused by theologians like St. Augustine and St. Thomas Acquinas (→ Ethos, Ethics and Morality in International Relations). One of the founders of international law, Francisco de Vitoria (1480–1546), taught that even in → war one was bound to do as little harm as possible to the enemy. Balthazar Ayala, in 1582, wrote that not even the command of Emperor or Pope could justify mass killing of innocents. A few years later, Alberico Gentili referred to a "common law of humanity" as the protector of humankind. The "father of international law", Hugo Grotius, called for the brotherhood of mankind and Samuel Pufendorf, who occupied the first chair of international law founded at a university (Heidelberg), wrote in 1688 that human beings owed each other the duties of humanity. In The Law of Nations (1758), Emerich de Vattel held that all nations could intervene to rescue co-religionists from tyrannical persecution, and Jeremy Bentham, who first used the term "international law", sought, in 1789, to codify norms of international behaviour (→ History of the Law of Nations).

The rise of humanitarianism brought demands for human rights protection by constitutions and codes. In 1863, Francis Lieber drafted a code of conduct for armies in the field and it became a model for laws of humanitarian warfare (→ War, Laws of). Johann Kaspar Bluntschli drafted a code of conduct for "civilized States" and the President of the → International Law Association sought to guarantee "impartiality and humanity" by an international penal code. The Hague Conventions of 1899 and 1907 on the laws and customs of war (→ Hague Peace Conferences of 1899 and 1907) referred to "the laws of humanity" and the dictates of the public conscience, and an 1890 code by Pasquale Fiore of Naples condemned war as "the greatest of all crimes".

2. *Legal Application*

From earliest times, pirates (→ Piracy) were recognized as the enemies of all mankind who could be punished by any captor. Later, the slave trade (→ Slavery) was similarly condemned, but these were exceptions; the → sovereignty of States severely limited the reach of criminal jurisdiction and international law dealt only with rights between States (→ Subjects of International Law). It was therefore an innovation when, in 1915, the Turkish massacre of its Armenian minority was denounced as a "crime against humanity" for which the responsible officials would be held accountable. The 1919 recommendation of the Allied Commission that those who had violated "laws of humanity" by World War I atrocities should be punished – and similar provisions in various → peace treaties – remained unenforced (→ Peace Treaties after World War I).

Following World War I, many legal scholars and law societies urged that international criminal law be codified and that a court be created to punish international crimes. It was not until the end of World War II, however, that the recommendations were implemented. In 1945 the United States, the Soviet Union, the United Kingdom and France formed an International Military Tribunal (IMT) for the trial of defeated German leaders pursuant to a Charter which set forth the applicable law (→ Nuremberg Trials). It listed three categories of offences: → crimes against peace, → war crimes and crimes against humanity. Crimes against humanity were defined as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". What distinguished crimes against humanity from war crimes and ordinary felonies was that they constituted not isolated incidents but large and systematic actions, often cloaked with official authority, which by their dimension or brutality placed the international community in danger or shocked the conscience of humankind.

The IMT interpreted the Charter to mean that crimes against humanity were punishable only if connected with crimes against peace or war crimes; persecution before the war was not covered. This restriction was lifted in December 1945 when the four Powers enacted Control Council Law No. 10 which deleted the qualifying clauses. The subsequent twelve Nuremberg trials before American judges held that crimes against humanity could be punishable even if unrelated to war and regardless of the → nationality of the victim. The IMT Charter was adhered to by 19 other Allied nations and served as a model for the → Tokyo trial of Japanese war criminals. The Nuremberg principles were unanimously affirmed by the first → United Nations General Assembly (Res. 95(I)), thereby endorsing the responsibility of → individuals in international law and the conclusion that individuals were a proper subject of international protection.

3. Current Legal Situation

Action by the → United Nations has confirmed and expanded the scope of crimes against humanity. → Genocide – a "denial of the right of existence of entire human groups" – was declared an international offence (UN GA Res. 96(I)) and a 1948 Convention (UN GA Res. 260(III)) to prevent and punish the crime was widely ratified. The → International Law Commission (ILC) drafted a Code of Offences against the Peace and Security of Mankind, but work was suspended in 1954 when States could not agree upon a definition of → aggression or upon the creation of an → international criminal court. The willingness of States to expand individual protection was manifested in a host of → declarations, covenants and conventions on → human rights (→ Human Rights Covenants) and by the establishment of the → European Court of Human Rights and the → Inter-American Court of Human Rights. Numerous UN resolutions condemned racial discrimination (→ Racial and Religious Discrimination) and → apartheid as crimes against humanity. → Traffic in Persons, → terrorism and → torture were also denounced as international crimes and, after aggression was defined by → consensus in 1974, world attention returned to drafting the suspended international code of offences against mankind. Newly independent States insisted that the code incorporate the emerging new norms of international behaviour. Punishment was proposed for such other crimes as environmental pollution (→ Environment, International Protection), the use of nuclear, biological or chemical weapons (→ Nuclear Warfare and Weapons; → Biological Warfare; → Chemical Warfare) and violations of the → Charter of Economic Rights and Duties of States. The ILC was requested to consider all views as it renewed its efforts in 1983 to redraft the Code of Offences against the Peace and Security of Mankind.

4. Legal Problems and Evaluation

No universal agreement has yet been reached regarding all specific acts that constitute crimes against humanity. Many countries pay lip-service to the idea; very few are ready to accept effective implementation. The → extradition of accused who enjoy governmental protection remains a major obstacle. The definitions of international crimes are ambiguous and subject to conflicting interpretations, and many States have failed to ratify the relevant instruments or have done so subject to evasive reservations. Some nations and groups insist that every action is licit if taken in pursuit of legitimate goals. Also international law does not develop in a political vacuum; it is dependent upon improved relations among the more powerful nations and upon broader acceptance of common norms.

The conception of "crimes against humanity" seeks to impose restraints on sovereign behaviour in order to protect the individual from gross abuse of fundamental human rights. Although it still has a very long way to go before it can be of major significance in altering the conduct of nations, it is part of a persistent evolutionary process reflecting the expanding social consciousness of the world community.

E. SCHWELB, Crimes against Humanity, BYIL, Vol. 23 (1946) 178–226.

J.Y. DAUTRICORT, La définition du crime contre l'humanité, Revue de droit international, de sciences diplomatiques et politiques, Vol. 25 (1947) 294–311.

H. LAUTERPACHT, International Law and Human Rights (1950).

E. ARONEANU, Le crime contre l'humanité (1961).

B.B. FERENCZ, An International Criminal Court, A Step Toward World Peace, 2 vols. (1980).

L.C. GREEN, International Crimes and the Legal Process, ICLQ, Vol. 29 (1980) 567–584.
H.-H. JESCHECK, Development, Present State and Future Prospect of International Criminal Law, Revue internationale de droit pénal, Vol. 52 (1981) 337–363.
B.B. FERENCZ, Enforcing International Law, A Way to World Peace, 2 vols. (1983).

BENJAMIN B. FERENCZ

CRIMES AGAINST THE LAW OF NATIONS

The term "crimes against the law of nations" is neither frequently nor uniformly used and most works on international law do not mention it. It originated in the criminal law of States to designate acts of individuals directed against foreign States and their representatives. However, it subsequently came to be applied to other crimes in so far as conventional or customary international law binds or entitles States to punish their authors. Crimes against the law of nations must be distinguished from international delicts (→ Internationally Wrongful Acts) and from → international crimes in the sense of the draft articles on State responsibility (→ Responsibility of States: General Principles), adopted by the → International Law Commission (YILC (1980 II, 2) p. 32, Art. 19). Both of the latter terms refer to State responsibility only.

The crimes against the law of nations may be classified as follows:

1. Crimes punishable under internationally prescribed municipal criminal law

(a) Crimes against foreign States and their representatives and against international organizations. Under customary law States have the duty to prevent and punish crimes committed by individuals against foreign States (e.g. against their honour, national insignia or → territorial integrity and political independence), their representatives and against international organizations. Such types of conduct have been criminalized by penal codes since the end of the 18th century. The United States Constitution refers to them in Art. I, section 8, clause 10, by authorizing Congress "to define and punish . . . offenses against the law of nations". The Swiss Federal Constitution contains a similar reference in Art. 122(2). The failure of a State to prevent or punish such crimes may give rise to international responsibility.

(b) Crimes defined by international conventions, but punishable under municipal criminal law. Alongside this customary law, a great number of international conventions have been concluded in the past decades for the suppression of certain crimes which concern interests of the entire international community. The following examples (among many) may be given: Convention on the Prevention and Punishment of the Crime of Genocide (1948) (→ Genocide); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) (→ Traffic in Persons); the Unified Convention on Drugs (1961) (→ Drug Control, International); Convention for the Suppression of Unlawful Seizure of Aircraft (1970) (→ International Civil Aviation Organization); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) (→ Civil Aviation, Unlawful Interference with); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) (→ Apartheid); Convention on Prevention of and Punishment for Crimes against Persons under the Protection of International Law, including Diplomatic Agents (1973) (→ Diplomatic Agents and Missions).

All these conventions define the respective crimes and impose upon the States parties the duty to punish persons who commit them or to extradite these persons for punishment (*aut dedere aut punire*; → Extradition). Some of the conventions also provide for universal jurisdiction and contain provisions on the cooperation of States in the suppression of the crimes. These crimes constitute the bulk of crimes against the law of nations at present.

2. Crimes punishable under internationally authorized municipal criminal law

For some types of conduct which are universally recognized as criminal, customary international law authorizes all States to extend their criminal jurisdiction to any person who commits them regardless of his or her → nationality or the *locus* of the offence (principle of universality). The best

known examples are → piracy and → war crimes. While customary law does not impose upon States a duty to punish such crimes, conventions concluded in the past decades provide for such a duty (for piracy: Geneva Convention on the High Seas 1958, UN Convention on the Law of the Sea 1982 (→ Conferences on the Law of the Sea); for war crimes: → Geneva Red Cross Conventions and Protocols).

3. Crimes punishable under international law

Crimes for which individuals are directly responsible under international law are also, though not uniformly, considered as crimes against the law of nations (→ Individuals in International Law). Under customary law only war crimes fall into this category. States in this case are entitled to punish individuals directly on the basis of international law. The municipal law of States may, however, require municipal norms as a condition of punishment. The Geneva Conventions and Protocols oblige States to enact legislation necessary to provide effective penal sanctions for persons committing grave breaches of the Conventions. At the same time they confirm individual responsibility under international law for such crimes (Art. 99(1) of Convention III on → prisoners of war). The London Agreement on War Criminals of 1945 and the Charter of the International Military Tribunal annexed to it (→ Nuremberg Trials) also included → crimes against peace and → crimes against humanity in this category. Piracy has sometimes been mentioned as a crime directly punishable under international law, but this is not the prevailing opinion. The Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 declares that "[i]nternational criminal responsibility shall apply . . . to individuals" (Art. III). This also seems to establish the direct responsibility of individuals.

All these crimes against the law of nations embrace acts of individuals which violate interests protected by international law. International regulation of such crimes has greatly increased in the past decades owing to the growing → interdependence and vulnerability of States and the international repercussions of certain crimes. The term "crimes against the law of nations" is misleading in so far as it seems to imply individual responsibility under international law; individuals, however, are only exceptionally punishable directly under international law. In most cases States have to enact the necessary penal legislation and to try the offenders. In order to achieve greater uniformity and effectiveness in the prevention and prosecution of such crimes, it might be desirable to create international penal norms applicable to individuals and to establish an → international criminal court. Thus far, however, all attempts of this kind have failed.

J.B. KEENAN and B.F. BROWN, Crimes against International Law (1950).

H.-H. JESCHECK, Verbrechen gegen das Völkerrecht, in: Deutsche Landesreferate zum IV. Internationalen Kongress für Rechtsvergleichung in Paris 1954 (1955) 351–382.

G. SIMSON, Internationales Strafrecht und Verbrechen gegen das Völkerrecht in schwedischer Sicht und Gesetzgebung, Internationales Recht und Diplomatie (1957) 113–125.

G. HOFMANN, Strafrechtliche Verantwortung im Völkerrecht (1962).

A. HETTINGER, Die völkerrechtliche Verpflichtung der Staaten zur Bestrafung Einzelner (1965).

I. BLISHCHENKO and N. SHDANOV, The Problem of International Criminal Jurisdiction, CanYIL, Vol. 14 (1976) 283–291.

L.C. GREEN, International Crimes and the Legal Process, ICLQ, Vol. 29 (1980) 567–584.

DIETRICH SCHINDLER

CRIMES, INTERNATIONAL *see* International Crimes

CURRENCY BLOCS *see* Monetary Unions and Monetary Zones

CUSTOMS FRONTIER

1. Notion

By virtue of the → territorial sovereignty of States, the imposition of customs duties is a matter of → domestic jurisdiction, unless otherwise provided by an international instrument (→ Customs Law, International). As a rule, the customs frontier of a State coincides with its national → boundaries. Thus, → border controls usually comprise both police and customs con-

trols, which may be exercised by officers belonging to different governmental units.

The authority of States to impose customs duties is reflected in the obligation to declare goods upon importation (and sometimes also upon exportation) and to pay the respective customs duties. Two conditions must be met for such an obligation to arise: The existence of legal rules imposing customs duties upon certain goods and their movement across the customs frontier. There are, however, many exceptions to the rule as well as special régimes with regard to customs.

A State's authority to impose customs duties may be subject to various restrictions, which may stem from international or domestic law. They may apply *ratione personae*, *ratione materiae* or *ratione loci*. Neither boundaries nor customs frontiers are altered by such restrictions.

2. *Privileges and Immunities*

(*a*) *Diplomatic missions, consulates and headquarters*

In accordance with the law of the receiving State, goods serving in official use are exempt from customs duties when they are sent to permanent diplomatic missions (Art. 36(1)(a) of the → Vienna Convention on Diplomatic Relations (1961)), → special missions (Art. 35(1)(a) of the Convention on Special Missions), and consular posts (Art. 50(1)(a) of the → Vienna Convention on Consular Relations (1963); → Diplomatic Agents and Missions, Privileges and Immunities). The same applies to permanent missions and delegations to an organ or conference of an international organization (Arts. 35(1)(a) and 65(1)(a) of the → Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character).

Articles imported (or exported) for the official use of an international organization are free from customs duties (→ International Organizations, Privileges and Immunities). Yet they are not allowed to be sold in the host State, except with its permission (cf. Art. II(7)(b) of the Convention on the Privileges and Immunities of the United Nations, UNTS, Vol. 1, p. 18). Permission to run a duty-free commissary for the sale of certain goods for the personal use or consumption of the officials of an international organization, and representatives and delegates to it enjoying diplomatic status, is usually given by the host State.

Since the premises of diplomatic missions, either permanent or special, and of consular posts, as well as the headquarters of international organizations, are immune from inspection, and free communication must be granted to them, it is almost impossible for the receiving State to find out whether its regulations are being observed.

(*b*) *Heads of State*

Heads of State abroad are entitled to absolute immunity, including exemption from customs duties. According to recent practice, heads of government, ministers of foreign affairs and other cabinet ministers (at least) are also granted absolute immunity.

(*c*) *Members of missions; staff*

Goods serving the personal use of a diplomatic agent or consular officer are, with some restrictions, exempt from customs duties according to the law of the receiving State. As far as members of permanent missions are concerned, the exemption includes articles intended for their establishment. Members of special missions and delegates to an organ or conference of an international organization enjoy exemption only for articles of their personal use imported in their personal baggage when entering the host State. These exemptions also extend to members of the family of a diplomatic agent who form part of his household or accompany him. As to articles imported at the time of first installation, the exemption also applies to members of the administrative and technical staff (families included) of a diplomatic mission or a consular post, if they are not nationals of, or permanently resident in, the receiving State.

The personal baggage of a diplomatic agent and members of his family as well as of a consular officer may not be inspected by customs officers except in case of serious suspicion of an offence and in the presence of the person concerned. Customs control by the receiving State is further restricted by the inviolability of the private residence.

Exemptions of this kind granted to diplomatic agents also apply to the secretary-general of an international organization, his deputies and other

officials of the highest categories as well as their spouses and minor children. Other categories of officials only enjoy exemption with regard to their furniture, effects, cars and limited quantities of goods for personal use or consumption (→ Civil Service, International; → Civil Service, European). They do not enjoy immunity from inspection by customs officers of the host State. Subject to special agreements, similar exceptions are granted to United Nations peacekeeping forces (→ United Nations Peacekeeping System; see also → Military Forces Abroad; → Military Bases on Foreign Territory).

3. *Special Régimes to Abolish Customs Barriers*

There are various forms of economic cooperation between States which have as a major objective the reduction or abolition of tariffs and of quantitative restrictions to trade.

(*a*) *Customs unions*

Customs unions entail the elimination of customs barriers between members of the union and the establishment of a common external tariff (→ Customs Union). Customs unions may also be the basis of more comprehensive forms and methods of economic cooperation (e.g. → Benelux Economic Union; → European Economic Community; → Economic Community of West African States; → Latin American Economic Cooperation; see also → Economic Organizations and Groups, International).

(*b*) *Free trade areas*

Free trade areas differ from customs unions in that the elimination of customs barriers between members in the area is not matched by a common tariff (→ Free Trade Areas). Instead, each country retains its own tariff structure on trade with the outside world (see → European Free Trade Association). The resulting difference of external tariffs involves a considerable risk of deflection of trade. This is remedied by special rules of origin and a particular system for the control of certificates of origin to be produced upon importation of area goods. One important condition for the customs administration in this field are common standards for the classification and valuation of goods for customs purposes (→ Customs Cooperation Council).

(*c*) *GATT*

The → General Agreement on Tariffs and Trade (GATT) is a régime of outstanding importance, one of whose major aims is the reduction of customs tariffs among member countries in order to develop world trade (→ World Trade, Principles). The establishment of customs unions or free trade areas is compatible with GATT as long as customs duties adopted by those régimes are not higher than those prevailing prior to their formation (Art. XXIV of the GATT).

4. *Frontier Regions*

(*a*) *Local frontier traffic*

Frontier lines cutting across private real property may hamper its cultivation and burden the owners with considerable problems. Therefore, → neighbour States often agree upon special customs rules applying to residents of border districts, which usually coincide with local authorities or districts of the countries concerned. Facilities granted to landowners include exemption from customs duties of goods to be used for agricultural purposes (including animals and plants), goods for personal use and crops. In industrialized and densely populated areas, other personal facilities have also proved necessary, especially in the interest of crossborder commuters (cf. also → Boundary Régimes).

(*b*) *Transfrontier cooperation*

The ordinary facilities granted to local → boundary traffic do not satisfy the needs of urbanized areas intersected by a boundary and of regions oriented towards an urbanized centre beyond the boundary. Although the free flow of goods and services (as well as of capital and labour) is to a considerable extent secured by comprehensive customs régimes, improvements on a regional scale are still regarded necessary. They will better allow → transfrontier cooperation between local and regional authorities, particularly in the performance of all kinds of public services.

5. *Selected Customs Regulations*

Growing → interdependence of the economies is reflected in a gradual reduction of customs rules and formalities concerning transfrontier transport.

Besides other facilities, favourable conditions for the import, export and transit of vehicles have developed. They apply to → aircraft, the rolling stock of railways as well as to lorries, buses and private cars (→ Air Transport Agreements; → Railway Transport, International Regulation; → Traffic and Transport, International Regulation).

On the basis of international agreements, customs control and clearance may even be exercised on foreign territory. Whether the permission to act on foreign territory qualifies as an international → servitude is not undisputed (→ Railway Stations on Foreign Territory; → Administrative, Judicial and Legislative Activities on Foreign Territory).

6. *Influence of Topographical Conditions*

(*a*) *The Law of the Sea*

The sovereignty of a coastal State stretches to the outer limit of the territorial sea including the → sea-bed and subsoil below and the airspace above (→ Air, Sovereignty over the). Thus, the national boundary as well as the customs frontier of a coastal State coincide with the outer limits of its → territorial waters (Arts. 2 to 4 of the 1982 United Nations Convention on the → Law of the Sea). Within the limits of the territorial sea, however, the coastal State has to allow the → innocent passage of foreign ships (→ Navigation, Freedom of). If undertaken during the passage, loading or unloading of goods in violation of the customs regulations of the coastal State would destroy the innocent character of the passage (Arts. 17 to 19) and entitle the customs authorities to take appropriate steps.

Although the → contiguous zone adjacent to the territorial sea is not part of the coastal State's territory, customs authorities of that State are entitled to prevent and punish infringements of customs regulations committed there (Art. 33). The notion of a contiguous zone goes back to the claim for "customs waters" which gradually gained support (→ Hovering Acts). In times of extensive and sophisticated smuggling of arms and drugs the contiguous zone may be of special significance (→ Contraband; → Drug Control, International).

Customs jurisdiction of the coastal State also extends to the → continental shelf and the → exclusive economic zone, but is then restricted to → artificial islands, installations and structures and their → safety zones (Arts. 60 and 80).

Foreign ships may even be arrested on the → high seas if they have been detected as being in breach of customs regulations (→ Ships, Visit and Search). But the chase in → hot pursuit must at least have commenced in the State's contiguous zone. The same applies, *mutatis mutandis*, to infringements committed on the continental shelf and in the exclusive economic zone (Art. 111).

(*b*) *Micro-States*

Micro-States owe their existence to historical tradition, self-confidence and political utility (→ Micro States). Their customs régime, however, seems to depend largely on practical factors, such as topography and economy. A customs union has proved useful in various cases, irrespective of whether the micro-State is adjacent to a number of States (→ Liechtenstein) or only to one State and the sea (→ Monaco) or is enclaved by one State (→ San Marino; → Land-Locked and Geographically Disadvantaged States). Special customs regulations have been devised to guarantee the supply of the Vatican City (e.g. Art. 20 of the → Lateran Treaty (1929); → Holy See).

(*c*) *Free zones and similar régimes*

The peculiar topographical situation of a border area may result in its orientation towards the neighbouring State, with various disadvantages. If a cession of the territory is ruled out, a transfer of the customs frontier may help to overcome or at least mitigate these problems. By withdrawing its customs frontier behind the national boundary the State can meet the requirements of the area concerned without giving up → sovereignty over it. To what extent territorial jurisdiction in customs matters (or even other matters) is surrendered to the neighbouring State depends on the individual agreements entered into by the parties. Phenomena of that kind are qualified as free zones (→ Free Zones of Upper Savoy and Gex Case) or as national territories excluded from the national customs area (*Zollausschlußgebiete*).

The withdrawal of a coastal State's customs frontier to form a → free port has become the

exception rather than the rule. Usually the customs frontier remains unchanged, but exemption from customs duties is granted on the assumption that the goods moved to and from free ports, foreign-trade zones and bonded warehouses have not crossed the customs frontier.

(*d*) *Enclaves* (*exclaves*)

An interesting species in international law, though more and more threatened by extinction, consists of relatively small territories completely separated from their home (or national) State and entirely surrounded by another (the host) State (→ Enclaves). The problems arising from the separation of a territory from its mainland can be overcome if free access is granted by a right of passage over foreign territory (→ Right of Passage over Indian Territory Case). No change of customs jurisdiction takes place. If, however, a right of passage does not turn out practicable, those territories are usually excluded from the customs area of their national (home) State and included in the customs area of the contiguous (host) State.

7. *Evaluation*

The purpose of national boundaries is the delimitation of the territorial jurisdiction of States or, politically speaking, of spheres of territorial influence. With regard to the organization and development of the national economy, considerable importance attaches to the customs system, which is closely connected with the shape and significance of the customs frontier.

The privileges and immunities granted in order to secure unimpeded diplomatic and consular functions, as well as statutory activities of international organizations on the territory of the receiving or host State, serve a special purpose. Though restricting customs authority, they are not used as an instrument of economic policy. A speciality of another kind has emerged in the law of the sea where the particular conditions and requirements of the coastal States and of the freedom of navigation were taken into account.

Most customs régimes and regulations are mainly economic in character. Their development and shape reflect the traditional conflict between liberalization and protectionism, regardless of whether the particular regulation concerns a region or the State as a whole. Sometimes, customs liberalization is considered as affecting national coherence and, in the long run, even threatening State sovereignty. Thanks to political institutions and national self-confidence, however, such fears have so far proved to be unfounded.

H. MARTINSTETTER, Die Staatsgrenzen (1952).
C. D'OLIVIER FARRAN, International Enclaves and the Question of State Servitudes, ICLQ, Vol. 4 (1955) 294–307.
I. BERNSTEIN, Delimitation of International Boundaries (1974).
O.L. BRINTZINGER, Versuch über Exklaven und Enklaven, Recht im Dienst des Friedens, Festschrift für Eberhard Menzel (1975) 487–515.
J.R.V. PRESCOTT, Boundaries and Frontiers (1978).
J. ATKINS, S. DOYLE and W. SCHWIDETZKY, Foreign-Trade Zones: Sub-Zones, State Taxation and State Legislation, Denver Journal of International Law and Policy, Vol. 8 (1979) 445–473.
H.M. CATUDAL, The Exclave Problem of Western Europe (1979).
A.M. MIATELLO, Les zones franches, les institutions similaires et le droit communautaire, Rivista di Diritto Europeo, Vol. 22 (1982) 99–142.

HERBERT MIEHSLER

CUSTOMS LAW, INTERNATIONAL

A. General Description: 1. Legal Bases; Notion. 2. Sovereign Customs Prerogatives and "Self-Limitation". – B. Historical and Economic Background: 1. The State as Economic Unit. 2. Free Trade as an Economic Form. 3. Modern Hybrid Forms. – C. Institutes and Institutions: 1. Regulation by Treaties (excluding international organizations). (a) Fixing of tariffs. (b) Most-favoured-nation terms. (c) Preferences. 2. Organized Customs Associations. (a) Customs unions. (b) Economic unions. (c) Free trade zones. (d) Europe as a free trade area (excluding Comecon States). – D. Universal Customs Systems: 1. Brussels Customs Council. 2. General Agreement on Tariffs and Trade.

A. General Description

1. *Legal Bases; Notion*

International customs law is essentially international law. As such, and only as such, it places a limit on the exercise by States of their independent financial prerogatives based on → sovereignty of which customs prerogatives

form a part. International customs law must be viewed in terms of the law of → treaties. Although, in principle, → customary international law is conceivable as a source of international customs law, States regularly demonstrate an unwillingness to be legally bound on the basis of what might be determined as long-standing practices. It is simply not possible to infer from the constant practice of a State in the economically and politically sensitive area of its own financial affairs that it intends to give up part of its autonomy. Thus, the formation of customary international law, as such, normally does not arise. Where a congruent practice has developed over a longer period of time, it has mainly been based on → comity and self-limitation rather than on the recognition of an existing legal duty.

It follows from the above that the sovereign customs prerogatives of States are only limited by the express agreement of States, i.e. by treaty, and only for as long as the agreement provides. The frequent renewal of particular treaty standards does not mean the latter mature into specific rules of customary international law with corresponding duties for States.

Eventual customary rules for diplomatic agents and missions and for international organizations cannot be discussed here *in extenso* (see *infra* and the articles on → Diplomatic Agents and Missions, Privileges and Immunities; → International Organizations, Privileges and Immunities).

Customs duties are payments levied on transfrontier movements of goods. Since internal tolls (duties levied within States) became matters of no practical importance, the boundaries which, once crossed, fix customs dues upon goods are, with certain modifications, the → boundaries of States. As a rule, the power to levy customs duties is based on autonomous, national customs law.

All such provisions regulating customs will be of some international relevance. It would be arguable to say the totality of these provisions constitute "international customs law" using the example of private international law. However, this would in no way aid the understanding of the peculiarities of international customs law. In so far as customs law forms a part of national public law and is laid down in such a way that it operates autonomously from other → subjects of international law and does not give rise to international obligations, it does not seem appropriate to speak in terms of international customs law.

It follows that international customs law can only be public international law. On basic principles, international law is not restricted as to the forms it assumes. Consequently it is of no importance whether a given instrument of customs law is a treaty between States requiring ratification or whether it is a formless transfrontier regulation, e.g. an agreement between two neighbouring customs authorities on common opening hours for the customs offices within their respective areas.

2. Sovereign Customs Prerogatives and "Self-Limitation"

The area within which the State exercises its sovereign customs prerogatives is the "customs area (or territory)". According to the German Customs Statute, for example, this is defined as (German) "sovereign territory", extended by "customs enclaves" (*Zollanschlüsse*) and limited by "customs exclaves" (*Zollausschlüsse*) and tax-free areas. In customs exclaves, political sovereignty remains over an area which is integrated into the customs area of another State. Customs enclaves are the mirror image of the latter. This kind of arrangement is only possible by means of a treaty since it invariably requires a State to dispose of a part of its sovereignty. Tax-free areas are part of a State's territory over which an autonomous decision is made to refrain from the exercise of sovereign customs prerogatives without, however, any other State stepping in to fill the vacuum. It is nevertheless possible that tax-free areas are established on the basis of a treaty. Such treaties are always required (e.g. for railway stations on borders) to make agreed provision for sovereign acts on foreign territory (→ Railway Stations on Foreign Territory). As a rule, however, tax-free areas in all their diversity (e.g. the island of → Heligoland, → free ports and other free zones) are established by means of a unilateral State act, in other words by an act of "self-limitation" (→ Unilateral Acts in International Law).

It may be argued that such unilateral acts by States do not belong within the framework of

international customs law, but this would be to neglect their contribution from time to time to international cooperation. Such national acts cannot be understood in isolation from their international importance and effects. "Self-limitation" thus most certainly has its place within the system of international customs law.

In practice, each reduction in the extent of a customs area serves to facilitate the international movement of goods both for the State initiating the self-limiting measures and its foreign trading partners. Such measures intensify and assist international cooperation without the necessity of a formal legal obligation. They do not bring about any unilateral obligations under international law and may be revoked at any time.

Also to be mentioned are the limits to customs prerogatives which do not relate to a given area, so much as to personal status. In this respect, the exemptions accorded to diplomats come most readily to mind. These allegedly rest upon a corresponding rule of customary international law, but controversy has always surrounded this proposition. As was pointed out earlier, great circumspection must surround the identification of any customary rules within the field of customs law. Even in the example of diplomatic exemptions, the view has prevailed that at most a rule of comity is here the issue, in other words and in the final analysis, another instance of self-limitation. The adoption of a corresponding provision in the → Vienna Convention on the Law of Treaties (1969) has promoted the provision into a rule of positive international law for all those States ratifying the Convention.

This is the appropriate place also to mention the special status of foreign (allied) troops stationed in a given country (→ Military Forces Abroad; → Military Bases on Foreign Territory). The basic principle is that all the goods required by the forces and their dependants may be imported free of customs payments. If the goods are later introduced into the host State's economy, they will attract customs duties. This is clearly spelled out, for example, in the 1963 Agreement governing customs and excise privileges which was designed to supplement the Status of Forces Agreement of the → North Atlantic Treaty Organization.

B. Historical and Economic Background

1. The State as Economic Unit

Well before the rise of the sovereign territorial State following the collapse of the medieval order, there were in existence economically significant movements of people and goods. The legal basis for such movements was provided by the contemporary understanding of the *jus gentium*, which did not supply an "international customs law". Customs dues, then the most important source of public funds, were collected on the spot by those who had been granted powers to do so or by those who in practice were powerful enough to make good their claims to collect dues at suitable points along trade routes. Over the longer term, this system led to the invigoration of territorial powers. In the end, sovereign territorial powers came into existence, each understanding itself as equal and separate, without reference to political and economic power. In so conceiving of themselves, these States chose the economic model of autarky, because only autarky could properly serve the fundamental principle of complete independence from others, i.e. the principle of sovereignty in its most extreme sense. That autarky nonetheless remained always an aim rather than a reality lay in the fact that trade had long rested on laws of its own. The flow of goods could no longer be simply cut off; such goods satisfied general needs which were independent of the State and its aims. Moreover, the many small States which came into being were not in a position to satisfy all their needs from their own resources; of necessity they relied on exchanges of goods and services.

Since autarky was not capable of realization, a practicable half-way house was created less out of theoretical convictions than present needs. The necessity for trade with lands far beyond the border of the State was acknowledged; nonetheless, imports were to be small and exports as large as possible. All the new States declared their belief in this notion of foreign trade which was known as "mercantilism". They protected domestic producers with a multiplicity of economic measures designed to direct commerce, pre-eminently the device of the "protective tariff". Custom dues were levied on the basis of particular tariffs which

could be designed in such a way that domestic producers remained competitive. They could be laid down to effect a *de facto* import ban ("prohibitive tariffs") or to serve as weapons against the measures of other States which were having a damaging effect on trade. By this time customs dues ceased being mere sources of revenue. Whilst of course retaining their revenue-raising function, above all customs became a device providing economic direction which even made it possible for a State's interior to be turned into a closed economic system when necessary – in every sense an autarky.

The above presented a dilemma for States which did not, under mercantilism, wish to deny themselves the markets of other States or whose economic needs were such that they relied upon these markets. The dilemma was resolved by means of treaties which served States as instruments of consensual agreement and obligation.

2. *Free Trade as an Economic Form*

The economic notion of mercantilism was challenged by Adam Smith's ideas on free trade. Tariffs, long held to be absolute necessities, fell into disfavour. According to Adam Smith, goods ought to be bought from the places where they were cheapest to be had. Only then would economies based on the natural division of labour arise. The flow of goods ought not to be diverted along false paths by tariffs; protective tariffs gave rise to monopoly producers at the cost of the generality. Only free trade unhindered by customs barriers served the common good. These ideas (first in England, then spreading onto the Continent) influenced the economic policies of governments to some extent, but they have never prevailed over longer periods of time. It was not felt possible to discard protective tariffs: the interests of the domestic economy had to be considered. This approach found support in the theories of the German economist Friedrich List but it also characterized the industrialization which had begun to take place on the Continent. Protective tariffs were now seen as "nursery tariffs" behind which commercial strength could be garnered and nurtured. After a certain period goods could then be purchased cheaper at home than abroad.

Even though in principle a transition from protection to free trade by means of the unilateral abolition of tariffs was thought desirable, the damaging consequences to domestic economies of such measures were feared. The capacity of the free trade system to minimize such damaging consequences was exemplified by Britain's free trade measures within her Empire. However, different problems of economic cooperation arose for the system of relatively small States on the Continent, even if some of the latter had already become "colonial powers".

3. *Modern Hybrid Forms*

The principle of free trade, which aims at universal application throughout the world economy, has never prevailed sufficiently for it to be adopted by all States. There have always been States which distrust the universalism or internationalism implicit in free trade as well as the free trader's rejection of central economic intervention. Despite the theoretical abundance of 19th and 20th century economic thinking, no self-sufficient third concept has emerged alongside those of protectionism (as rooted in mercantilism) and free trade (understood in terms of a universal, self-regulating market economy). Instead, various hybrid forms have developed along mainly pragmatic lines and largely predisposed towards central planning and protectionism. During both world wars and the inter-war period, command economies developed on the basis of real or imagined needs. War economies, both before and directly after wars, always have a large element of central planning. In the period following World War II, the liberalization of trade was seen as an urgent priority. The great variety of international organizations emerging during the period were charged with attending to the issue in so far as they were competent to do so. Above all, the → General Agreement on Tariffs and Trade became the leading organization in this field.

The importance of tariffs over the years has declined. The revenue needed by States is today largely collected from sources other than tariffs. It has also been possible in the relations of modern States to eschew the guiding function of tariffs in favour of other, more effective devices (bans on import, export or transit, quotas, subsidies and other kindred measures). It would nevertheless be

wrong to deny the importance of customs and by extension customs law. The old debate between "mercantilism" in its modern manifestation and "free trade" continues.

C. Institutes and Institutions

1. *Regulation by Treaties (excluding international organizations)*

(a) *Fixing of tariffs*

Customs duties are levied on the basis of exact requirements called tariffs which lay down the circumstances when duties are payable and the amount payable. The value or weight of the goods serve as the basis of measurement; in practice, however, weight measures are no longer important having been supplanted by measures based on value. Tariffs are generally fixed by means of autonomous acts carried out by States exercising their sovereign customs prerogatives (autonomous tariffs). Early on, it came to be asked whether a State in exercising its unfettered discretion to fix tariffs should use its own interests as the sole basis for its decisions. One consequence of this question was the search for a "fair tariff", i.e. a tariff which was in conformity with the requirements of all the given trading partners. Had this been successful, it is probable that such a tariff or system of tariffs would have attained recognition as a general rule of customary international law. All States would have been prepared to recognize as binding upon themselves a tariff rate which was really fair. However, this search was rewarded with as little success as the searches for "fair prices" and "fair pay". All that emerged was a recognition rather than a legal obligation that tariffs should not be so excessive that they seriously hindered economic cooperation and the flow of goods in the absence of some special justification for so doing.

The determination of the correct measure is an aspect of self-limitation in the fixing of autonomous tariffs. Since, however, value is placed on the reliability and reasonableness of partner States and given the reluctance of States to allow their requirements to depend on foreign measures, regulations by treaty soon followed, based on the principle of → reciprocity and designed to fix and harmonize tariffs. As a consequence of the changing political and economic needs of States, these treaties, like all tariff and economic treaties, are concluded for short periods of time ("treaty tariffs").

In 1980 during the era of "functionalism" (the last third of the 19th century) the Union for the Publication of Customs Tariffs was created which aimed to bring about "market transparency" as conceived in free trade terms. The underlying hope was that through the Union a self-regulating mechanism would arise which would lead to the reciprocal equalization of customs tariffs between States. The Union was not an international organization in the modern understanding of the term. It did not have any recognized legal capacity despite its rudimentary organizational character. Instead, it rested upon a different conception of international organization which accorded full priority to States whilst relying on the self-limitation which was inherent in the subject-matter itself; after World War I, the foundation of the → League of Nations and the → International Labour Organisation introduced a different conceptual model.

It should lastly be mentioned that at the time the Union was founded, no decision had been made between tariffs based on value and tariffs based on weight which therefore continued, side-by-side, in existence. This had to be so, since the alternative would have required an imposition upon State competence which prevailing opinion rejected as excessive.

(b) *Most-favoured-nation terms*

The principle of the equality of all sovereign nations, a basic rule of recently created, now called classical international law, *inter alia* requires that advantages given to one State should also extend to other States (→ States, Sovereign Equality). Taken at face value, this should mean that preferential tariffs agreed in favour of one State will *per se* apply to all other States. This is not the case. No State can demand to share the favoured position of another in the absence of particular legal grounds for so doing. Only when → most-favoured-nations clauses have been agreed in a treaty and the relevant conditions have been met, will a State directly enjoy the benefits of most-favoured-nation status. Most-favoured-nation terms say that when a third State

receives better treatment or a more favourable position under a later treaty when compared with the treatment or position under the treaty with the original partner, the original partner has an automatic right to the better treatment or the more favourable position which arises out of the new treaty terms.

Thus, the principle behind most-favoured-nation terms is all-embracing and wide-ranging. A particular agreement between two States only also extends to States which took no part in it. The most-favoured-nation clause which is not *per se* a special instrument of customs law, has gone on to attain its extraordinary position in trade between States and particularly in the field of customs law. The clause will only apply in the presence of a treaty relationship between the parties which incorporates most-favoured-nation terms. Most-favoured-nation terms only attain their actual aim, i.e. the wide-ranging cooperation of equals, when "unconditional most-favoured-nation" terms are agreed. Only in such cases is it possible to demand without more the terms and conditions contained in later treaties. The wide-ranging effect will be lost if "conditional most-favoured-nation" terms are agreed.

As economically desirable as it might be, there is no right to most-favoured-nation terms. This would only be possible if an appropriate rule of customary international law existed, but this is not the case. In this respect, States do not wish to be bound tightly. Thus, the relevant clause must be incorporated in new treaties as they are concluded. However, the importance of the clause is now so widely appreciated that a refusal to incorporate a most-favoured-nation clause in negotiations towards a treaty in the absence of compelling reasons would be construed as an → unfriendly act.

(c) *Preferences*

A different approach to the wide-ranging principle behind most-favoured-nation terms is presented by the grant of preferences which is more likely to arise out of the closer political accommodations of an association of States. To grant preferences (preferential treatment) is to arrange, on the basis of a treaty, a better position for one or more States than is enjoyed by other States. This system of political association can in some circumstances be very loose indeed and entirely without organizational manifestations. One frequently mentioned historical example of such a preferential statute is the Methuan Treaty of 1793 concluded between Great Britain and Portugal. Portugal's political incorporation into the British system of → hegemony amounted at the time to an advantage to Portugal when her position was compared to those of other States.

On the face of it, preferences violate the basic principle of the equal treatment of all States, but they have been introduced and they have prevailed. Today they are generally held to be lawful.

In recent times, where the grounds advanced for their validity are concerned, preferences have actually turned full circle. In connection with their efforts towards a new → international economic order, the → developing States have demanded preferences for themselves on the grounds that a kind of restitution should be made to them for the damages they suffered or at any rate claimed to have suffered during the colonial period. Whether preferences, which are instruments of customs law, are a viable way towards such aims is a question which need not be considered here.

2. *Organized Customs Associations*

(a) *Customs unions*

A → customs union is a treaty-based association of several States for a unified customs area. The political independence of the associated States remains intact. The idea of customs unions rests on the conviction that a small or otherwise weak State can only develop its economy in an unsatisfactory way and that therefore it must expand beyond its actual territorial boundaries into a larger economic area. It must be borne in mind that at the beginning of the last century when the idea of customs unions was developed, a customs area was the same as an economic area and therefore in practical terms where a customs union was created, an economic union also came into being.

In customs unions, the State partners exempt each other from all customs duties. Internal tolls cannot be levied. Externally, a unified tariff is fixed for States outside the Union. Receipts of these external dues are distributed to the member

States in accordance with agreed quotas. To resolve questions arising out of these arrangements, common organs are created (e.g. a customs parliament or customs council) which may make resolutions binding on the member States. It is by means of these organs and the nature of their work that a customs union acquires a character similar to that of a State, even if the union does not represent a political unity. Nevertheless they are often willingly characterized as a step towards political unity and statehood.

This characterization of the history of customs unions is well-founded, so far as the → Zollverein (German Customs Union) is concerned. At the beginning of the 19th century, the German Customs Union was brought into being to maintain the economic viability of the small German States. Nevertheless also tied together with the German Customs Union was the profound desire for political unity which eventually in 1871 was brought about with the foundation of the German Reich. This was, however, no necessary consequence of the existence of the German Customs Union, but rather an expression of an existing and underlying political desire for unity.

The notion that a customs union could serve as a remedy for many kinds of economic difficulties has led repeatedly to extensive experiments designed to solve particular problems. That these experiments proved fraught with difficulties at the outset (e.g. the attempted customs union between France and Italy after World War II) was also due to the fact that the needs of States and their economies had over the years expanded beyond what the customs union in its traditional form was able to accommodate.

(*b*) *Economic unions*

The idea that a simple customs union of itself will create an economically satisfactory area is no longer tenable today. The needs which must be satisfied by a modern State are greater than can be satisfied solely by a common customs policy pursued within a customs union. What is required is a common economic policy in a wider sense so that even such things as a common research and development policy are also included. Thus, instead of the customs union with all its tried and tested merit purely as an instrument of customs law, what is needed is the expanded, more durable solution of the economic union.

The → European Economic Community despite its appellation, is only a step towards the above solution. It is said that given its structure, the (supranational) competence of its organs and the breadth of its tasks, the EEC is more than a customs union. However, the EEC does not measure up as a genuine economic union. Nevertheless, beginnings have been made which may lead the organization to further development as an economic union, e.g. freedom of movement for workers, free flow of services and payments, and the protection of property within the area of the EEC.

Customs unions as well as economic unions facilitate internal free trade. However, since this is limited to the area of the unions and free trade is really a principle which can only be realized on a universal basis, customs and economic unions stand in contradiction to the philosophy underlying GATT which aims at the world-wide liberalization of trade. Nevertheless, customs and economic unions are expressly allowed under GATT between its members.

(*c*) *Free trade zones*

The free trade zones established by inter-State treaties (e.g. the → European Free Trade Association) provide for free trade as between the contracting partners by removing existing customs barriers between them. Such zones again are in conformity with GATT, even though in principle the position might appear to be otherwise. They are less associations of States than are customs unions because they do not provide for common external tariffs and the need for a common customs policy does not arise. When compared with customs unions or the EEC, such zones have only rudimentary organizational units and modest technical organs both in terms of personnel and competences. That free trade zones are nevertheless capable of estimable achievements is illustrated by the development of EFTA and its present standing. This is, however, partly due to the close links between the EFTA member States and the EEC system.

(*d*) *Europe as a free trade area (excluding Comecon States)*

Since 1972, the EEC has exercised its power to conclude treaties as an international organization with legal capacity by entering into free trade

agreements with the member States of EFTA (→ European Communities: External Relations). In accordance with the structure of EFTA, each EFTA member binds itself on its own behalf, whilst for its part, the EEC as such is the contracting party. Since January 1, 1984, a binding system covering a wide area has existed between the member States of the two Organizations. The free trade area established by EFTA under the multilateral Stockholm Convention, as such, continues but it is now linked with the EEC area and thus a unified free trade area has come into being. The following organizations now exist side-by-side, but legally linked: The EEC as a customs union, EFTA, as a free trade zone and the EEC and EFTA together as a free trade zone. Thus, with certain territorial exclusions (not limited solely to the Comecon States) Europe as a free trade area has become a reality.

D. Universal Customs Systems

1. Brussels Customs Council

Soon after World War I, a clear tendency emerged favouring a multilateral approach in customs matters. In 1921 the Barcelona Convention on Free Transit Movements was concluded, followed in 1923 by the Geneva Convention on the Simplification of Customs Formalities. It had long been recognized that separate and complicated customs formalities requiring strict compliance laid down autonomously by States could be as deleterious to the movement of goods as the duties themselves. It was accordingly in the acknowledged interest of all States that formalities should be simplified and unified.

This tendency became even more pronounced following World War II. With the aim of establishing a new order for the war-torn economy of Europe, a study group was set up in 1947 charged with examining the prospects for establishing a European customs union and making proposals. This initiative was ahead of its time, given the political and economic circumstances then prevailing and the over-ambitious goal of a European customs union proved incapable of attainment. Nevertheless, the 1950 agreement on the value of goods for the purposes of tariffs was based on the work of the study group. It is on the latter agreement that the economically significant decision rested to replace weight with value as the appropriate measure for customs use. At that time, amongst other things, a council was also established to support cooperation between States in customs matters.

The present-day Brussels Customs Council rests on the Agreement on the Simplification and Harmonization of Customs Procedures which was revised in Kyoto in 1973. In no sense does the latter supply mere technical marginalia for the purposes of international customs law. The modern practice of States has demonstrated ever more clearly how complicated customs procedures autonomously laid down by States can be genuine hindrances to trade, quite independently of tariffs. The aim is therefore now towards a harmonization and unification of procedures. This is to be made possible by a "world customs code" which is presently under preparation and is designed like many other codes to carry the load of a new world economic order.

Since none of the latter are to be legally binding in the classical sense, they all aim to serve as → codes of conduct for the acts of self-limitation undertaken by all the participating States.

At the same time, the same formative influences which once shaped the exclusively bilateral character of customs treaties now apply to the multilateral Kyoto Agreement and determine its special structure. Only the rules contained in Part I of the Agreement are equally binding on all contracting States, whilst Part II consists of 30 annexes each of which contains a separate and entirely self-sufficient customs procedure. Each of the annexes when combined with the "general provisions" of Part I constitutes a separate and particular agreement. Brought about in this way, these widely differing regulations between the various contracting States, are to be applied in domestic law by every State for itself "as soon as possible". International customs law directly applicable in domestic law does not arise in this way. The contracting parties are merely obliged to provide for the most timely application of the regulations within their States consistent with their particular circumstances. To ensure that this is brought about, States are obliged to report to the Council at three year intervals on the prevailing legal situation or the legal position under the Kyoto Agreement as the case may be.

The special feature of this régime is that no attempt is made at a solution which would be

immediately and equally binding on all the participants; instead what have been created are the conditions for continuous development towards the realization of the actual goal which is universal agreement on rational procedures. This might serve as an example for other complex matters in other legal areas. Also to be mentioned is the responsibility of the Council (*inter alia*) to advise States on the way they set down their customs law. The importance of this function lies less in the availability of competent specialists to help with difficult legislative tasks (as desirable as this is, of course), so much as in the way effectiveness in the same spirit is transfered to domestic laws from the international level. Given the different interests contending in the area of customs law, it may be that the above represents a more effective working method than a literal transformation of the regulation into national law, particularly when it is considered that no international unanimity on a single text yet exists.

2. *General Agreement on Tariffs and Trade*

After World War II an attempt was made to recast the world economy badly shaken by war with the help of an international trade organization. The universal multilateral treaty designed to serve as the basis for the organization (the so-called → Havana Charter) did not receive general consent. The only part of the Havana Charter which survived to be realized was GATT whose authoritative legal provisions today can be overlooked only with great difficulty. Since 1947, its *de facto* year of establishment, GATT has led a continuous process of legal formation which only taken together establishes GATT's decisive legal basis.

The purpose of GATT is the universal liberalization of trade relations which after the war were subject to the greatest variety of historically developed trade barriers. Tariffs were not the only problem, but at first they were the primary problem, followed then by quantitative restrictions, currency measures and many others. The reduction of tariffs followed upon successive so-called "tariff-rounds" (e.g. Tokyo round). However, since the contracting States to GATT represent a very wide diversity of economic structures and GATT rests on the idea of the equality of all States, a number of difficulties arose: one example of the attempts towards their resolution were the agreed differential reductions made on the basis of the origins and types of goods.

Further problems then came to the fore as the developing countries persuasively pressed home the argument that their interests were not sufficiently served within the framework of GATT. Consequently, a new Part IV was inserted into GATT in 1964/65 which was to give proper emphasis to the special position of the developing countries. The ensuing expressions of dissatisfaction showed the reform wide of the mark if only because the newly adopted provisions were more expressions of ultimate aims and declarations of intent than regulations which were capable of realization. Although the developed States declared that they would not expect of the less developed contracting States an assurance of reciprocity in the obligations which had been previously agreed in talks on the reduction or elimination of tariffs or other trade barriers, the developing States nevertheless successfully insisted upon the establishment of a new international body which, from the onset, would concentrate primarily on them to ensure that their interests were properly served. From this point onwards, the output of the → United Nations Conference on Trade and Development has necessarily been taken into account whenever the achievements of GATT are examined, even if the latter has quite unjustifiably been neglected in recent writings.

The → waiver of reciprocity on the part of the developed States, notwithstanding the recognition of reciprocity as a fundamental principle of classical international law (which can on the other hand be excluded by a treaty between particular parties), readily demonstrates how recent international customs law sheds light on developing tendencies towards a new understanding of international law. It must, however, be said that the consequences which some allege have already followed from this new understanding are largely overestimated. Under Art. I, GATT rests on the basic principle of unconditional most-favoured-nation terms. This means that a third country will accede to favours which have been bilaterally agreed between two other States without the country so favoured itself having to grant such favours. To this must be added the basic principle

of reciprocity which is equally anchored in GATT. When combined with the most-favoured-nation principle an implementation mechanism arises and all the successes of previous tariff rounds, including the Tokyo round, rest upon it. Waiving reciprocal favours in itself will not facilitate an improvement of the developing countries' position, since everything will ultimately depend on what the developing States grant each other. Thus, the preferential tariffs demanded by the developing States do not have an adequate legal basis and this applies all the more to the preference system called for under UNCTAD II of 1968. The demands of the developing countries are for general, non-reciprocal and non-discriminating preferences allowing the importation of their finished and semi-finished goods (excluding raw materials).

Ever since the inception of free trade theory, it has been the goal of economists who adhere to the theory to progressively reduce tariffs, and their efforts have repeatedly influenced the economic policies of States. GATT, with all its weaknesses, is today the most important instrument in the liberalization of trade. The importance of tariffs, both as a source of revenue and as an instrument supplying economic direction, has continuously receded. However, in their place, States have developed other non-tariff trade barriers and are inclined to decide on their use autonomously without any real regard for the interests of the other members of the → international legal community. Thus, the problem-solving task of customs law has remained the same, namely to restrain interventions which hamper the movement of goods to economically tolerable limits with the aid of conventions as well as autonomous acts of self-limitation.

A. ASHWORTH, A Short History of the International Economy 1850–1950 (1952).
D. WIGHTMAN, Economic Co-operation in Europe (1954).
G. ERLER, Grundprobleme des internationalen Wirtschaftsrechts (1955).
J.E. MEADE, The Theory of Customs Unions (1955).
B. KUSKE, Zur Entstehung der Weltwirtschaft, in: Wirtschaft, Gesellschaft und Kultur, Festgabe für Alfred Müller-Armack (1961).
B. BALASSA, The Theory of Economic Integration (1962).
G. CURZON, Multilateral Commercial Diplomacy (1965).
P. BERNHOLZ, Außenpolitik und internationale Wirtschaftsbeziehungen (1966).
J.H. JACKSON, World Trade and the Law of GATT (1969).
K.W. DAM, The GATT Law and International Economic Organization (1970).
A. PREDÖHL, Außenwirtschaft (2nd ed. 1971).
A.D. NAU, Tarifäre und nichttarifäre Handelshemmnisse der Bundesrepublik Deutschland gegenüber Einfuhren aus Entwicklungsländern (1972).
G. HEIDUK, Die weltwirtschaftlichen Ordnungsprinzipien von GATT und UNCTAD (1973).
V. CURZON, The Essentials of Economic Integration, Lessons of EFTA Experience (1974).
G. CURZON and V. CURZON, The Management of Trade Relations in the GATT, in: A. Shonfield (ed.), International Economic Relations of the Western World, 1969–1971, Vol. I, Politics and Trade (1976).
Wissenschaftlicher Beirat des Bundesministers der Wirtschaft, Fragen einer neuen Weltwirtschaftsordnung (1976).
E. VON HIPPEL, Grundfragen der Weltwirtschaftsordnung (1980).
E.-U. PETERSMANN, Dreißig Jahre Allgemeines Zoll- und Handelsabkommen, AVR, Vol. 19 (1981/1982) 23–80.
G.-D. GOTSCHLICH, Internationales Kyoto-Übereinkommen zur Vereinfachung und Harmonisierung der Zollverfahren, Recht der Internationalen Wirtschaft, Vol. 30 (1984) 457–460.

HANS BALLREICH

W. GERLOFF, Die deutsche Zoll- und Handelspolitik von der Gründung des Zollvereins bis zum Frieden von Versailles (1920).
W. BICKEL, Die ökonomische Begründung des Freihandels, Eine dogmenhistorische Untersuchung (1926).
A. SARTORIUS VON WALTERSHAUSEN, Die Entstehung der Weltwirtschaft, Geschichte des zwischenstaatlichen Wirtschaftslebens vom letzten Viertel des 18. Jahrhunderts bis 1914 (1931).
J. VINER, Studies in the Theory of International Trade (1937).
J. VINER, The Customs Unions Issue (1950).

CUSTOMS UNION

A customs union is a combination of two or more States within a single customs area (see also → Economic Organizations and Groups, International), each of the participating States remaining politically independent. Tariffs originally levied on the traffic of goods between them are abolished with the entry into force of the treaty establishing the customs union, or successively disman-

tled according to an agreed scheme. Reservations concerning particular goods or groups of goods are possible. A common external tariff is imposed on goods imported from States outside the union. The income derived from customs duties thus levied is distributed according to a prearranged formula. Special organs are created to perform communal tasks, for example, the determination of external tariffs. According to the principle of the equality and independence of all States (→ States, Sovereign Equality), their decisions should be unanimous.

In order to survive for any length of time, a customs union should be economically homogeneous, lest it develops in ways detrimental to its weaker members, which would not then be able to withstand the pressure of competition. As no central political body exists, an internal adjustment of disparate burdens is not possible, at least according to the original concept of a customs union. If there is an imbalance between the States contemplating a union, the tendency is therefore to abandon the project in the preparatory stages, even when important political considerations are at stake. That is why at the turn of the century the "Chamberlain Plan" for a customs union within the British Empire was rejected by a conference of the prime ministers of the self-governing colonies (Australia, Canada and New Zealand; → British Commonwealth). It was feared that the young developing industries in these countries would not be able to hold their own in the face of highly developed British competition.

A customs union is always limited to a certain region; otherwise it would be tantamount to global free trade. Free trade in this sense is to be distinguished from a → free trade area (e.g. → European Free Trade Association). Such an area also has territorial limits, and here too no customs duties are levied on goods passing between member States, but, unlike in a customs union, there is no common external tariff for goods imported from third States; the decisive factor is the territorial limitation. A customs union (and to a certain extent a free trade area) aims primarily at the economic development of the area it comprises for the benefit of its inhabitants. Global free trade, on the other hand, has the welfare of all mankind as its object and aims primarily at the removal of all restrictions on the international traffic of goods, in particular the abolition of customs duties (→ Economic Law, International). It is claimed that this would lead to an intensification of trade on a world-wide basis, with a given item being produced where this can be done most cheaply and being distributed without hindrance of any kind. As this cannot be decreed by a rule of international law binding on a world-wide basis, the principle of most-favoured-nation offers a practical compromise. Since the 18th century it has been incorporated in all the major international → commercial treaties, including the 1947 → General Agreement on Tariffs and Trade (GATT).

It is especially the most-favoured-nation principle which raises problems for the concept of a territorially limited customs union. By definition, a → most-favoured-nation clause should abolish a customs union (or a preferential zone or free trade area) because its internal customs regulation should be passed on, by way of the most-favoured-nation clause, to States which do not form part of the union; thus every regional conformation would necessarily lose its *raison d'être*, its limited territorial aspect. It has, however, always been recognized that a most-favoured-nation clause is not applicable in the case of a customs union. In the GATT, for example, customs unions are specifically excepted from the operation of the most-favoured-nation clause (Art. XXIV). To this extent the application of the clause is suspended. The underlying idea is that a customs union (or a preferential zone, etc.) possesses to a large degree the economic attributes of a State, which of course is free to regulate its internal affairs.

This affinity with statehood, seen together with the economic process of concentration which gradually takes place within a customs union, was in the past and is still frequently today advanced as an argument to support the view that a customs union which has proved stable over a lengthy period of time always marks a preliminary stage towards political unity – which will then come about more or less automatically. The prime example cited is the history of the attempts to achieve German unity in the 19th century, in which customs unions played an important part, culminating in 1871 with the founding of the German Reich as a political unit. In this reason-

ing, however, cause and effect have been confused, at least as far as the German example is concerned. The customs union is thus given exaggerated political significance.

By virtue of the incorporation of the act of confederation in the Final Act of the → Vienna Congress (1815), the German Confederation became a → subject of international law, but the authorities who wielded territorial power in the many small German States (whose independence was reconfirmed) jealously guarded their → sovereignty. As practical considerations motivated the creation of a larger economic area, a decision was made to choose a customs union rather than a common tariff policy, thus bypassing the issue of sovereignty. A network of bilateral and multilateral agreements arose to form the basis of various customs unions including, of prime importance, the → Zollverein (German Customs Union), founded in 1837. In addition to its original purpose of removing customs barriers, it was also an instrument of policy. Nevertheless, the Zollverein itself never achieved political unity; nor did it even form the basis of such unity. The German Reich which eventually came into being in 1871 owed its origin rather to the politically-based power manoeuvres of the "German war" of 1866 and the Franco-Prussian war of 1870/1871 (→ Frankfurt Peace Treaty (1871)). In this connection, proof of the intensity of the economic ties can be seen in the fact that although the legal functioning of the Zollverein was disrupted by the war of 1866, it still continued to operate in practice. No less significant is the fact that, after the Cobden Agreement of 1860 between England and France, conceived as a practical example of the British free trade ideal, it was possible in the interests of broader cooperation to reconstitute the Zollverein, originally conceived as a protectionist union serving the economic interests of its member States, as one element of a free trade system. This was thus a solution in which the hegemony of Prussia was still admittedly a relevant factor, but which, since economically more attractive, brought about the failure of the Austrian plan for a central European customs union with protective customs barriers against third countries – also conceived as a weapon against Prussian hegemony in the community of German States.

An argument against the view that a customs union must necessarily be a first step on the path towards political integration is to be seen especially in the fact that such a union is predominantly the means of preserving the political independence of small, less powerful States. As a general rule, such States, having to rely economically on a broader trading area than that offered within their own territorial limits, face the danger of being absorbed by more powerful neighbours. In a customs union, however, they have all the advantages of extended territory without having to sacrifice the advantages of independence. Europe can offer several examples of this phenomenon: → Andorra, linked with Spain and France; → Liechtenstein, linked with Switzerland; → Monaco, linked with France; and → San Marino, linked with Italy. Economic ties alone are sufficient to satisfy the interests of all the parties concerned (see also → Monetary Unions and Monetary Zones). Neither the smaller nor the large partners ask for more. As the will for political integration is absent, there is no tendency towards fusion. (See also → Belgium-Luxembourg Economic Union; → Benelux Economic Union.)

The classical form of the customs union which developed in the 19th century as the instrument of the customs and financial policy of sovereign States, and as the means for extending the economic sphere without undesirable political consequences, is no longer practicable in its original form. From its inception it had dimensions beyond the literal definition referring only to customs; as the form of the customs union developed, the old, established instruments of international economic cooperation, such as national treatment, freedom of movement, and the law of → aliens in its broadest sense took on added weight.

The concept of the customs union still exists, but its content differs from what it was originally. Customs policy is no longer the main instrument of State economic intervention. Much more effective means have been developed which have also had to be legally regulated and included within the system. Characteristic of this development is the situation which has arisen since the signing of the Treaty of Rome establishing the → European Economic Community (EEC), which is also a

customs union, but not exclusively so; nor is it an economic union. So far there is no common economic policy – one of the criteria of a true economic union. A desire for political unity is no substitute for the missing elements necessary for economic union. Characteristic of its present form as a "common market", i.e. a customs union with additional elements, are the "five freedoms" of the EEC Treaty, which had to be clearly spelt out because the absence of internal customs barriers alone is no longer sufficient to ensure an adequate free flow of goods and all its concomitants. In addition to the "free movement of goods", here as in the classical customs union the central element, the other freedoms listed are "freedom of movement for workers", including the social guarantees necessary to make this possible, "freedom of establishment", "freedom to provide services", and "free movement of capital"; of primary importance is also the prohibition of discrimination.

Many entities which are still known by the "old" name of "customs union", even some which have been recently created, are in reality much more. But these too still have a long way to go before economic union may be achieved. Political union stands on an entirely different level. As forceful amalgamation through → war or revolution is inadmissible (→ Use of Force), the necessary persistent political will must be evident before political union can be achieved. The desire for economic cooperation in a customs union, even in the latter's recent, intensified form, is not sufficient. The customs union will continue to play a useful role in the future. Through the establishment of numerous regional pacts, the division of the world into economic blocs may be observed. Internally they are free trade markets, sometimes with common external tariffs (customs unions) and sometimes without (free trade areas). It would seem that the modern customs union, properly understood, is the best tool for fulfilling the requirements of present-day international regionalism. Therein lies its worth.

A.H. PRICE, The Evolution of the Zollverein, A Study of the Ideas and Institutions Leading to German Economic Unification between 1815 and 1833 (1949).
J. VINER, The Customs Unions Issue (1950).
F.K. LIEBICH, Die europäische Zollunion, Ihre Möglichkeiten und Grenzen (1951).
J.E. MEADE, Problems of Economic Union (1953).
J.E. MEADE, The Theory of Customs Union (1955).
T. SCITOVSKY, Economic Theory and Western European Integration (1958).
W.O. HENDERSON, The Zollverein (2nd ed. 1959).
R. ZINSER, Das GATT und die Meistbegünstigung (1962).
H. STEINBERGER, GATT und regionale Wirtschaftszusammenschlüsse (1963).
W.M. CORDON, Recent Developments in the Theory of International Trade, International Economics, special paper, No. 7 (1965).
W.O. HENDERSON, Mitteleuropäische Zollvereinspläne 1840–1940, Zeitschrift für die gesamte Staatswissenschaft, Vol. 122 (1966) 130–162.
H.R. KRAEMER, EWG und EFTA, Entwicklung, Aufbau, Tätigkeit (1968).
J.H. JACKSON, World Trade and the Law of GATT (1969).
K.W. DAM, The GATT, Law and International Economic Organization (1970).
F.K. LIEBICH, Das GATT als Zentrum der internationalen Handelspolitik (1971).
W. FISCHER, Der Deutsche Zollverein, die Europäische Wirtschaftsgemeinschaft und die Freihandelszone, Ein Vergleich ihrer Motive, Institutionen und Bedeutung (1972).
F.A. HAIGHT, Customs Unions and Free-Trade Areas under GATT, Journal of World Trade Law, Vol. 6 (1972) 391–404.
F. MACHLUP, Economic Integration, Worldwide, Regional and Sectoral (1977).
F. MACHLUP, A History of Thought on Economic Integration (1977).
E. USTOR, The MFN Customs Union Exception, Journal of World Trade Law, Vol. 15 (1981) 377–387.

HANS BALLREICH

CZARNIKOW v. ROLIMPEX

1. Background

In the spring of 1974, Rolimpex, a Polish State-owned enterprise, twice contracted with C. Czarnikow Ltd., an English company of sugar merchants, to sell altogether 17 000 metric tons of Polish white crystal sugar f.o.b. from a Polish port, subject to the rules of the British Refined Sugar Association.

The Polish National Economic Plan forecast a surplus in the sugar produced during the 1974/1975 season over and beyond domestic needs. Rolimpex was authorized to contract for the export of 200 000 metric tons. However, bad weather conditions reduced the size of the crop to such

an extent that even domestic needs could not be satisfied. On November 5, 1975, before Rolimpex had satisfied its contractual obligations, the Polish Council of Ministers banned the export of sugar and cancelled all the required export licences; the Minister for Foreign Trade and Shipping signed a decree accordingly. Rolimpex declared *force majeure* the next day.

2. *The Judgments*

Two clauses in the Refined Sugar Association's rules became the issue. Rule 18(a) governing *force majeure* provided that should delivery be prevented, *inter alia* by government intervention beyond the seller's control, and the seller informed the buyer of the fact, then if the seller elected not to cancel the contract and delivery remained impossible 60 days after the last delivery date under the contract, the contract was to be void without penalty. Rule 21 made the seller responsible for obtaining any necessary export licence, the failure to do so not being sufficient grounds for a claim of *force majeure* if the regulation in force called for such a licence to be obtained.

The dispute went to → commercial arbitration. The arbitrators appointed by the Council of the Refined Sugar Association accepted that Rolimpex was covered by the *force majeure* clause, but stated a case for the decision of a court. Their decision was upheld by Kerr J. ((1977) 2 Lloyd's Rep. 203). On appeal his decision was affirmed by the Court of Appeal ((1978) 1 All ER 81). Finally in C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex, the House of Lords ((1979) A.C. 351) affirmed the decision of the Court of Appeal.

The broad issue the House of Lords had to consider was whether Rolimpex, a State sugar import/export monopoly established by the Polish Minister of Foreign Trade, could rely on a decree by that minister as a case of *force majeure*.

The Court agreed with the findings of the lower instances that, on the evidence, Rolimpex could not be regarded as an organ of the Polish State. Although it was set up and controlled by the Polish State, it was not so closely connected with it that it was precluded from relying on the ban as government intervention within rule 18(a). As commission merchants, Rolimpex had legal personality under Polish law and a separate identity. Although a State enterprise, Rolimpex made its own commercial decisions, was managed on the basis of economic accountability and was expected to make a profit.

On the issue of the export licence, the House of Lords ruled that Rolimpex had "obtained" the licence as required under rule 21 and was thus not precluded from relying on rule 18(a). There was no warranty on their part to maintain the licence in force.

3. *Evaluation*

Trends in English case law culminating in the decision in → Trendtex Trading Corp. v. Central Bank of Nigeria ((1977) Q.B. 529), together with section 3 of the State Immunity Act of 1978, have severely limited the possibility of State trading enterprises relying on a plea of sovereign immunity to avoid obligations arising out of ordinary commercial transactions (→ State Immunity). At first sight, the decision in Czarnikow v. Rolimpex would appear to open up new possibilities for advancing sovereign immunity under the guise of *force majeure*. Yet it is important to note that the decision was on the narrow construction of a standard form contract and that the appellate courts all relied on the findings of fact by the panel of six arbitrators that Rolimpex was not an organ of the Polish State under Polish law and that there had been no collusion or conspiracy between Rolimpex and the Government of Poland. In the House of Lords, Lord Wilberforce did not, for example, rule out cases where it was clear that a foreign government was taking action purely to extricate a State enterprise from contractual liability. In this case the ban on exports had been imposed because it was "unacceptable to put the people of Poland on short rations" and the "other alternatives were unacceptable".

The case is nevertheless a neat illustration of the continuing legal difficulties presented by State trading enterprises. One critic of the decision (Lasok) points to the high degree of *de facto* control exercised by the Government of Poland over enterprises like Rolimpex, the artificiality of its separate legal personality, and the pitfalls in drawing analogies using State enterprises in countries like the United Kingdom.

The decision in Czarnikow v. Rolimpex under-

lines the additional hazards of dealing with State trading enterprises. Forward dealing in commodities has never been a business without risks, and crop failures inevitably affect prices on the world market. In the end it cannot be denied that the Polish Government's ban on sugar exports also prevented Rolimpex from having to honour a poor bargain and saved the Polish Exchequer from having to pay for the consequences.

M. LESSER, Rolimpex: A Sweet Solution to Legal Status, New Law Journal, Vol. 128 (1978) 591–592.
C. SCHMITTHOFF, Export Prohibition Pleaded as Force Majeure by State-Owned Corporation, Journal of Business Law (1978) 372–373.
K. LASOK, Government Intervention and State Trading, Mod rn Law Review, Vol. 44 (1981) 249–269.

JONATHAN S. IGNARSKI

DEBTS *see* Foreign Debts; State Debts

DENATIONALIZATION AND FORCED EXILE

1. Notion

For the purposes of this article, the term denationalization is used to signify all deprivations of → nationality by a → unilateral act of a State, whether by the decision of administrative authorities or by the operation of law. In this sense, denationalization thus does not concern the legal problems connected either with renunciation of nationality, i.e. expatriation or loss of nationality resulting from a deliberate renunciation by the individual, or with substitution of nationality, i.e. automatic loss of nationality upon acquisition of another nationality. As a rule, any act of denationalization in this sense renders the individuals concerned stateless, unless they were holding double nationality (→ Stateless Persons). In the case of forced exile, a person is deprived of the possibility to enter the territory of the State of which he is a national.

Whereas some States make no provision for denationalization in their legislation, others have developed a number of statutory grounds which are common to many legal systems. However, one cannot speak of uniform legislation, nor may such grounds be considered as universally accepted (see UN Doc.A/CN.4/66, Nationality Legislation concerning Grounds for Deprivation of Nationality, prepared in 1953 for the → International Law Commission (ILC)). These grounds include: entry into foreign civil or military service (→ Aliens, Military Service), or acceptance of foreign distinctions; departure or sojourn abroad; conviction for certain crimes; political attitude or activities; racial and national grounds. Denationalization may thus concern an individual or a specified group of individuals, which in the latter case amounts to so-called collective or mass denationalization.

Acquisition and loss of nationality are in principle considered as falling within the domain of exclusive → domestic jurisdiction, and are as such not subject to international law (→ International Law and Municipal Law). It follows, however, from the rights and duties conferred upon States by international law that States are bound to behave in a certain manner when regulating questions of nationality.

2. Historical Development of Legal Rules

During the 19th century, deprivation of nationality took place almost exclusively as a penal measure upon conviction for certain crimes. The provisions of municipal law concerned raised little discussion as to their consistency with international law. However, a resolution of the → Institut de Droit International of September 29, 1896 stated in Art. 6: "Denationalisation can never be imposed as a penalty" (AnnIDI, Vol. 15 (1896) p. 271). The question of the admissibility of denationalization arose on a larger scale when States began, for political reasons, to withdraw nationality from greater numbers of their nationals. The Soviet Union resorted to mass denationalization of some two million persons who had opposed the Bolshevik régime or who were considered as being opposed to it (by Ordinance regarding Union Citizenship of October 29, 1924, No. 202 and Union Citizenship Law of November 13, 1925, No. 581). The validity of the results of this legislation was seen differently by the courts of different States. Some refused initially to give effect to the decrees holding that they were in violation of international law (Tcherniak v. Tcherniak, Swiss Federal Tribunal, Decision of June 15, 1928, Official Collection of Decisions,

Vol. 54 II, p. 225, Annual Digest, 1927–28, Case No. 39). Most courts, however, held that the persons involved had lost their citizenship and had become stateless persons on the theory that even if the decrees were contrary to international law, that would only mean a violation of the duties of one State to another: since individuals are not → subjects of international law, they cannot derive claims from its violation by a State (Lempert v. Bonfol, Swiss Federal Tribunal, Decision of June 15, 1934, Official Collection of Decisions, Vol. 60 I, p. 67, Annual Digest, 1933–34, Case No. 115; cf. Bek-Marmatsheff v. Koutsnetskoff, Tribunal de la Seine, March 7, 1929, Revue de Droit International Privé, Vol. 24 (1929) pp. 297–307; → Individuals in International Law). Italian citizens who had lost their nationality under the decrees of January 31, 1926 and November 25, 1926, were also generally treated as stateless persons.

Denationalization based on racial grounds is a more recent phenomenon. Whereas the German Law of July 14, 1933 concerning Cancellation of Naturalization and Deprivation of nationality (Reichsgesetzblatt (1933 I) p. 480) provided for denationalization mainly on political grounds, the 11th Order of November 25, 1941 (Reichsgesetzblatt (1941 I) p. 722) made under the Reich Citizenship Law and concerning denationalization of Jews resident abroad was enacted exclusively on racial grounds, as was the Italian Decree No. 1728 of December 17, 1938 (→ Racial and Religious Discrimination).

Mass denationalization of ethnic minorities occurred on a larger scale immediately after World War II, notably in Czechoslovakia (Presidential Decree of August 2, 1945) affecting nationals of German and Hungarian origin; in Poland (Law of May 6, 1945, as amended by the Decree of February 2, 1946 and Decree of September 13, 1946, as amended by the Law of November 18, 1948) affecting nationals of German origin; and in Yugoslavia (Law of July 1, 1946 as amended by the Law of December 1, 1948) also affecting nationals of German origin.

Of all these legislative measures providing for *de facto* mass denationalization, the German Order of 1941, in particular, resulted in several important judicial decisions in the national courts of other countries with regard to the question whether or to what extent a foreign State would recognize the denationalization (cf. Levita v. Federal Department of Justice and Police, Swiss Federal Tribunal, Official Collection of Decisions, Vol. 72 I, p. 407, Annual Digest, 1946, Case No. 58; Rosenthal v. Federal Department of Justice and Police, Official Collection of Decisions, Vol. 74, p. 346; Eyck v. Office des Séquestres, Belgian Cour de Cassation, March 26, 1953, Clunet, Vol. 81 (1954) p. 420; Guinguène v. Falk, French Cour de Cassation, December 20, 1950, Clunet, Vol. 78 (1951) p. 176; United States ex rel. Schwarzkopf v. Uhl, 137 F. 2d 898 (1943), Annual Digest, 1943–45, Case No. 54; The King v. The Home Secretary, ex parte L. and Another (1945) 1 K.B. 7, Annual Digest, 1943–45, Case No. 59; Löwenthal and Others v. Attorney General (1948) 1 All ER 295). It should be noted that the Federal Constitutional Court of the Federal Republic of Germany held in its judgment of April 15, 1980 that all deprivations of German nationality for reasons of racist ideology between 1933 and 1945 were void *ab initio* (Entscheidungen des Bundesverfassungsgerichts, Vol. 54 (1981) p. 53; Fontes, Series A, Sectio II, Vol. 8 (1976–1980) p. 557). Victims of these measures are, however, not regarded as Germans by the Federal Republic unless they meet the requirements of Art. 116(2) of the Basic Law, i.e. they have to use their right to renaturalization by filing the necessary application. These persons are nevertheless regarded as Germans if they have taken up residence in Germany after World War II.

While the practice of States and most judicial decisions seemed to recognize the right of each State to determine freely the conditions for the loss of its nationality, many scholars endeavoured to prove the existence of rules of international law restricting this right. In order to avoid statelessness, denationalization should only be admissible on the simultaneous acquisition of another nationality (Isay). Mass denationalization was declared to be contrary to the international obligations of States (Niboyet) and it was suggested that a rule existed which prohibited denationalization for penal or political reasons as being inconsistent with the notion of the human being as a person in law (Lapradelle, Scelle). Some argued that States must not resort to denationalization, this being an

→ abuse of rights casting an illegal burden on the State of residence (Leibholz). Learned societies of international law adopted numerous resolutions to prohibit denationalization, again linking its admissibility with the simultaneous acquisition of another nationality (see e.g. AnnIDI, Vol. 15 (1896) p. 271 and Vol. 34 (1928) p. 760; and Proposed Nationality Rules in Connection with Statelessness, Transactions of the Grotius Society, Vol. 28 (1943) p. 157). Attention should also be given to the International Conference for the Codification of International Law, held at The Hague in March and April 1930 (→ Codification of International Law) whose First Committee dealt with the problems of nationality in international law. It failed, however, to agree upon the drafting of any provision concerning deprivation of nationality which might have been included in the Convention or any of the three Protocols adopted there (Convention concerning Certain Questions Relating to the Conflict of Nationality Laws, LNTS, Vol. 179, p. 89; Protocol Relating to Military Obligations in Certain Cases of Double Nationality, LNTS, Vol. 178, p. 227; Protocol relating to a Certain Case of Statelessness, LNTS, Vol. 179, p. 115 and Special Protocol concerning Statelessness, LoN Doc. C.227.M.114.1930.V.).

At the end of World War II, international law thus did not restrict the right of a State to deprive its nationals of their nationality, even if there existed an increasing tendency to establish rules limiting this freedom.

3. Legal Developments after World War II

Following World War II the question of the international protection of → human rights acquired increased importance culminating in the Universal Declaration of Human Rights of December 10, 1948, which provides in Art. 15 that "1. Everyone has a right to a nationality" and "2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality" (→ Human Rights, Universal Declaration). Following this pronouncement, several international treaties on the protection of human rights on the universal or regional level have entered into force (→ Human Rights Covenants), of which solely the → American Convention on Human Rights of November 22, 1969 (OAS Treaty Series, No. 36) guarantees a right to nationality. This Convention stipulates in Art. 20(3): "No one shall be arbitrarily deprived of his nationality or of the right to change it." The → Inter-American Commission on Human Rights on several occasions has dealt with the admissibility of deprivations of nationality. The Commission's point of view in this field has been made particularly clear in its Third Report on the Situation of Human Rights in Chile (OAS/Ser.L/V/II.40, Doc. 10, of February 11, 1977) where it declared that the denationalizations based upon the provisions of Decree No. 175 of December 3, 1975 were enacted in violation of the right to nationality. It was further stressed that under the Convention any expatriation must be voluntary, and that there was no legal justification for any deprivation of nationality on political grounds.

The attempt to limit denationalizations manifested by Art. 15 of the Universal Declaration of Human Rights became important for the work of the ILC which, at the urging of the → United Nations Economic and Social Council, prepared draft conventions on the elimination and on the reduction of future statelessness (YILC (1954 II) p. 143). Strong opposition to the draft conventions was voiced in the Sixth Committee of the → United Nations General Assembly on the ground that they encroached upon the domestic jurisdiction of States in matters of nationality. Even when a conference to conclude a Convention on the Reduction of Statelessness finally convened in 1959, the failure to reach agreement upon how to limit the competence of States with regard to deprivation of nationality delayed the adoption of the Convention until August 28, 1961 (UN Doc. A/CONF.9/15). The Convention did not enter into force until December 13, 1975 and has so far only been ratified by Australia, Austria, Bolivia, Canada, Costa Rica, Denmark, the Federal Republic of Germany, Ireland, Kiribati, Norway, Sweden and the United Kingdom.

Art. 8(1) of the Convention prohibits the deprivation of nationality if such a measure renders the person concerned stateless. This principle is, however, followed by extensive exceptions. Art. 8(2), for example, provides that a naturalized person may be expatriated on account of permanent residence abroad for seven consecutive years unless he declares his intention to retain his nationality, or if the nationality has been obtained by misrepresentation or fraud (cf. the recent decision of the United States Supreme Court in

Fedorenko v. United States, 449 U.S. 490 (1981)). In addition to these grounds, contracting States may under Art. 8(3) deprive their citizens of their nationality for disloyalty or repudiation of allegiance if, at the time of signature, ratification or accession, such grounds exist in their national law. As safeguard against possible abuse of these extensive powers by States, Art. 8(4) stipulates that these powers shall be exercised in accordance with law and that the individual concerned shall be given the right to a fair hearing before a court of law or other independent body.

Of particular importance is Art. 9 of the Convention, which prohibits under all circumstances deprivation of nationality on racial, ethnic, religious or political grounds. As the principle of non-discrimination on grounds of race and religion may be considered as a rule of present-day international law, the prohibition of discriminatory deprivation of nationality on racial or religious reasons as provided for by Art. 9 should be regarded as limiting the exclusive → jurisdiction of States to withdraw nationality. Although the very restricted number of States parties to this Convention clearly reflects the unwillingness of States to admit restrictions by international treaties to their exclusive power regarding denationalization matters, comparative studies on recent municipal legislation in this field show that there is a growing tendency to change nationality laws along the lines suggested in the Convention. Similar studies on the relevant State practice seem to prove that States in fact rarely resort to denationalization on racial or religious grounds, whereas denationalizations for political reasons appear to be still a rather widespread phenomenon. It suffices here to mention the legislation of the German Democratic Republic withdrawing nationality from persons having left the country illegally (Law of October 16, 1972, Gesetzblatt (1972 I) p. 265 and Decree of June 21, 1982, Gesetzblatt (1982 I) p. 418; → Emigration); or individual measures denationalizing political dissidents such as those recently taken by the Soviet Union and other East European or Latin American countries, in particular Chile.

4. Legal Problems of Decolonization

The special legal problems related to the nationality of persons being subject to measures of transfer of territory or population are dealt with elsewhere (→ Population, Expulsion and Transfer; cf. also → Territory, Acquisition; → State Succession). In the case of → decolonization, questions of nationality have been regulated unilaterally, by the legislation of the former colonial power, mandatary or trustee, or the newly independent State. In a few cases independence was based on a treaty containing provisions on nationality. The instruments providing for independence usually stipulate which groups of persons acquire the nationality of the new State or keep their old nationality, or they may provide for a certain time limit within which a right of option for one or the other nationality will have to be exercised (→ Option of Nationality). Statelessness is thus usually avoided, and this change of nationality was generally considered as a special case of substitution of nationality valid under international law. Somewhat different, however, appears the case of the former South African homelands Transkei, Bophuthatswana and Venda, when South Africa withdrew its nationality from a very substantial number of its citizens proclaiming them to be citizens of the thenceforth "independent" new States. These measures are invalid under international law because of their apparent discriminatory motives violating the prohibition of racial discrimination; moreover, nothing in international law suggests that South Africa had the power to confer any citizenship except its own. It should also be taken into consideration that South Africa's attempt to turn her own citizens into nationals of these "independent" States differs from the accepted pattern of nationality substitution as citizenship was withdrawn before the substitution of a new nationality and at the election of the State rather than the individual. The validity of the substitution argument is further challenged by the facts that the statehood of these territories is doubtful under international law and that there has been no international → recognition of Transkei, Bophuthatswana or Venda (→ South African Bantustan Policy).

5. Forced Exile

The right to reside in the territory of the State of nationality or, conversely, the obligation of the State to grant such residence to its nationals is generally considered as inherent in the concept of

nationality. There are, however, a few exceptions to this rule when municipal laws permit the expulsion of nationals as a penal sanction in connection with conviction for a crime. The national subject to such a measure of banishment is thus forced into exile. Since the admission of aliens has always been considered as being in the discretion of each State (→ Aliens, Admission), the expulsion of a national may therefore only be carried out with the explicit or implicit consent of the receiving State upon whose demand the State of nationality is under the duty to readmit its national to its territory. This duty has always been considered as an obligation under international law (see e.g. Havana Convention on the Status of Aliens, of February 20, 1928, LNTS, Vol. 132, p. 301, Art. 6: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory"). This is based upon the legal argument that, if States were to expel their nationals to the territory of other States without the consent of those States or were to refuse readmission, thus seeking to force States to retain on their soil aliens whom they have the right to expel under international law (→ Aliens, Expulsion and Deportation), such action would constitute a violation of the → territorial sovereignty of these States. This is particularly apparent in cases of mass expulsion of nationals, but might also be true for policies resulting in massive flows of → refugees, casting thereby a burden upon the receiving States which they are not bound to accept under international law and which might seriously affect their internal order.

From these cases affecting the relations between States must be distinguished the question whether between a State and its nationals there is under international law a right to return to the country of nationality. After World War II there has been a growing tendency to consider this right as a fundamental human right, manifested, for example, by Art. 12(4) of the International Covenant on Civil and Political Rights, Art. 3 of Protocol No. 4 to the → European Convention on Human Rights (1950) (ECHR) Art. 22(5) of the → American Convention on Human Rights, and Art. 12(2) of the → African Charter on Human and Peoples' Rights (cf. also Art. 13(2) of the Universal Declaration of Human Rights and Art. 5(a)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (UN GA Res. 2106(XX)). The question has recently been raised in connection with British immigration legislation (cf. also → British Commonwealth, Subjects and Nationality Rules), the application of which was challenged before British courts and the → European Commission of Human Rights, in particular in connection with the mass emigration of Asians from Kenya and Uganda. The English Court of Appeal held that there was no rule of international law incorporated into English law which would require the United Kingdom to admit these persons to its territory (Regina v. Secretary of State for the Home Department ex parte Thakran [1974] 2 All ER 241 A.C.). As the United Kingdom had not ratified Protocol No. 4 to the ECHR, the Commission could not deal with the right of entry protected thereby, but held nonetheless that discrimination based on race could of itself amount to degrading treatment within the meaning of Art. 3 of the ECHR (cf. First African Asians Case, Yearbook of the European Convention on Human Rights, Vol. 13 (1970) p. 928 and Second East African Asians Case, ibid., p. 1014).

Whereas international law recognizes a duty of a State to admit its nationals expelled from the territory of another State, it seems doubtful whether such an obligation exists as regards former nationals, in particular persons having lost their nationality by unilateral action of the State concerned. It has been argued that since States are under no obligation to permit aliens to reside on their soil, the → good faith of the State which had admitted an alien, on the assumption that the State of his nationality would readmit him if expelled, would be deceived if this duty were to be extinguished by subsequent denationalization (Fischer Williams, Lessing, Preuss). An examination of the practice of States, including their treaty practice, shows, however, that → customary international law does not impose on the State of former nationality a duty of readmission. This was manifested by the proceedings of the Hague Codification Conference of 1930 relating to nationality (Acts of the Hague Conference for the Codification of International Law, Vol. 2, Minutes of the First Committee: Nationality, LoN Doc. No. C.351(a).M.145(a).1930.V.) and explains the existence of repatriation treaties

(e.g. Convention between Belgium and the Netherlands concerning Assistance to and Repatriation of Indigent Persons, of May 15, 1936, LNTS, Vol. 179, p. 141; → Repatriation).

6. Conclusion

Present customary international law does not prohibit deprivation of nationality by unilateral action of the State of nationality with the exception of discriminatory denationalization based on racial or religious grounds. There is, however, a growing tendency to reduce statelessness by preconditioning the validity of denationalization measures on the prior or simultaneous acquisition of another nationality. But it must be stressed that international law does not prohibit State actions resulting in statelessness, not even in cases of mass denationalization. International law does, however, impose upon a State the duty to readmit its nationals expelled from the territory of another State, but this obligation does not apply to former nationals. Considering the large number of States parties to international conventions on human rights recognizing a national's right to enter his country, it may soon be justified to consider this right as part of international law. In view of the serious disadvantages still faced by stateless persons it is to be hoped that the apparent development of international law with regard to human rights will lead to the general recognition of a right to nationality as a basic human right, which would considerably limit a State's sovereign power to denationalize.

E. ISAY, De la nationalité, RdC, Vol. 5 (1924 IV) 429–471.

J. FISCHER WILLIAMS, Denationalisation, BYIL, Vol. 8 (1927) 45–61.

J.P. NIBOYET, [Note on the decision of the Cour d'appel de Paris of April 30, 1926], Revue de droit international privé, Vol. 22 (1928) 245–250.

A. DE LAPRADELLE, Consultation donnée dans l'affaire Bek-Marmatsheff v. Kousnetskoff, Revue de droit international privé, Vol. 24 (1929) 308–313.

G. LEIBHOLZ, Verbot der Willkür und des Ermessensmißbrauchs im Völkerrecht, ZaöRV, Vol. 1 (1929) 77–125.

G. NITTI, La situation juridique des émigrés italiens en France, RGDIP, Vol. 36 (1929) 738–759.

Research in International Law of the Harvard Law School, Draft Conventions and Comments, The Law of Nationality, AJIL, Vol. 23, Special Supp. (1929) 11–130.

R.W. FLOURNOY, Nationality Convention, Protocols and Recommendations adopted by First Conference on Codification of International Law, AJIL, Vol. 24 (1930) 467–485.

L. PREUSS, International Law and Deprivation of Nationality, Georgetown Law Journal, Vol. 23 (1934–1935) 250–276.

G. SCELLE, A propos de la loi allemande du 14 juillet 1933, Revue critique de droit international privé, Vol. 29 (1934) 63–76.

B. SCHENK GRAF VON STAUFFENBERG, Die Entziehung der Staatsangehörigkeit und das Völkerrecht, ZaöRV, Vol. 4 (1934) 261–276.

H. LESSING, Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit zu Strafzwekken (1937).

P. ABEL, Denationalization, Modern Law Review, Vol. 6 (1942–1943) 57–68.

E. CASTRÉN, Die gegenseitigen Pflichten der Staaten in bezug auf den Aufenthalt und die Aufnahme ihrer Staatsangehörigen und der Staatenlosen, ZaöRV, Vol. 11 (1943) 325–417.

C. PARRY, The Duty to Recognize Foreign Nationality Law, ZaöRV, Vol. 19 (1958) 336–368.

H.F. VAN PANHUYS, The Role of Nationality in International Law (1959).

L.B. BOUDIN, Involuntary Loss of American Nationality, Harvard Law Review, Vol. 73 (1960) 1510–1513.

E. LAPENNA, La cittadinanza nel diritto internazionale generale (1966).

R. PLENDER, International Migration Law (1972).

W.H. OLIVIER, Statelessness and Transkeian Nationality, SAYIL, Vol. 2 (1976) 143–154.

L. ROTH, Transkei: A Tale of Two Citizenships, New York University Journal of International Law and Politics, Vol. 9 (1976) 205–235.

K. VASAK and S. LISKOFSKY (eds.), The Right to Leave and to Return, Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19–21 June 1972 (1976).

A.P. MUTHARIKA, The Regulation of Statelessness under International Law (1977).

H.-J. UIBOPUU, Das Recht des Einzelmenschen auf eine Staatsangehörigkeit, Art. 15 der Allgemeinen Erklärung der Menschenrechte, A.W.R. Bulletin, Vol. 10 (1978) 35–41.

P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979).

F.A. MANN, Ausbürgerung und Wiedereinbürgerung nach Art. 116 Abs. 2 GG in der Rechtsprechung des Bundesverfassungsgerichts und des Auslands, in: Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Vol. 2 (1982) 323–340.

RAINER HOFMANN

DEPORTATION *see* Aliens, Expulsion and Deportation

DIPLOMATIC ASYLUM *see* Asylum, Diplomatic

DISCRIMINATION AGAINST INDIVIDUALS AND GROUPS

1. Notion

The term discrimination (from the Latin *discriminare*) means, in everyday language, the act or power to make distinctions in either a positive or a negative sense. A discriminating intellect, for example, has the power to distinguish keenly.

As far back as the 19th century the term was used in the legal language of the United States in a negative sense ("discrimination against . . .") in order to mark an arbitrary or unreasonable distinction contrary to the principle of equality, although the term was not qualified as "unjust" or "unlawful". International practice and jurisprudence adopted this use mainly in commercial and trade matters (→ Most-Favoured-Nation Clause; cf. also → States, Equal Treatment) but also with respect to the treatment of → aliens, → minorities and the inhabitants of territories under → mandate of the → League of Nations.

Since World War II the term has been used increasingly in the field of the protection of → human rights. In this field – as in international trade and in instruments of → European integration – there must be clarification as to whether any form of distinction between different persons or objects is meant or only a distinction where the criteria employed have no reasonable and adequate relationship with the qualification used.

It is frequently said that the rule of non-discrimination is nothing more than the negative form of the rule of equality connected with a specification of certain illegal criteria. This cannot be denied; the relationship between the two concepts is evident. If the content and bearing of the rule of non-discrimination are to be defined, it is necessary to explain which concept of equality is meant: an equal application of existing law (equality before the law) or an egalitarian rule requiring that every person or object receive absolutely equal treatment in legislation (equality in the law).

2. Evolution of Legal Rules

The key question is whether a general rule of → customary international law prohibits all or only certain forms of discrimination. If such a rule exists, it should be reflected in conventional law.

Strong opposition to any form of discrimination at the hands of authoritarian régimes of all political colours has been widely expressed in political → declarations and these have influenced the formation of legal rules. An accurate assessment of the legal situation, however, requires that a clear distinction be drawn between declarations and rules established under their influence.

World War I and the years immediately following it led to discussions of the problem. They are reflected in the Draft Declaration of International Human Rights, accepted by the → Institut de Droit International in 1929 at New York (AnnIDI, Vol. 35 II (1929) p. 298) on the basis of a report by André Mandelstam. A guarantee of effective equal rights and the elimination of any direct or indirect discrimination on the basis of → nationality, sex, race, language and religion are predominant elements (→ Racial and Religious Discrimination; → Sex Discrimination). It has to be taken into account, however, that its formulations were inspired largely by international treaties for the protection of minorities (e.g. Treaty of the Allied Powers with Poland of June 28, 1919, CTS, Vol. 225, p. 412), and that an attempt to extend the relevant obligations to all members of the League of Nations failed (AnnIDI, Vol. 34 (1928) 276–280).

Principle VI of the → Atlantic Charter (1941) proclaimed that the future peace should "afford assurance that all the men in all the lands may live out their lives in freedom from fear and want". Seeking to implement this programme, the → United Nations Charter emphasizes three times the principle of non-discrimination as to race, sex, language and religion (Arts. 1(3), 55(c) and 76(c)). Other criteria were subsequently added. In its Namibia Advisory Opinion of June 21, 1971 the → International Court of Justice ruled that "to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . is a flagrant violation of the purposes and principles of the Charter" (ICJ Reports (1971) p. 57; → South West Africa/Namibia (Advisory Opinions and Judgments)). This opinion is based on Art. 1(3) of the Charter, in which

"distinctions as to race" are expressly mentioned. In the opinion the concept of "race" is elaborated in the same way as in Art. 1 of the International Convention on the Elimination of all Forms of Racial Discrimination of 1966 annexed to UN GA Res. 2106(XX) ("Racial Discrimination Convention"); it cannot be extended to discrimination based on other criteria.

The Universal Declaration on Human Rights (→ Human Rights, Universal Declaration (1948)) increased the breadth of protection by prohibiting discrimination based upon "political or other opinion, national or social origin, property, birth or other status" (Art. 2, para. 1). Some of these criteria, such as property and political and other opinions, correspond to specific freedoms (Arts. 17, 19), others only to the general clause of Art. 1. A general guarantee of equality before the law is combined with a prohibition of discrimination (Art. 7).

The latter has been interpreted as a prohibition against the introduction by law of any kind of discrimination; this interpretation, however, ignores the close conjunction with the former sentence proclaiming only equality before the law, i.e. an equal application of existing laws. The programme proclaimed in the Universal Declaration was later transformed into legal rules in the → Human Rights Covenants and should not be interpreted without note being taken of its final form.

Prior to the finalization of the Human Rights Covenants different → United Nations Specialized Agencies enacted prohibitions of discrimination within their specific field (see Convention on the Status of → Refugees, 1951, Art. 3, UNTS, Vol. 189, p. 137; → International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958, Art. 1(a), UNTS, Vol. 362, p. 31; → United Nations Educational, Scientific and Cultural Organization Convention Against Discrimination in Education, 1960, Art. 1, UNTS, Vol. 429, p. 93). Most repeat the list of criteria of the Universal Declaration, while some add certain other specific criteria (see, for instance, Art. 1(b) of the ILO Convention). Apart from their specific purpose these Conventions generally recognize the validity and applicability of the principle of the prohibition of discrimination. They cannot, however, be cited in order to prove the existence of a rule of customary international law.

Of major importance are general discrimination clauses in regional instruments and their application. Art. 14 of the → European Convention on Human Rights (1950) prohibits discrimination on grounds similar to those of the Universal Declaration in so far as they endanger the enjoyment of the rights and freedoms set forth in the Convention. The → European Court of Human Rights has ruled that this prohibition does not presuppose a previous violation of one of these rights (Belgian Linguistic Case, European Court of Human Rights, Judgment of July 23, 1968, Series A 5/6, p. 33); the clause has an existence of its own and is applicable, for example, when a State party, while acting within its legitimate competence, introduces limitations of a discriminatory character. Not every distinction has to be regarded as discriminatory: the Court may recognize that it was reasonable and legitimate. The reasoning emloyed by the Court in order to reach this result has, however, been criticized (A. Khol, Zur Diskriminierung im Erziehungswesen, ZaöRV, Vol. 30 (1970) p. 263, at p. 289).

Art. 1 of the → American Convention on Human Rights of 1969 (ILM, Vol. 9 (1970) p. 99) is very similar in this respect.

The Racial Discrimination Convention of 1966 was elaborated by the same UN organs as, and almost concurrently with, both Covenants. It provides expressly an obligation for States parties to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization" (Art. 2(d)). Discrimination by private persons is included. The Convention further obliges States parties to penalize incitement to racial discrimination (Art. 4; see also Art. 20(2) of the International Covenant on Civil and Political Rights). It is significant that it was deemed necessary by the authors expressly to mention such obligations; where racial discrimination is dealt with specifically, a tightening of obligations is regarded as necessary.

The primary instrument in the field is the International Covenant on Civil and Political Rights of 1966 (CCPR), which entered into force on March 23, 1976. Two of its provisions are relevant. Art. 2(1) covers discrimination with respect to rights

recognized in the Covenant. All of the criteria of the Universal Declaration appear, though some of them do not correspond to special guarantees contained in the Covenant (e.g. property and "other status"). For its interpretation, reference may be had to the European Convention (→ Interpretation in International Law).

Unlike the European Convention, the CCPR also contains a general guarantee for equality before the law, combined with a prohibition of discrimination "in this respect" (Art. 26). The criteria mentioned again correspond to those of the Universal Declaration. The interpretation of this provision is controversial. Some writers interpret it as a general prohibition of any discrimination whatsoever; they conclude that States parties are obliged to enact appropriate legislation binding public authorities as well as private persons. Since customary international law, as embodied in numerous declarations of UN bodies, in their opinion contains a general prohibition of any discrimination, Art. 26 must be interpreted in the same sense – a "progressive" and "egalitarian" method of interpretation would seem necessary (B.G. Ramcharan in Henkin, pp. 246–269).

This interpretation of Art. 26 of the CCPR, however, conforms neither to the wording and drafting history, nor to the scope of the Covenants. A careful analysis (first by E. Schwelb, The International Convention on the Elimination of All Forms of Racial Discrimination, ICLQ, Vol. 15 (1966) p. 996, at p. 1019; subsequently and in greater detail by Tomuschat) has shown that the words "in this respect" connects the two sentences – the first on equality before the law and the second on discrimination – in such a way as to subordinate the second to the first. Discrimination which prevents an equal application of the law – as it stands – to all persons is prohibited; but the provision gives rise to no obligation to enact legislation in order to treat all persons on an equal basis, no rule regarding discrimination between private persons, and no requirement to punish certain discriminatory behaviour. These obligations are beyond the ambit of a guarantee to ensure equality before the law and to abstain "in this respect" from discrimination. The Racial Discrimination Convention in fact demonstrates how such obligations can be created. This latter interpretation is also supported by the fact that if the broader interpretation were accepted, the clearly intended limitation to certain specific rights in the Covenant would be meaningless and the specific system of enforcement of civil and political rights would be extended not only to social and economic rights but also to other rights outside the realm of the protection of human rights.

Support for a restrictive interpretation of Art. 26 of the CCPR may be found in the formulation of the Final Act of the Helsinki Conference (→ Helsinki Conference and Final Act on Security and Cooperation in Europe). According to the declaration of Principle VII, human rights and fundamental freedoms shall be respected "without distinctions as to race, sex, language and religion", a selection of criteria drawn from the UN Charter and also from the public emergency clause in Art. 4 of the CCPR. The prohibition of discrimination appears as a modality of a guarantee of human rights. In the following restatement of the rights of national minorities (para. 4) it is expressly emphasized that members of such groups shall enjoy "equality before the law".

The various formulations of the legally binding instruments indicate that States parties hesitate to accept either guarantees for the general equality of all persons in the law or unlimited prohibition of discrimination in all its aspects. Evidently they do not subscribe to the view that customary international law already contains a rule of this kind. This does not preclude the prohibition of discrimination on the grounds of certain criteria, such as race, colour or ethnic origins by a rule of customary international law, which might possibly attain the force of → *jus cogens*.

3. Evaluation

(a) A hierarchy exists between the different criteria mentioned in connection with discrimination. Discrimination on the basis of sex has to a certain extent been assimilated alongside racial discrimination. For a detailed discussion of the problems in these two areas, see the separate articles on → Racial and Religious Discrimination and on → Sex Discrimination. The position of other forms of discrimination in this hierarchy depends upon the manner and form in which substantial equality is guaranteed in the respective fields.

(b) Language, national origin and "association with a national minority" are closely interconnected. The problem of the protection of minorities is a very complex one (see F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, ECOSOC Doc. E/CN.4/Sub.2/384 Rev. 1, 1979). A person victim of linguistic discrimination may belong to various groups. As a member of a "people" he may exercise the right to → self-determination (possibly connected with a right to → secession); he may belong to a different "race" in the sense of Art. 1 of the Racial Discrimination Convention or to a linguistic minority in that of Art. 27 of the CCPR. Finally he may possess a distinct status as a recent immigrant (→ Immigration). The legal provisions applicable in all those cases vary; the protection against discrimination varies according to personal status.

The protection of linguistic minorities is rather precarious. As no official definition has been accepted, Capotorti had to proceed in his study from the assumption that only citizens of the State of residence were included (para. 23). Neither → migrant workers nor recent immigrants can be afforded protection (L.B. Sohn, The Rights of Minorities, in Henkin, p. 270, at p. 281). Even protection of an indigenous population (→ Indigenous Populations, Protection) is regarded as a special problem outside the protection of minorities (ibid., p. 282). To "[P]ersons belonging to such minorities shall not be denied" certain rights (CCPR, Art. 27). A literal interpretation leads to the assumption that States are not allowed to interfere with the enjoyment of these rights, without being obliged to take promotional measures and to subsidize certain activities. The more generous opinion of Capotorti (paras. 98 and 99) was supported by the World Conference to Combat Racism and Racial Discrimination of 1978 (UN Doc. A/33/262, at pp. 20–21).

The rights guaranteed to linguistic minorities include the right "in community with the other members of the group to enjoy their own culture . . . or to use their own language" (CCPR, Art. 27). Whether their particular own language may also be used in official contacts is not expressly stated; in this regard the present instruments offer fewer safeguards than special minority treaties.

There exists a general problem which has long delayed the enactment of special provisions: In order to achieve full equality for these groups, special measures in their favour are necessary which in an egalitarian system may be regarded as privileges or preferences. The Racial Discrimination Convention thus permits special measures for underprivileged groups, but only for a transition period; the maintenance of separate rights for different racial groups is not permitted (Art. 1(4)). The idea behind these provisions is apparently a policy of assimilation or at least full integration of such minorities. This intention contrasts with the aim of preserving the cultural identity of minorities, the main incentive of Art. 27 of the CCPR.

(c) The freedom of "political or other opinions" is guaranteed in Art. 19 of the CCPR, without adding any new egalitarian element to Arts. 2(1) or 26. This fundamental right may be limited, *inter alia*, in the interest of → ordre public. If the public policy of a State which is based on the concept of a closed society contains hierarchical elements hardly compatible with the principle of equality before the law, such elements should not form the basis for a limitation of these rights. It is, however, questionable whether this could be achieved in such a State.

(d) "Social origin or birth" should confer neither privileges nor disadvantages. They would certainly be incompatible with the idea of "equal and inalienable rights of all members of the human family" (CCPR, Preamble, para. 1). But there exists in neither Covenant any special provision which requires the abolition of either traditional or "progressive" class distinctions. Nevertheless the criterion is of practical importance regarding the rights of equal access to work or public service (see Art. 2 of the 1958 ILO Convention).

(e) "Property" was mentioned in the Universal Declaration (Art. 17) but is absent from the Covenants. Only with some difficulty can a residual protection be derived from the right to privacy and inviolability of the home (CCPR, Art. 17). Problems arose even in the restatement of the prohibition of confiscation of the property of aliens (→ Aliens, Property) – a rule of tradi-

tional customary law – in the European Convention (First Additional Protocol, Art. 1).

(f) The addition of "other status" in the Universal Declaration to the list of criteria is in keeping with the exemplary and not exhaustive character of this list ("any discrimination such as . . . "). It would not, however, be justified to conclude that a status not guaranteed by the Covenant (such as "property") is protected as such by the inclusion of this term into the list of criteria.

I. BROWNLIE (ed.), Basic Documents on Human Rights (3rd ed. 1983).

G. JAENICKE, Der Begriff der Diskriminierung im modernen Völkerrecht (1940).

D. SCHINDLER, Gleichberechtigung der Individuen als Problem des Völkerrechts (1957).

F. ERMACORA, Diskriminierungsschutz und Diskriminierungsverbot in der Arbeit der Vereinten Nationen (1971).

G. SCHWARZENBERGER, Equality and Discrimination in International Economic Law (I), Yearbook of World Affairs, Vol. 25 (1971) 163–181.

W. KEWENIG, Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Handelsbeziehungen (1972).

E.W. VIERDAG, The Concept of Discrimination in International Law (1973).

L. HENKIN (ed.), The International Bill of Rights, The Covenant on Civil and Political Rights (1981).

C. TOMUSCHAT, Equality and Non-Discrimination under the International Covenant on Civil and Political Rights, in: Staatsrecht, Völkerrecht, Europarecht, Festschrift Hans-Jürgen Schlochauer (1981) 691–716.

KARL JOSEF PARTSCH

DOUBLE TAXATION

1. Notion

Double taxation is commonly defined as the imposition of comparable taxes in two (or more) States on the same taxpayer with respect to the same subject matter and for identical periods (see Escher, p. 43 and Tixier et al., pp. 8 to 13). As a phenomenon of international taxation (→ Taxation, International) double taxation must be distinguished from the double tax burden which may occur under the internal laws of a particular country.

International double taxation requires that the same person is liable for the taxes from two (or more) States. The taxpayer may be an individual or a corporation, or any other entity (e.g., partnership) upon which, according to domestic laws, taxes may be imposed. Although for identity purposes, it is of no significance who, in the final analysis, bears the taxes economically, identity of tax subjects does not exist where, for example, one country taxes the income of a corporation while another country taxes corporate dividends paid by the corporation to its shareholders on the basis of such income.

It is not necessary that the items subject to double taxation be identical. Whether or not the subject-matter corresponds, is a question of both law and fact to be decided by a functional approach.

In view of the differences that exist among the various tax systems, one country's taxes will rather seldom exactly correspond to the taxes of another country. It is therefore sufficient that the taxes in question are functionally similar. Thus, neither tax rates nor the economic significance of specific taxes within a given country exclude the possibility of international double taxation problems.

Taxes are imposed for identical periods when the conflict of tax claims relates to the same period of time. It is thus insignificant when the taxes were levied or when they were paid.

2. Reasons for Double Taxation

International double taxation results from the conflict of the tax laws of two (or more) States which, through their internal laws, assert jurisdiction to tax the same item of income or capital (→ Jurisdiction of States). States' increasing needs of capital has led to permanent extensions of tax jurisdiction. When and to what extent double taxation issues may arise, depend upon the criteria used by States to impose taxes. Although the criteria used vary widely from one country to another, two main bases may be distinguished: "residence taxation" where the base is derived from the residence of the recipient of the income or capital item, and "source taxation" where the source of the income or capital item forms the base for taxation.

Most States assert jurisdiction to tax "resi-

dents" on their world-wide income (commonly referred to as "unlimited tax liability"). With regard to individuals, resident status, though variously defined, is typically achieved through a limited stay (often six months) and thus generally falls far short of domicile (cf. Art. 4 of the Model Convention of the → Organisation for Economic Co-operation and Development (OECD)). In addition to residence, some States (particularly the United States) further apply a test of citizenship (or → nationality) and thereby extend their world-wide tax jurisdiction to their citizens even when resident or domiciled outside the country. In the case of corporations, residence jurisdiction is usually extended to enterprises organized under the laws of the country. Some countries (e.g. the Federal Republic of Germany), however, assert jurisdiction over enterprises having their "seat of management" within the country even though organized elsewhere.

In addition to the foregoing personal tax criteria, almost all States assert jurisdiction over domestic source income and capital situated in their territory (commonly referred to as "limited tax liability").

It follows from the foregoing that the problem of double taxation is likely to arise when commercial, industrial or financial transactions are not confined to one State. Generally speaking, double taxation issues may arise from the combined application of: residence and source taxation, residence and residence taxation, and – more rarely – source and source taxation.

3. Avoidance of Double Taxation

No principle in public international law requires States to take measures against double taxation of income or capital. In the light of the principles expressed by the → Permanent Court of International Justice in the → Lotus Case, restrictions upon the States' power to tax (→ Sovereignty) cannot be presumed as long as there is a "genuine link" between the taxing State and the taxpayer or the subject-matter.

The model conventions that are extant today do not contain a general rule of international law which would prohibit international double taxation because these conventions are not "instant public international law" in the sense that they automatically become customary law upon the mere act of adoption. The model conventions do, however, contain international standards of public policy which, in the course of time and frequent application, may pass into the general corpus of → customary international law – even for those States which do not follow their pattern.

Despite the absence of any obligation to avoid international double taxation, States commonly recognize that the avoidance of double taxation is necessary, as it hinders transnational commercial and industrial activities as well as the transfer of capital. To shield → transnational enterprises from these negative effects, a State can, through legislation, take unilateral measures to remove, or at least ameliorate, the problem of double taxation. Bilateral agreements and multilateral conventions represent another means to solve international double taxation issues.

Today, most States have in their internal tax laws provisions unilaterally dealing with the problem of double taxation. A variety of approaches which have developed over time in individual countries are apparent. Some countries, now declining in number, totally or partially exempt foreign income or capital from taxation, especially if the income or capital was taxed in the source State ("tax-exemption system"). Others, growing in number, impose taxes upon foreign income and capital but credit the tax of the source State against their own tax ("tax-credit system"). The tax-credit approaches are accompanied by various methods regarding the structuring of the credit. Moreover, these methods have varied from one country to another and have changed over time within particular countries. The tax laws of a third group of countries provide for a deduction of the source State's tax in computing the taxable income or capital ("tax-deduction system"). A fourth approach taxes foreign income and capital at a reduced rate ("reduced tax rates system").

Even when unilateral provisions exist, double taxation problems can still arise, e.g. from an imperfect meshing of "source rules". Many States have therefore resorted to double taxation treaties which aim at the clarification and harmonization of tax jurisdictions between the contracting States (see also → Unification and Harmonization of Laws). Bilateral tax agreements form a more or less comprehensive system of mutual tax disclaimers. As a general rule, double taxation

treaties create no new tax liability nor do they increase an existing one. The treaties only determine if and to what extent the contracting States may make use of their power to tax.

Double taxation treaties are generally based upon the priority of residence taxation; the source State retains, however, power to tax within certain limits. Double taxation treaties thereby follow the balancing of residence and source taxation enunciated in the 1977 OECD Model Convention, and not the 1980 United Nations Model Convention, which predominately emphasizes taxation at source.

While focusing on double taxation issues, double taxation treaties also contain rules to eliminate discriminatory provisions in national tax laws (Art. 24 of the 1977 OECD Model Convention), to reduce international tax evasion by means of an exchange of information between national tax administrations (Art. 26), and to install mutual agreement procedures (Art. 25).

Bilateral tax treaties have a long tradition. Among the earliest European treaties of this kind are: the Agreement between Great Britain and the Swiss Canton of Vaud of 1872 and the Treaty between Austria and Prussia of 1899. The United States ratified its first income tax treaty in 1932, which became effective in 1936 after ratification by France in 1935; the United States' first tax treaty with Great Britain was completed and signed in 1945.

Since the end of World War II, the number of double taxation agreements has grown rapidly. More than 1000 double taxation treaties are in force. The treaties are published by the → United Nations in its World Guide to International Tax Agreements (since 1951).

As the existing double taxation treaties vary considerably in their content and form, double taxation problems will continue to exist. This has led to attempts to solve double taxation issues on a multilateral level. While the corpus of bilateral agreements is, by now, a substantial one, multilateral agreements are few in number; nevertheless, their significance should not be underestimated.

The idea of removing – or at least substantially lessening – double taxation by means of multilateral conventions can be traced back to the so-called Roman Treaty, which was signed by the successor States of the Austro-Hungarian Empire on April 6, 1922; this convention, however, remained without practical effects.

Of greater practical significance is the Convention on the Taxation of Road Vehicles for Private Use in International Traffic of May 18, 1956, which was signed by many States. Another example of a multilateral agreement is Art. 220 of the 1957 Treaty of the → European Economic Community. This provision requires the member States to enter into → negotiations with each other on the elimination of double taxation within the Community. Today all member States of the EEC have double taxation treaties.

The attempt to multilaterally remove, or at least ameliorate, double taxation is reflected further in extant model conventions including the OECD Model Double Taxation Convention on Income and Capital of 1977 and the UN Model Convention for Tax Treaties Between Developed and Developing Countries of 1980 (→ Developing States). Though compliance with these conventions is voluntary, the model conventions have had a far-reaching impact on the solution of double taxation issues. This is particularly true with regard to the OECD's Model Convention, as almost all OECD member States have, in their subsequent tax treaties, closely followed its pattern. Only the United States prefers, as a general rule, its own Model Income Tax Treaty the most recent draft of which was issued by the United States Treasury Department on June 16, 1981 and supplemented on December 23, 1981. The present proposal supersedes the two previous Model Treaties of 1976 and 1977.

4. Perspectives

The most desirable means for the avoidance of double taxation is an international tax convention (e.g. agreed by all member States of the United Nations) which would help to remove the present distortions in the activities of both individuals and transnational enterprises. Due to the considerable differences that exist between the various tax law systems in the world, such a convention is, however, far from being realized in the foreseeable future. The significance of bilateral tax agreements will therefore continue to increase, especially in the relationship between developed and developing countries where double taxation

treaties inevitably become tools for the implementation of economic, political, and fiscal goals.

OECD, Model Double Taxation Convention on Income and Capital (1977).
OECD, Model Convention on Estates and Inheritances (1966).
United Nations, Tax Treaties between Developed and Developing Countries, 8th Report (1980) UN Doc. ST/ESA/101.
United Nations Model Double Taxation Convention between Developed and Developing Countries (1980) UN Doc. ST/ESA/102.

H.F. DEBATIN, Grundzüge der Abkommen zur Vermeidung der internationalen Doppelbesteuerung (1963).
Entscheidungen internationaler Steuerfälle, Sammlung von Entscheidungen internationaler und nationaler Gerichte in internationalen Steuerstreitigkeiten unter besonderer Berücksichtigung von Doppelbesteuerungsfällen (1969–1974) [looseleaf].
R. VON THULEN RHOADES and M.J. LANGER, Income Taxation of Foreign Related Transactions, Vol. 3, Analysis of U.S. Income Tax Treaties and Model Treaties (since 1971) [looseleaf].
F. ESCHER, Die Methoden zur Ausschaltung der Doppelbesteuerung (1974).
C. HEUCHEMER, Das Doppelbesteuerungsproblem in völkerrechtlicher Sicht (1974).
D. MÜHLHAUSEN, Das Verständigungsverfahren im deutschen internationalen Steuerrecht (1976).
E. OWENS and G. HOVEMEYER, Bibliography on Taxation of Foreign Operations and Foreigners, 1968–1975 (1976); 1976–1982 (1983).
M. REICH, Das Verständigungsverfahren nach den internationalen Doppelbesteuerungsabkommen der Schweiz (1976).
W.D. GOODMAN, International Double Taxation of Estates and Inheritances (1978).
Istituto de Estudios Fiscales, Estudios de Doble Imposición Internacional (1979).
A.A. KNECHTLE, Basic Problems in International Fiscal Law (1979).
R. PREUNINGER, Rechtsprobleme des Funktionswandels deutscher Doppelbesteuerungsabkommen. Dargestellt an Abkommen mit Industriestaaten, Entwicklungs- und Staatshandelsländern, Thesis, University of Mannheim (1980).
S.S. SURREY, United Nations Model Convention for Tax Treaties between Developed and Developing Countries (1980).
P.R. MCDANIEL and H.J. AULT, Introduction to United States International Taxation (1981).
G. TIXIER, G. GEST and J. KEROGUES, Droit fiscal international (2nd ed. 1981).
E. WEBER, Handausgabe der Doppelbesteuerungsabkommen, Texte und Erläuterungen zu den wichtigsten DBA (1982).
K. VOGEL, Doppelbesteuerungsabkommen. Kommentar (1983).

WERNER EBKE

DRAGO-PORTER CONVENTION (1907)

1. Historical Background

Until the beginning of the 20th century there were various instances of "gun-boat diplomacy" carried out by European powers, in particular with regard to Latin American States unable or unwilling to honour their financial obligations (→ Cerrutti Arbitrations; → Foreign Debts; → State Debts). Thus, in reaction to the → blockade and → bombardment of Venezuelan ports by the → warships of Great Britain, Germany and Italy in 1902–1903 (→ Preferential Claims against Venezuela Arbitration), the Argentinian Minister of Foreign Affairs, Luis M. Drago, in 1902 instructed the Argentinian ambassador in Washington to seek United States support for a principle which later became known as the Drago Doctrine: "that a public debt cannot give rise to the right of armed intervention, and much less to the occupation of the soil of any American nation by any European power" (→ International Law, American).

His argument was twofold: that the creditors involved in the State debts were aware of the risks involved, which were taken account of by the conditions of the loans, and that the → sovereignty of the debtor State prohibited execution of the entitlements *manu militari* either by forcible → intervention or any territorial occupation (cf. the → Monroe Doctrine of 1823). International law, the role of international tribunals and → diplomatic protection were not to be questioned; however, the State was to determine when and how it would pay back its debts, with repayment in any event being in its own interest.

2. The Drago-Porter Convention

The Drago Doctrine gave rise to an international debate on the legitimacy of the → use of force in the collection of public debts. This issue was discussed at the Third Pan American Conference in Rio de Janeiro in 1906, which found that the

question was of more general importance and thus referred it to the second → Hague Peace Conference of 1907.

At that Conference, the United States, through its delegate General Horace Porter, presented an alternative proposal for diminishing inter-State conflicts of pecuniary origin. This led to the adoption of Hague Convention II of 1907 respecting the Limitations of the Employment of Force for the Recovery of Contracts Debts.

Art. 1 of this treaty, which came to be known as the Drago-Porter Convention provided:

> "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.
>
> This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award."

In Art. 2 it was further agreed that the → arbitration was to be based on the Hague Convention for the Pacific Settlement of International Disputes (→ Peaceful Settlement of Disputes). However, the Drago-Porter Convention did not reflect the proposals of Argentina and other Latin American States that → denial of justice should be included as a precondition for arbitration and that in the case of public debts armed intervention should be excluded altogether. This prompted reservations by Argentina and other States, who only signed the Convention but never ratified it. Switzerland also abstained, holding that by virtue of their private nature, such claims were subject exclusively to → domestic jurisdiction.

3. *Special Legal Problems*

According to the Drago Doctrine, public debts are → acts of State *jure imperii*, which legally can never be recovered by use of force because this would constitute a violation of the principle of sovereign equality of States (→ States, Sovereign Equality). However the Drago-Porter Convention did not, as had been suggested by Drago, distinguish between State debts or State loans on the one hand and contract debts which are claimed against another State by a State for its nationals, on the other.

As in the question of the Calvo Clause (→ Calvo Doctrine, Calvo Clause), armed intervention by a State to recover contract debts due to its nationals raised the possibility of an excessively broad interpretation of diplomatic protection. Furthermore, the assumption that equal treatment of the nationals of a State and → aliens is not enough contains implicitly the idea that in regions like Latin America legal standards are not sufficiently developed to ensure this.

Although the Convention was initially introduced as an instrument of obligatory arbitration, according to the → International Court of Justice in the → Norwegian Loans Case (1957), the Drago-Porter Convention does not require obligatory arbitration, because the only obligation it imposes is that an intervening power must not use force before having tried to settle the question by arbitration (ICJ Reports (1957) p. 24).

4. *Evaluation*

The discussion of State intervention in financial matters and the efforts to restrict the use of force in financial disputes were much in evidence during the first decades of this century. The Drago-Porter Convention was the first international legal instrument to contain the principle of the prohibition of the use of force in the recovery of contract debts. However, the principle is qualified by the condition of full acceptance of arbitration. The Convention was an important step in restricting the practice of → self-help and in establishing means of peaceful settlement of financial disputes (→ State Debts, International Administration and Control).

Today we are confronted with new cases of State debts in an enormous measure (→ Loans, International; → International Monetary Fund). However, because of the absolute prohibition of the use of force in the → United Nations Charter, such disputes have to be solved solely by peaceful means. Thus, the second part of the Drago Doctrine, that public debts may never be a ground for armed intervention, is also now applicable in international law.

The arguments raised by Drago, i.e. that a State has a basic interest in honouring its financial

obligations so as not to lose access to further loans, are still valid today. The Drago-Porter Convention may be considered as a → minimum standard in questions of recovery of contract debts. However, State practice suggests that also Drago's more far-reaching propositions, such as the duty to exhaust all local remedies (→ Local Remedies, Exhaustion of) and the prohibition of use of force, have evolved to become principles of universal international law.

Instructions of the Minister of Foreign Relations to the Minister to the United States, December 29, 1902, AJIL, Vol. 1, Supp. (1907) 1–6.

Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, AJIL, Vol. 2, Supp. (1908) 81–85.

L.M. DRAGO, Cobro coercitivo de deudas públicas (1906).

L.M. DRAGO, State Loans in their Relation to International Policy, AJIL, Vol. 1 (1907) 692–726.

A.S. HERSHEY, The Calvo and Drago Doctrines, AJIL, Vol. 1 (1907) 26–45.

H.A. MOULIN, La doctrine de Drago, RGDIP, Vol. 14 (1907) 417–472.

C.I. GOMEZ, Die gewaltsame Eintreibung von öffentlichen Staatsschulden nach heutigem Völkerrecht, Eine kritische Studie über die Drago-Doktrin (1911).

W. SPIELHAGEN, Die Dragodoktrin und die Festsetzungen der zweiten Haager Friedenskonferenz (1915).

J. FISCHER WILLIAMS, Le droit international et les obligations financières internationales qui naissent d'un contrat, RdC, Vol. 1 (1923) 293–361.

K. STRUPP, L'intervention en matière financière, RdC, Vol. 8 (1925 III) 5–124.

WOLFGANG BENEDEK

ECONOMIC AND TECHNICAL AID

1. Introduction

Overcoming underdevelopment is one of the major challenges for the international community in our time, as important as preserving our natural environment and safeguarding peace. Despite the efforts made by the developing countries themselves and the economic, financial and technical aid given by States and international organizations, the gap between rich and poor nations has not disappeared or even diminished in past decades. Taken together, the developing countries have also experienced economic growth, but this has been produced, in the main, by a small number of States, leaving most countries in Asia, Africa and Latin America with the classic symptoms of underdevelopment: low rates of economic growth, low per capita incomes, unequal distributions of income, malnutrition of considerable parts of the population, deformation of economies, high rates of foreign debts, chronic deterioration of terms of trade, high unemployment, illiteracy, mother and infant mortality, insufficient medical and sanitary supplies and degradation of natural environments. For some countries, particularly in Africa, the situation has deteriorated dramatically. These countries, categorized as least developed countries (LDCs) or most seriously affected countries (MSACs), have particularly low per capita incomes, low industrial production, poor terms of trade, or particularly high external debts.

The stated purpose of economic and technical aid given by industrialized States either directly to the developing countries or to international organizations is to contribute towards overcoming underdevelopment. The fact that the aid given to date has not altered the situation occasionally gives rise to the argument that the concept of aid is wrong. It is argued that aid maintains the very economic and social structures that cause underdevelopment, and that it prevents the receiving States from developing self-initiative. It is also argued that aid does not take into account the real needs of the → developing States and is given by the industrialized States to serve their own interests, because they consider developing countries only as suppliers of raw materials and consumers of their products. Evidence exists for all of these arguments; on the other hand evidence that economic and technical assistance given to developing States has genuinely helped those States is no less difficult to find. Every life that is saved by the giving of aid is in itself a success, even if the ultimate purpose of aid must be to abolish the causes of underdevelopment, and thus to save hundreds of millions from having to live on the edge of starvation.

2. Forms of Aid

Economic aid may generally be defined as any

measures intended to support and foster the economies of developing countries. This is a comprehensive notion, which includes any measures of a financial and technical nature given by industrialized States to developing countries. In a narrower sense, and to distinguish it from technical aid, economic aid comprises financial assistance, which in most cases means loans granted on favourable conditions, i.e. long terms, several years without amortization and low interest rates. Financial aid may also be given in the form of grants without any obligation of repayment, a form of aid which is often given to the least developed countries. Financial assistance regularly aims at financing private and/or public investments in the fields of infrastructure, industry and agriculture.

Technical aid includes various kinds of measures supplying developing countries with technical, economic and organizational capabilities. Principally, it means intellectual and practical assistance, which is provided by sending advisors and experts, supplying material, devices and production equipment, educating and training technical personnel, or by wholly or partly financing education and training in developing countries.

In recent years, the notion of aid has been increasingly replaced by that of cooperation. This change of terminology, it was said, was required by the principles of → sovereignty and equality of States (→ States, Sovereign Equality). The new terminology, however, should not be overestimated; in reality, the unequal standing between developing and industrialized States continues to exist, and cooperation between the two groups on an equal basis remains a long-term objective. Many agreements which today fall under the rubric of economic cooperation relate in fact to the same matters as aid. Nevertheless, the new terminology shows an emerging consciousness that developing countries have to be accepted as equal partners in international economic relations, and not merely as silent receivers of aid the amount and conditions of which are determined exclusively by the donor States (see → International Economic Order; → International Law of Cooperation).

As far as economic aid is concerned, another distinction must be made between public aid and aid on the basis of market conditions. Public aid is provided for in the budgets of States and given either directly to developing countries or to international organizations founded to coordinate development aid. Aid given under market conditions includes private investments in developing countries and private credits and loans. This category of aid will be excluded from this article, as will any other forms of preferential treatment which developing countries may receive in international commercial relations, e.g. preferential access to the markets of industrialized States or freedom from the requirement of → reciprocity in terms of trade (→ World Trade, Principles).

3. Bilateral Aid

Bilateral economic and technical aid, i.e. aid given by States directly to developing countries, remains the most important form of aid. According to figures issued by the → Organisation for Economic Co-operation and Development (OECD), the bilateral aid given in 1980 by the member States of the Development Assistance Committee (DAC) of the OECD, by member States of the → Council for Mutual Economic Assistance and by other countries, amounted to 25,750 million US dollars. Whether international law contains an obligation for States to provide aid to developing countries and whether there are any rules as to the quantum, conditions and execution of such aid, will depend on State practice; a short description of that practice is thus necessary.

In 1980, 75 per cent of all the aid given by DAC member States was in the form of non-repayable grants, the remaining 25 per cent being development credits with an average interest rate of 2.6 per cent, an average term of 30 years and 8 years without obligation to repay. The practice of individual States, however, varied considerably. Australia and Norway, for example, gave non-repayable grants only; Finland, Italy, New Zealand, Sweden, Switzerland and the United Kingdom provided more than 90 per cent of their aid in the form of such grants, whereas the practice of Austria and Japan prefers a low proportion of non-repayable grants. As far as obligations attached to the aid are concerned the individual States have here also followed different policies; the Federal Republic of Germany, for example, did not link its grants and credits with any corres-

ponding obligation on the part of receiving States, nor did the Netherlands, Norway or Sweden. Examples of a different approach were shown in the practice of the United States and France. With regard to the sectors financed by public aid provided by the DAC countries, most funds were given for infrastructural measures. The other sectors, ranked according to the amount of the funds, were agriculture, education, industry, construction and public health.

4. *Multilateral Aid*

Although most economic and technical aid is given on a bilateral basis, multilateral aid has grown considerably. This is true at least for individual industrialized States like the Federal Republic of Germany, whose multilateral aid accounts for up to 35 per cent of total public aid she provides. Multilateral aid may be defined as funds raised within international organizations in order to finance development programmes and projects in developing countries. A considerable number of international institutions have been created to provide economic and technical help for developing countries. Many of these are run under the auspices of the → United Nations, like the → United Nations Development Programme (UNDP), the → World Food Programme, the → United Nations Children's Fund, the → World Health Organization, the → Food and Agriculture Organization and the → International Fund for Agricultural Development. Institutions providing multilateral aid from outside the UN system are the → International Bank for Reconstruction and Development (IBRD), the → International Development Association (IDA) and the → International Finance Corporation (IFC), together known as the World Bank Group.

Of special importance for the multilateralization of economic and technical aid are the UNDP on the one hand and the World Bank Group on the other. The UNDP, a universal institution both in regard to the participating States and the scope of its activities, performs an important coordinating function: it not only coordinates the efforts of different UN bodies, other organizations and the recipient States, but also the bilateral development aid given by individual States. The IBRD, on the other hand, is both a financing and development institution. Measures financed by the IBRD pursue a twofold purpose in that they have to foster development programmes in developing countries and, at the same time, must pay their way. The IDA provides credits mainly for the poorest countries on particularly favourable terms. The purpose of the aid given by the IFC is to support the private sector in the less developed countries; thus the IFC provides for investment in developing countries and offers credits for private enterprise.

In addition to the organizations mentioned above, the → International Monetary Fund assists member States in cooperating in the field of currency policy, and offers aid to stabilize currencies and solve balance of payments difficulties. On the regional level, development banks like the Asian Development Bank, the African Development Bank and the Inter-American Development Bank have been established to finance projects and programmes of their member States (see → Regional Development Banks). The work of these regional development banks is comparable to that of the World Bank in that credits on market terms are offered as well as grants for technical cooperation; for the least developed States the banks provide special programmes. The → European Economic Community (EEC) also gives development aid in various ways. The most important form is in the cooperation between the EEC and the African, Caribbean and Pacific (ACP) countries on the basis of the two → Lomé Conventions of 1975 and 1979 which, in addition to regulations on commercial relations, export stabilization, funds and industrial cooperation, also contain provisions on cooperation for development. The EEC has also concluded cooperation agreements with a number of mediterranean States, providing for financial assistance to be given by the EEC. Finally, the EEC is the largest supplier of food aid after the United States, and this aid is given not only to the ACP countries but is distributed world-wide.

The IBRD and the IMF have faced considerable criticism in recent years over the criteria they use to select the countries receiving aid, the sectors and projects they are prepared to finance and the stabilization programmes which the two institutions regularly require from the receiving countries as a condition for assistance. It has been argued that the IBRD and the IMF monopolize

the decision over which countries, sectors and projects qualify for development aid, that, in practice, the purpose of the aid is not the well-being of the developing countries but rather their integration into the existing world market, which may not necessarily be in their interests. The two institutions are also accused of interfering in the domestic affairs of the receiving countries by imposing conditions for the assistance given.

5. The Right to Development Aid

These criticisms, as well as the various concepts and forms of aid described above, raise questions as to what kind of legal rules, if any, exist in the field of development aid. According to both conventional and customary international law it must be assumed that States and international organizations continue to enjoy a wide discretion as to the ultimate recipients of assistance as well as the nature, amount and conditions of the assistance. What may be said today is that States have a general obligation to provide assistance to developing countries, an obligation which is based on the indisputable fact that all those States which are capable of supplying economic and technical aid do so. However, it has been shown that the practice of States varies considerably and it is therefore hardly possible to identify any special rule of customary international law governing the amount or the conditions of aid. Limitations on the giving States may only be found in other general principles of international law such as the prohibition of discrimination. Yet, however, the latter principle basically amounts to a prohibition against acting arbitrarily, which still preserves a broad scope of discretion for States and international organizations.

The treaty law contains only general obligations to provide aid, which may be found in the → United Nations Charter (Arts. 1 and 2) in the Agreement establishing the OECD (Arts. 1 and 2), or in the Treaty establishing the European Economic Community (Arts. 3, 131 and 132). This legal situation remains unchanged despite the many efforts undertaken by the developing countries during the past two decades to reform international economic relations. Two reasons for this may be cited: firstly, what is called the new international economic order is still only based on recommendations of the → United Nations General Assembly, the → United Nations Conference on Trade and Development (UNCTAD), the → United Nations Industrial Development Organization (UNIDO) and other international bodies rather than on legally binding instruments. Secondly, irrespective of the problem of the legal foundation of the new international economic order, there is still no consensus on basic questions like the principle of sovereignty over natural resources (→ Natural Resources, Sovereignty over), compensation for nationalizations (→ Expropriation and Nationalization) or → technology transfer.

As for the amount of aid, it is still impossible to find a generally accepted rule that a certain share of the Gross National Product (GNP) is to be given. UNCTAD, during its Second Session in New Delhi in 1968, passed a resolution requiring that industrialized States should give 1 per cent of their GNP as public development aid. In 1970 the UN General Assembly declared that 0.7 per cent of GNP should be the guideline. A similar recommendation was issued by the OECD. Yet these guidelines are not legally binding and a number of States expressly rejected them. The recommendation of the OECD, for example, was never accepted by the United States or Switzerland. State practice shows that the guidelines were never uniformly observed. The practice of member States of the Development Assistance Committee of the OECD shows wide variations in the amount of public development aid given; only Denmark, the Netherlands, Norway and Sweden gave 0.7 per cent or more of their respective GNPs as public development aid, whereas the aid of all other States remained below that figure.

Under recent discussion it has been the question whether an obligation to give development aid could be based on the human right to development. However, this right has yet to find universal recognition, and must therefore be considered a right *de lege ferenda*. To be the basis for an obligation to give aid to developing countries, it must be a collective right which can be claimed by both individuals and groups. However, at this point it is not clear which groups or States can claim this human right, which States are obligated by it, or even what its real content might be (→ International Law of Development).

World Economic Outlook, IMF, Washington D.C. (1983).

Zusammenarbeit im Bereich der Entwicklung. Politik und Leistungen der Mitglieder des Ausschusses für Entwicklungshilfe, OECD (1981).

K.-H. SOHN, Entwicklungspolitik, Theorie und Praxis der Entwicklungshilfe (2nd ed. 1973).

M. FLORY, Droit international du développement (1977).

J. BETZ, Die Internationalisierung der Entwicklungshilfe (1978).

A. PELLET, Le droit international du développement (1978).

H. WEBER, Der Anspruch auf Entwicklungshilfe und die Veränderung des internationalen Wirtschaftsrechts, Verfassung und Recht in Übersee, Vol. 11 (1978) 5–25.

G. WIEGAND, Organisatorische Aspekte der internationalen Verwaltung der Entwicklungshilfe (1978).

A. BLECKMANN, Anspruch auf Entwicklungshilfe?, Verfassung und Recht in Übersee, Vol. 12 (1979) 5–14.

R.-J. DUPUY (ed.), The Right to Development at the International Level, Workshop, The Hague Academy 16–18 October 1979 (1980).

R. TETZLAFF, Die Weltbank: Machtinstrument der USA oder Hilfe für die Entwicklungsländer, Zur Geschichte und Situation der modernen Weltgesellschaft (1980).

C. TOMUSCHAT, Das Recht auf Entwicklung, GYIL, Vol. 25 (1982) 85–112.

J.-J. ISRAEL, Le droit au développement, RGDIP, Vol. 87 (1983) 5–41.

R.Y. RICH, The Right to Development as an Emerging Human Right, Virginia Journal of International Law, Vol. 23 (1983) 287–328.

LOTHAR GÜNDLING

ECONOMIC COERCION

1. Notion

It would be difficult to name a term of public international law, whose notion is vaguer than that of economic coercion. This is partly because of the relationship between economic coercion and the prohibition of → intervention which itself lacks a clear-cut and operable definition (→ Non-Intervention, Principle of). At the same time, the very nature of this relationship is a matter of debate. Some authors have expressed the view that economic coercion is only one form of illegal intervention by means of economic measures, namely intervention through economic measures having the character of *vis absoluta* or *vis compulsiva*. According to other authors, economic coercion and illegal intervention through economic measures are one and the same thing. Finally, Bowett considers the duty to refrain from economic coercion as a duty to adhere to "fair trading practices", a concept which extends the notion of economic coercion to a larger field of application than that governed by the principle prohibiting intervention.

There does, at any rate, seem to be a common consensus that economic coercion should be deemed illegal. But great differences of opinion exist over which acts of economic coercion are illegal *de lege lata* rather than *de lege ferenda*. A number of different approaches have been adopted to impart legal clarity to a politically charged concept. Some authors aim at a distinction based on the motives of the action. Thus, the pursuit of legitimate economic interests is allowed, whereas action based on other, political motives is seen as economic coercion. Others plead for the outright prohibition of certain measures as such.

Further problems arise regarding the legitimate exceptions to any prohibition of economic coercion. These exceptions and their necessity or justification depend, of course, on the resolution of the issues raised above. However, the discussion to date has revealed two lines of thought. The first maintains that States may protect their own legitimate interests. In this case economic coercion may be justified as a matter of → self-defence, → reprisal or even → retorsion. The second holds that States may also protect the interests of other → subjects of international law (generally within the framework of an international organization). The hypothesis of providing help to one who is too weak to help itself cannot be excluded out of hand.

2. Historical Evolution

Though measures that might be qualified as economic coercion date back to early times and found spectacular expression in modern times with Napoleon's → economic warfare against Great Britain, discussion of economic coercion as a separate issue in public international law began only some 20 years ago. Formerly such problems were merely subsumed under the general topics of → aggression and intervention. Thus the concept

of economic coercion has no real past of its own. In addition, some authors go so far as to maintain that the concept has no future. But while the term "economic coercion" is open to doubt and misunderstandings, it is mentioned in several important international documents. The only sensible attitude is to impute a useful meaning to the concept.

3. *Legal Aspects*

Although some authors still try to use Art. 2(4) of the → United Nations Charter as the starting point for a discussion of economic coercion, this approach has not born fruit. In the drafting of the Charter, a Brazilian proposal to outlaw economic coercion was rejected by a vote of 26 to 2 (Documents of the United Nations Conference on International Organization, Vol. 6 (1945) p. 334). Other proposals of this kind in the history and practice of the → United Nations have not fared better. Thus, there is no option but to rely on the principle of non-intervention. This principle is mentioned expressly in the UN Charter only in Art. 2(7) with regard to the United Nations itself, but it is also a corollary to Art. 2(1) with regard to States. However, an essential feature of the concept of → sovereignty is the capacity to engage in binding commitments and to be subjected to the rules of public international law.

In this regard Arts. 1, 11, 13 and 20 of the → General Agreement on Tariffs and Trade (GATT) may also be cited. Yet these provisions are helpful only to a limited extent, as practice has shown, and only in so far as purely economic problems are concerned. GATT has never proved to be helpful in resolving major political issues, and whether any State adhering to GATT ever meant to deprive itself of the weapon of economic coercion is subject to considerable doubt. With the → use of force now declared illegal, economic coercion remains the strongest weapon available.

Economic coercion is frequently mentioned in resolutions of the → United Nations General Assembly. Examples are the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (GA Res. 2131(XX)), the 1970 → Friendly Relations Resolution (GA Res. 2625(XXV)), the 1973 Resolution on Permanent Sovereignty over Natural Resources (GA Res. 3171(XXVIII); → Natural Resources, Sovereignty over) and the 1974 → Charter of Economic Rights and Duties of States (GA Res. 3281(XXIX)). Though these resolutions show a certain tendency in the development of public international law, at best they constitute non-binding "soft law" (→ International Organizations, Resolutions). The notion of economic coercion in the resolutions cited remains too vague to create a basis for obtaining practical results.

Although the notion of economic coercion is not clear-cut, one finds in legal literature and international practice a good number of examples which are sometimes considered as illegal acts of coercion; cf. the articles on → aggression, → blockade (see also → Blockade, Pacific), → boycott, → discrimination against individuals and groups, → economic warfare, → embargo, → sanctions, → States, equal treatment, and → use of force.

The attempt by some authors to limit the concept of economic coercion to measures having the character of *vis absoluta* or *vis compulsiva* is not very helpful. *Vis absoluta* means that the victim does not even have a theoretical choice of reaction; economic measures, however, will never be coercive in this way. The application of the notion of *vis compulsiva* gives rise to unsolvable problems as well. Even an unimportant reduction in exports of an insignificant product will inevitably cause a reaction; the importing country will either search for another supplier or impose internal restrictions. To avoid concluding that all economic measures have the character of *vis compulsiva*, other criteria must be sought.

A discussion of the notion of economic coercion within the content of fair trading practices is similarly fruitless, even if confined within the framework of GATT. As an autonomous principle of public international law this is not feasible, because the term "fair" is too vague to be applicable without adjudication.

If the concept of economic coercion is to be more than a reference to the prohibition of intervention by economic measures (this being a mere reference to public international law as such, e.g. to the principles of non-discrimination, → *pacta sunt servanda*, etc.), new and clear-cut rules must be developed to give this idea substance and shape. There is no reason why one could not make simultaneous use of the two

approaches existing in the current literature on this topic. On the one hand, one may declare as illegal certain measures such as boycott, blockade (whether pacific or not), embargo and dumping (→ Antitrust Law, International). On the other hand, the possibility of condemning certain motives of action remains open. In the latter case the distinction between economic and political motives is by far too simple. There are economic motives that are not above suspicion, such as economic damage *per se* or coercion to conclude an economic treaty having nothing to do with the economic measures applied. This being a discussion *de lege ferenda*, account should be taken of contemporary world politics. Afghanistan, the → war over the → Falkland Islands, and the stopping of → economic and technical aid for development in order to protect standards of → human rights show that the economic weapon is still used today to further political motives in a way which is approved by many nations. In a world where war and aggression have only recently been declared to be illegal, one should not inflate expectations concerning economic coercion.

K.A. BAGINJAN, Die Verletzung des Grundsatzes der Nichteinmischung seitens der imperialistischen Staaten (1954).

W.T. BURKE, The Legal Regulation of Minor International Coercion, in: R.J. Stanger (ed.), Essays on Intervention (1964) 87–125.

G. ADLER-KARLSSON, Ein Fehlschlag, 20 Jahre Wirtschaftskrieg zwischen Ost und West (1971).

M. DOXEY, Economic Sanctions and International Enforcement (1971).

G. PASCHOS, Die wirtschaftliche Intervention im Völkerrecht (1974).

I.F. SHIHATA, Destination Embargo of Arab Oil, Its Legality under International Law, AJIL, Vol. 68 (1974) 591–627.

D.W. BOWETT, International Law and Economic Coercion, Virginia Journal of International Law, Vol. 16 (1976) 245–259.

R.B. LILLICH, Economic Coercion and the "New International Economic Order", A Second Look at Some First Impressions, Virginia Journal of International Law, Vol. 16 (1976) 233–244.

H. NEUHOLD, Internationale Konflikte, Verbotene und erlaubte Mittel ihrer Austragung (1977).

D.C. DICKE, Die Intervention mit wirtschaftlichen Mitteln im Völkerrecht (1978).

W.A. KEWENIG, Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 22 (1982) 7–35.

D.C. DICKE

ECONOMIC INTEGRATION *see* Economic Organizations and Groups, International; Permanent Neutrality and Economic Integration

ECONOMIC LAW, INTERNATIONAL

A. Notion. – B. Historical Overview: 1. Origins. 2. Post-World War II; Bretton Woods System. 3. Questioning the Bretton Woods System. – C. Policies and Conflicts: 1. Managing the World Economy. 2. Policies of Economic Interdependence. – D. Characteristics: 1. Relation to General International Law. 2. The Participants. – E. Fundamental Norms: 1. General Considerations. 2. "Central" or "Fundamental" Norms: (a) "Most-favoured-nation" obligation. (b) National treatment. (c) Minimum standards. (d) Obligation to refrain from injuring others. (e) Safeguards; escape clauses. (f) Developing country preferences. (g) Dispute settlement and rule application. – F. Conclusion.

A. Notion

By far the most important international economic development of the last half of the 20th century is the remarkable growth of the economic → interdependence of the world. This overwhelming development has important and challenging implications for traditional ideas of international law. The concept of → sovereignty or independence of national governments, for instance, has a reduced meaning when one government's internal fiscal or monetary policy can have a dramatic effect on the economies of other countries. Equality of nations (→ States, Sovereign Equality), likewise, becomes a questionable assumption in the face of vast disparities of population, of economic production and of technology. Each of these may significantly affect military capability, internal stability and the welfare of citizens.

The potential for both harm and good of this increased interdependence is very great. History demonstrates that it is not an exaggeration to say that war or peace can depend on the success of nations in managing their economic interdepen-

dence. The problem of interdependence may thus be the foremost single problem of world affairs by the end of the 20th century, and as such, it cannot be ignored by the system of international law. International economic law is a response to these critical circumstances.

In a general sense there clearly is a subject which can be called "international economic law". The key question, however, is whether this is merely a loose designation of a variety of sub-topics of international law which have some connection with economic affairs, or whether there are some more substantial boundaries and certain distinguishing characteristics of international economic law making possible an identification of this subject as separate from the broader topic and meriting separate attention.

In its broadest sense, international economic law could be defined as including all legal subjects which have both an international and an economic component. Yet such a broad definition causes the subject to merge with the whole of international law, for what subject of international law does not in some sense bear a relation to economics? For instance, a broad definition could include all interactions of sovereign States, because these interactions virtually always have underlying constraints or objectives related to economic matters.

Another approach would be to examine how the phrase "international economic law" has in fact been utilized by writers and scholars in discussing matters which they deem to be part of this subject. Here, however, other difficulties are encountered. The phrase has not been used a great deal. Many writers deal with subjects which are arguably sub-topics of international economic law without examining broader linkages. One writer may address monetary law, another trade law, another investment problems, another the problem of → developing States, still another questions of economic → sanctions.

As to the content or meaning of the term "international economic law" some approaches focus on the "transborder transactional law" of capital investments, corporate activity, and competition policy (→ Capital Movements, International Regulation; → Foreign Investments; → Antitrust Law, International), while others focus on international regulation of monetary and trade matters at the government-to-government level (→ Monetary Law, International).

One of the most thoughtful attempts to delineate the subject of international economic law may be found in the work Droit international économique by Carreau, Juillard and Flory, which notes the dichotomy of an extensive approach, compared to a restrained approach. These authors lean towards a restrained approach and suggest as a definition (while recognizing its shortcomings):

> ". . . le D.I.E. [droit international économique] est cette branche du droit international qui réglemente, d'une part l'installation sur le territoire des Etats des divers facteurs de production (personnes et capitaux) en provenance de l'étranger et, d'autre part, les transactions internationales portant sur les biens, les services, et les capitaux" (p. 11).

In their view the subject embraces five subtopics: the law of establishment, the law of investment, the law of economic relations, the law of economic institutions, and the law of regional economic integration. However, there are, as they and other authors recognize, many other topics which might be called international economic law. These include questions of economic development (→ International Law of Development) and the linkage between economic subjects and → human rights. One important issue raised by VerLoren van Themaat is the question whether norms of national or "domestic" law which bear importantly on international economic issues should be included in a discussion of international economic law. A functional approach would lead to an affirmative answer. On the other hand, VerLoren van Themaat and his colleagues recognize that this integrative approach greatly burdens the scientific study of the subject, because precise analysis of issues which depend on norms drawn from such different sources becomes more difficult.

No attempt at a precise definition will be ventured here, but it may be noted that while international economic law can be very broadly defined, the focus in this article will generally be somewhat restrained.

B. Historical Overview

1. Origins

VerLoren van Themaat notes that international

economic law, as he defines it, originated as early as the 12th century. Indeed, he implies that the evolution of international economic law has been much more continuous than is the case with national economic law. However, he observes that there was a qualitative leap to multilateralization and international economic organization after World War II. Treaty clauses on → most-favoured-nation treatment have been traced back as far as 1417. Principles of national treatment and of → reciprocity can be found expressed in other early → treaties. To a certain extent, it may be argued that principles of the law of the sea are related to international economic law, and early development of that subject could be considered part of the historical antecedents of international economic law (→ Law of the Sea, History). Likewise, the law merchant, although a somewhat different type of subject, could be considered an antecedent to international economic law.

The 19th century has been termed the beginning of the "Liberal Age", at least with respect to international economic matters. It has even been stated that 1860 marked the culmination of the most-favoured-nation clause, because at that date it became the "common commercial law of the great European powers" (C. Rist, Comments on the Past and Future of the Most-Favored Nation Clause (1936); → Commercial Treaties).

One of → Wilson's Fourteen Points in the post-World War I → negotiations urged "the establishment of an equality of trade conditions among all the nations consenting to the peace", and the Covenant of the → League of Nations mentioned the goal of "equitable treatment for the commerce of all members" (Art. 23(e)). Likewise the → peace treaties after World War I contained most-favoured-nation clauses.

The League extensively studied most-favoured-nation clauses and other trade matters, continuing a tradition that can be traced back to a convention signed on July 5, 1890 regarding the publication of customs tariffs. International congresses to consider rules for cooperation of customs administration (→ Customs Law, International) were held in 1900, 1908, and 1913. Additional conferences were held under the auspices of the League of Nations. The League sponsored a series of studies on matters regarding customs formalities between 1923 and 1936. Principles discussed in these studies were later relied upon for some of the post-World War II economic agreements such as the → General Agreement on Tariffs and Trade (GATT). For example, in 1936 the League published a study which included legal language for a recommended most-favoured-nation clause.

During these years, other economic subjects were also receiving international attention, including such matters as telegraphic communication (→ Telecommunications, International Regulation), protection of industrial property (→ Industrial Property, International Protection), and railway traffic and road traffic (→ Railway Transport, International Regulation; → Traffic and Transport, International Regulation).

2. Post-World War II; Bretton Woods System

During World War II the Allies (especially the United States and the United Kingdom) began preparations for developing international economic institutions to fulfil several important policy objectives. One of these policy objectives was to continue a programme that began in the early 1930s with the Reciprocal Trade Agreements Act of the United States. Under this programme a number of reciprocal agreements for the reduction of tariffs and other barriers to trade were entered into.

A second policy objective was to provide a post-war economic framework that would prevent or minimize the types of economic conflicts that occurred between the two wars and which are at least partly blamed as a cause of World War II. This policy objective led to the → Bretton Woods Conference (1944) and the establishment of the → International Monetary Fund (IMF) and the → International Bank for Reconstruction and Development (IBRD). This Conference, although primarily devoted to monetary matters, recognized the need for similar initiatives regarding trade in goods. After the → United Nations was founded in 1945, one of its first actions was to sponsor a series of preparatory conferences in 1946 and 1947 charged with the task of drafting a charter for an International Trade Organization (ITO). This charter was completed at Havana in 1948 but never came into force, largely because the United States Congress refused to give its approval (→ Havana Charter; see W. Diebold, The End of the ITO (1952)).

The GATT had been negotiated at the same 1946 and 1947 meetings which prepared a draft

charter of the ITO. It was originally intended that the GATT would merely be a reciprocal multilateral agreement for mutual reduction of tariffs and that it would exist under the umbrella of an ITO. When the ITO failed to materialize, the GATT had to become the central institution with respect to trade in goods. The GATT as such has never come into force. Instead, it has been applied through the Protocol of Provisional Application, which was signed in the autumn of 1947 and designed to apply the GATT as a legally binding international treaty, pending the entry into force of the ITO. It was thought that once the ITO came into force, the GATT itself could be modified and brought definitively into force as a complement of the ITO.

As a consequence of this history, the GATT, although it has become the central international trade institution, nevertheless suffers from an inadequate constitutional base and lacks adequate procedural provisions. For example, although it contains clauses relating to the resolution of disputes among nations, these clauses are ambiguous and brief and have been the subject of controversy. In addition, the Protocol of Provisional Application allows countries to continue certain practices under pre-existing legislation even if those practices are inconsistent with certain portions of the GATT (these are the so-called "grandfather rights").

The basic international economic institutions for both money and trade, namely the IMF, the IBRD, and the GATT, are generally considered together to form the "Bretton Woods system". In addition, the → Organisation for Economic Co-operation and Development (OECD), which originated in 1960 as a successor to the Organisation for European Economic Co-operation set up to administer the Marshall Plan aid extended by the United States to Europe for post-World War II reconstruction (→ European Recovery Programme), plays an important role in discussing and formulating principles of national behaviour with respect to many types of international economic transactions, such as capital movements and investment. The OECD membership includes primarily the democratic industrial countries such as Japan, the countries of Western Europe, the United States, Canada, Australia and New Zealand. Other more specialized agencies have been set up or continued by the United Nations (→ United Nations Specialized Agencies), so that today a large number of international economic organizations form the platform on which international economic law is largely built. The → United Nations Conference on Trade and Development (UNCTAD) plays an important role in representing the interests of the developing countries.

3. Questioning the Bretton Woods System

Even at its beginnings, the Bretton Woods system did not appeal uniformly to all nations. Those of the so-called "Eastern Bloc", the non-market economies of Eastern Europe including the Soviet Union, declined to participate in a number of these institutions on the grounds that they were based on principles that were suited only for economies which follow free market ideas. Likewise, a number of developing countries criticized the institutions as being too insensitive to the problems of the poorer countries. Many of the developing countries initially refused to join the Bretton Woods international institutions but, gradually, most became active and important participants of these organizations. Indeed, today the developing countries outnumber the industrial countries in most of these institutions. In those organizations which follow a one-nation one-vote system, this fact has important implications for the evolution of the policies of the organization (→ Voting Rules in International Conferences and Organizations). Other institutions, particularly the IMF and the IBRD (and its affiliates), have a → weighted voting system, so that the industrial countries still have the preponderant influence, although the voice of developing countries is strong.

In recent decades there has been a growing criticism of the essential components of the Bretton Woods system. In the middle 1960s UNCTAD was organized as a UN sub-body, in response to demands by the developing countries. This organization has continued as one of the principal spokesmen for developing country interests. Developing countries have urged that there should be a "new international economic order (NIEO)" (→ International Economic Order), which would change a number of the fundamental norms of the Bretton Woods system, so that they would be more suited to the kind of

economic development in third world countries which the developing countries feel is urgently needed.

As the Bretton Woods system became successful in dismantling some of the overt or explicit national government barriers to economic transactions which cross borders, other difficulties began to emerge. Problems engendered by international economic interdependence and the variety of national economic systems which are trading together in the world today have led scholars and statesmen alike to raise questions about whether the Bretton Woods system is properly constructed for the future of world economic relations.

C. Policies and Conflicts

1. Managing the World Economy

Technological innovations alone, in the absence of → armed conflict, would have probably created conditions of great economic interdependence, but economic interdependence would not necessarily have been so intense if governments had successfully resisted the effects of these developments. It must be recognized that the international institutions erected or reinstated by governments after World War II have made their contribution to the development of interdependence. The Bretton Woods system has resulted in greater freedom of movement of capital across borders; the GATT has been surprisingly successful in reducing the traditional barriers to trade in goods, and other liberalizing institutions have made their contribution.

But the receding waters of tariff and other overt protection inevitably uncover the rocks and shoals of a variety of non-tariff barriers and other more subtle problems. As the history of the development of the → European Economic Community demonstrates, free trade requires attention to a group of interrelated activities such as the flow of capital, the mobility of labour and the flow of technology and services. These in turn revolutionize the methods by which governments have traditionally controlled such matters as fiscal and monetary policy, taxation structure, environmental regulation, product standards and liability for product defects. One result of economic interdependence is that governments turn to international institutions or international economic rules as a way to solve some of their problems. The question today is not whether a government will play on the international scene. The questions are: Where will it play and with whom, i.e. what forum will it work in and which other governments will be allowed into "the club"? International economic law is a tool, perhaps the most important tool, which national governments can use to try to solve some of the problems that are thrust upon them by growing international economic interdependence.

Unfortunately, nations disagree fundamentally about how to organize their domestic economies and how to synchronize those economies with world markets. These differences primarily involve different degrees of governmental involvement in the economy, but there are also basic structural differences in economies such as the normal debt-equity ratios for enterprises and the degree of job security for workers. These differences can sometimes lead to allegations of "unfair trade" or "predatory policies". Pressures are created for the appropriate international institutions to resolve such disputes. This implies greater internationalization of government decisions. Governments, however, have been very slow to entrust international institutions with much concrete decision-making power, and not without reason. Yet in many circumstances, governments realize that the only approach open to them is the internationalization of government decision-making, which involves the difficult problem of how to obtain the advantages of international coordination and centralized decision-making while reserving for the smallest possible unit of government the decision-making authority which it needs to be responsive to its constituency.

Several different approaches to the problems of managing interdependence are being pursued and it is likely that no one approach will be utilized exclusively. These approaches include attempts to "harmonize" or develop uniformity in national government regulation; reliance on the exchange rate mechanism to redress disequilibrium; urging reciprocity in the way nations treat each other; and promoting an "interface" principle by which nations recognize their differences and try to ameliorate them by using "buffer" or "safeguards" rules in their economic transactions.

Conditioning all these approaches is the realiza-

tion that the current diversity among national economic systems is very great indeed. Some systems are designed to allow only a minimum of governmental interference in what might be called a market economy or *laissez-faire* approach. Other economies are structured to provide a great deal of governmental intervention or direction in the market. In between there is a vast array of economies involving different mixes of these principles.

A further problem is the dramatically different situation of developing countries, as compared with the industrial countries, which leads to divergencies of viewpoint with respect to how to coordinate those economies with an international system. In addition more closely-knit groupings of countries – because of their geographical location or the nature of the economies concerned – have been experimenting with even greater conditions of harmonization and interdependence than that which generally prevails in the world. The most extensive and successful of these, the EEC, has had a major impact on the development and implementation of rules of international economics in the world today.

2. *Policies of Economic Interdependence*

Despite the wide variety of national economic and legal systems and the great diversity of views on how the international economic system should be designed, for most of the post-World War II period there has been a fair amount of consensus with respect to some of the basic policy goals regarding that system (→ World Trade, Principles). These basic policy goals, perhaps more congenial to the advanced industrial market economies than to the non-market economies or the developing countries, have had great influence on the development and implementation of the international economic rules of law which are in place today. Nevertheless, there have been important dissenting opinions about these rules and there is considerable ferment and debate about their value. These rules cannot be well understood without knowing something about the policies underlying them.

Perhaps central to the Bretton Woods system are the economic theories of comparative advantage and economies of scale. The basic idea of economies of scale is that specialization will lead to efficiencies in the production of goods (and possibly services also), which will, in theory, allow the production of goods at a lower cost, therefore benefiting everyone. The economic theory of comparative advantage, attributed to David Ricardo and Adam Smith and greatly elaborated by many economists since, builds on the theory of economies of scale. If one nation tends to specialize in one type of goods while another nation tends to specialize in another type, each will choose to produce goods in which it has a "comparative advantage" in production in the sense of being able to produce the goods at a cost ratio more favourable than that for alternative goods, as compared to the other country.

The policy derived from these economic theories is a policy of trade liberalization. Basic to this policy is the notion of reducing barriers that might otherwise be imposed by governments on transactions which cross national borders and so frustrate economies of scale and comparative advantage. This is essentially the policy that has motivated the Bretton Woods system and which is basic to the GATT and its various subordinate agreements. Empirically, there is evidence to suggest that the policy has been very successful in the several decades of post-World-War-II history, enhancing world welfare. It is also clear, however, that the policy brings with it a series of problems.

Other policies, such as the desirability of stability and predictability in international economic transactions, also motivate the development of international economic rules. One way to lend a certain amount of stability and predictability to the world is to require governments to limit their interference with the market processes. This is the method employed by the GATT rules. They limit what governments can do, thus affording some predictability for private entrepreneurs who plan transactions which may take some years to be completed. These entrepreneurs can then be reasonably certain that governments will not impose tariffs in such a way as to frustrate their business plans.

It can be seen that international economic law – i.e. the rules of the "international economic system" – plays an extremely important role in world affairs today, both internationally and nationally. Yet there is some question whether that role in practice can be fulfilled by the current

system. There is in fact a lack of unanimity with respect to whether international rules should be the principal basis of international economic relations. There are many governments which dislike the constraints imposed upon them by international rules and which prefer a somewhat different *modus operandi* for managing the world economy or international economic interdependence. There is a dichotomy of viewpoints with respect to how international affairs should be conducted, which can be expressed in an oversimplified way as the contrast between "rule-oriented diplomacy" and "power-oriented diplomacy".

Particularly in a world that is more economically interdependent, private citizens often find their jobs, their businesses and their quality of life affected or controlled by forces outside their country's boundaries. As a result, citizens pressure their governments to respond to their needs and to their perceived injuries, a process which in turn creates conditions and parameters that make it very difficult to resolve problems coherently on an *ad hoc* basis. The rule-oriented approach thus may have particular merit in international economic affairs.

An implication of these factors is that not only the substantive rules of international economic law but also its adjective rules – namely the procedures for rule formulation and for rule application, such as in dispute settlement procedures – should be given great attention to analyse their efficiency and potential.

D. Characteristics

1. Relation to General International Law

Many of the norms of international law apply also to international economic law. Rules and principles as to how norms of → customary international law develop and rules and principles with respect to treaty law are all essential to the subject of international economic law. Perhaps one of the most important rules of customary international law that bears on economic issues is that relating to the expropriation of private property belonging to aliens (→ Aliens, Property; → Expropriation and Nationalization).

Nevertheless, there are certain characteristics, or at least nuances, of the subject of international economic law that differ from general international law. Perhaps the first and foremost is the fact that there are very few customary norms of international economic law; instead, it is essentially treaty-based. The Bretton Woods system is based on a growing number of treaties, some of which establish international organizations and others of which lay down general → codes of conduct. There are, of course, thousands of bilateral treaties that also form an important part of the subject of international economic law. Sometimes similarities among these bilateral treaties develop to the point that it can be argued that certain customary norms can be derived from these patterns of conduct.

There are certain other ways in which international economic law differs either fundamentally or as a matter of degree from general international law. One of these is the degree to which the norms of international economic law intertwine with norms of national law, particularly national constitutional law in its broad sense. Indeed, the constitutional processes of national governments are to some extent reflected in the law of international economic relations. For example, the United States Constitution, and particularly its limitations on the executive, its checks and balances and its built-in system of tensions between the executive and legislative branches, greatly influenced the formation and evolution of GATT. After several decades of GATT history, the influence also runs in the other direction: GATT and its existence are a basic condition for much United States legislation. The same is true with respect to developments in the EEC and its relation to GATT and other international organizations.

Another way in which international economic law departs substantially from general international law is in the technical and interdisciplinary nature of the subject. The subject of international economic law is, to a large extent, steered by the subject of economics. Economic principles are often key to the argumentation utilized in the development of new international economic norms and in the application of existing but ambiguous norms. On the other hand, the subject is also intertwined with non-economic topics and disciplines, particularly those of political science and municipal law.

2. *The Participants*

The implication of the matters discussed above is that the range and type of participants in the international economic system often are somewhat broader than may normally be encountered in many international situations. Clearly, relations between governments form the backbone of the subject. Likewise, international organizations are central to the system. The Bretton Woods system itself, with several international organizations as its core (IMF, IBRD, GATT), demonstrates the importance of international organizations and the relationship of governments to them.

Nevertheless, private enterprise and particularly the multinational corporation are of great importance (→ National Legal Persons in International Law; → Transnational Enterprises). The international economic system has relied on traditional international law doctrines such as → diplomatic protection and the exclusivity of government relations for much of the development of norms and their applications. In some societies, however, institutions are being developed which grant channels and procedures to individuals to participate in a meaningful way in the international system. For example, in the United States, Section 301 of the Trade Act of 1974 as amended by the Trade Agreements Act of 1979 establishes a channel for direct citizen complaint to the United States government against foreign government actions deemed to violate international norms of economic behaviour or otherwise deemed to be unfair economic practices. These procedures are relatively rare with respect to international economic affairs, although they involve some parallel to certain developments with respect to international protection of human rights.

In recent years there has been a great deal of attention given to the so-called "multinational corporation", which has been both praised and condemned for its role on the international economic scene. A number of international organizations have developed various codes of conduct for such corporations. Although most of these codes are termed "voluntary", they involve the question whether they should apply directly to the multinational corporation as an entity in the international economic system, or, on the contrary, apply only through government intervention and "transformation". Much of this activity is designed to affect the multinational corporation directly and may imply a future trend for the international economic legal system to deal directly with private enterprises.

E. Fundamental Norms

1. *General Considerations*

Having surveyed some of the general characteristics of international economic law, the question arises whether there are any fundamental norms of international economic law. The characteristics of the subject, discussed above, suggest that it may be difficult to provide an affirmative answer to this question, at least if the word "fundamental" is deemed also to mean universal.

The subject-matter is prominently based on treaties, with very little substantive basis in customary international law. Therefore, to the extent that the treaties are less than universal (and this is true of all the economic treaties, with the possible exception of the → United Nations Charter), few if any of the specific norms of international economic law can be deemed "fundamental". The difficulty of characterizing norms of international economic law as "fundamental" also stems from some of the characteristics of the subject, such as the wide diversity in national economic systems.

Nevertheless, there are norms which occur frequently in various international agreements relating to economic matters and which are often designated as "fundamental" or "central" in discussions among international economic participants. Some of these norms may be more fundamental than others but a brief description of a few of them may help in the understanding of some of the general trends of international economic law.

2. *"Central" or "Fundamental" Norms*

(a) *"Most-favoured-nation" obligation*

It is often said that the most-favoured-nation concept is central to the Bretton Woods system and, indeed, one can find this obligation not only in the GATT (with respect to trade in goods) but also in other international treaties of a general character such as the Articles of Agreement of

the IMF. In addition, many bilateral treaties such as → treaties of friendship, commerce and navigation contain clauses of this nature.

Basically the most-favoured-nation concept is a principle of non-discrimination as among different nations. The basic concept is that if country A and country B have agreed to apply to each other the principle of most-favoured-nation, then whenever country A extends a privilege regarding the relevant subject-matter to a third country it is also obliged to extend that privilege to its partner, country B. Reciprocally, B owes an obligation to A, whenever B extends a privilege to a third country.

The most-favoured-nation obligation generally comes in two different forms: conditional and unconditional. Under the conditional obligation, when country A extends a privilege to a third country it is obliged to extend a similar privilege to its partner, B, but only after that partner has "paid for" the privilege by agreeing to reciprocal benefits equivalent to those which have been granted by A. In the latter part of the 19th century and the early part of the 20th century this form was more prevalent, but it largely gave way to the concept of the "unconditional" most-favoured-nation obligation by the early part of this century.

An unconditional most-favoured-nation clause requires a country, A, which extends a privilege to a third country to automatically and unconditionally extend that privilege to its most-favoured-nation partner, B, without any requirement of reciprocity from B. Because of the difficulties of measuring the appropriate "payments" by a partner for a conditional privilege and because of the rancour and disputes that arose in the context of trying to administer a conditional clause, the tendency has been to move towards unconditional most-favoured-nation clauses. In addition, it was thought that an unconditional clause would more rapidly spread the benefits of trade liberalization or other reduction of national government barriers to economic transactions at the border. One of the difficulties of unconditional clauses is that they may inhibit the degree to which a nation is willing to initially offer privileges to a country.

Art. I of the GATT embodies the unconditional most-favoured-nation concept and obligation for trade in goods and is often deemed to be prototypical of such clauses. The GATT clause is derived from similar clauses in a number of bilateral trade agreements that preceded the GATT as well as from the substantial study of the most-favoured-nation clause that occurred under the auspices of the League of Nations.

The most-favoured-nation clause is not, however, confined to trade in goods. It can also apply to trade in services (e.g. insurance or shipping) and it can apply to national government treatment of investments and capital flows of various kinds. The OECD Code of Capital Movement also includes the concept. More recently, the → International Law Commission has studied most-favoured-nation clauses as they apply to subjects other than trade in goods (draft articles adopted by the ILC on July 20, 1978, UN GA Official Records, 33rd Session, Supp. No. 10, p. 28).

Occasionally it has been suggested that most-favoured-nation principles or at least the principle of non-discrimination in treatment of trade or other economic transactions is or should be a norm of customary international law so that it would apply universally to all nations (→ States, Equal Treatment). This viewpoint has generally been rejected by both Western scholars and State practice. Nations deem most-favoured-nation status to be a privilege which they have the right to confer on foreign nations, or to withhold, at their own discretion. Also, most-favoured-nation or non-discriminatory treatment obligations are sometimes very difficult to apply.

Although most-favoured-nation treatment may be considered central to the international economic system, there are nevertheless many exceptions to such obligations as they occur in the basic treaties of international economic law. For example, in the GATT there is an explicit exception to the most-favoured-nation obligation for regional → customs unions and → free trade areas. In addition a generalized system of preferences on tariffs for trade which comes from developing countries has developed. Other exceptions have crept into the system. One potential exception that has been debated at length is whether or not to allow departures in the context of an "escape clause" or "safeguards" import restriction (to stem imports temporarily to allow domestic indus-

try to adjust to a situation of serious injury caused by an increase in imports). Some argue that such a safeguard measure should always be taken on a most-favoured-nation basis; others maintain that nations utilizing safeguard measures should have the right to aim them at the particular foreign countries from which the troublesome imports come.

(*b*) *National treatment*

National treatment clauses, which are also widely found in a variety of treaties including the GATT and many treaties of friendship, commerce and navigation, are another type of obligation of non-discrimination. However, in contrast to the most-favoured-nation obligation, the national treatment obligation requires a nation to treat goods, services or capital which have entered into its internal economy, in the same way as it treats such matters when they are produced, owned or controlled by its own citizens.

An extensive debate concerns the expropriation of property owned by aliens. On the one hand, some argue that the only requirement of international law is that a nation treats the alien's property rights in the same manner as it treats those of its own citizens. On the other hand, some argue that there is some → minimum standard required by international law (such as the requirement of prompt, adequate and effective compensation whenever property is taken), regardless of how a nation treats its own citizens.

The principle of national treatment has extensive ramifications. In the interdependent world of today, particularly in the light of liberalization of explicit border barriers which has been achieved by the GATT and other agreements, other kinds of barriers to liberal flow of trade in goods, money and services have become considerably more important. Sometimes these are termed "non-tariff barriers". They can stem from a variety of internal regulations, such as regulations that would give preference to domestic goods as compared to foreign produced goods in matters of taxation, environmental regulation, product standards, consumer protection regulation, etc. A major effort was undertaken in the GATT Tokyo Round of trade negotiations (1973 to 1979) to develop a code of behaviour for nations with respect to "technical barriers" to trade. This resulted in an international treaty which imposed the obligation on nations to avoid the use of technical standards as a disguised barrier to trade. Likewise, government procurement regulations which have required government agencies and other government-owned and controlled entities to purchase only domestic goods or to give an advantage in the purchasing process to domestic goods as compared to foreign goods have been troublesome. Another agreement completed in the Tokyo Round addresses this subject.

(*c*) *Minimum standards*

In the context of the debate between those who argue that national treatment is the fullest extent of international obligation with respect to alien property or transactions and those who feel there is a minimum standard regardless of national treatment, a number of treaties have attempted to develop a series of minimum standards which nations must follow. The motivating principle of many of these treaties is to coordinate or harmonize the types of regulations which countries apply to goods, services or money transactions from abroad in order to equalize the opportunity of aliens to compete with the opportunity of citizens (cf. → Unification and Harmonization of Laws).

(*d*) *Obligation to refrain from injuring others*

An additional but more ambiguous general norm of international economic law could be stated as the obligation to refrain from injuring other nations or, in the alternative, the obligation to avoid "beggar-thy-neighbour" policies. A number of actions by governments with respect to international trade and other economic transactions can have the result of imposing substantial political or economic burdens on other societies.

International treaties relating to economic matters have increasingly recognized the need for nations to minimize the shifting of economic burdens through certain approaches to their domestic policies. One example can be seen in Art. III(1) of the GATT, which states that certain measures should not be applied "so as to afford protection to domestic production". Art. XVI(1) of the GATT provides an obligation of → consultation when any contracting party utilizes subsidies in any form thus recognizing that even domestic

subsidies not specifically tied to exports can injure or affect other countries.

Developing countries have negotiated for the adoption of treaty language that recognizes the desirability of avoiding national actions which impose burdens on the trade of developing countries. An example is found in one of the decisions of GATT resulting from negotiations in the Tokyo Round, which provides that the contracting parties undertake, to the maximum extent possible, to notify each other of their adoption of trade measures affecting the operation of the General Agreement. This decision provides for consultation on any measure contemplated as falling within its scope.

For a century or more, countries have recognized that certain actions by other nations can impose burdens on foreign societies in a manner that is deemed by most of the international community to be "unfair". Perhaps the most prominent of these have been those characterized as "dumping" and "subsidization". An elaborate set of specific rules with respect to dumping activity (defined as the sale by an enterprise of goods abroad at a price less than those goods are sold for in its own economy), as well as subsidization, has evolved over the decades. These activities culminated in the two agreements negotiated in the Tokyo Round (entering into force in 1979) which specify detailed rules with regard to what a nation may do to counteract what it deems to be unfair dumping or subsidization by other nations when those activities "materially injure" the domestic industries of like products. In addition, the Tokyo Round code on subsidies imposes the obligation to "refrain" from granting certain types of subsidies in the first place.

Similar concepts can be seen with respect to monetary affairs. Competitive devaluations have always been feared in international affairs and some of the measures taken by the IMF under its Articles of Agreement have been designed to try to prevent such activity.

(*e*) *Safeguards; escape clauses*

International treaties relating to economic affairs tend to recognize that undue rigidity of rules applied to these affairs can often be the undoing of the agreements themselves. Consequently, virtually all of these agreements have some sort of an escape mechanism. Many provide for the possibility of a → waiver by a certain specified vote of the participating nations. Some of these agreements also provide for an explicit "escape clause" such as that found in Art. XIX of the GATT, which gives a country a unilateral right to suspend for a temporary period its conformity with international obligations, such as those concerning tariff levels. Such suspension is allowed only in certain cases where conditions of international trade can be demonstrated to injure domestic industry seriously. The theory is that, for a temporary period, some relief from the stringency of the international rules should be provided to allow a country or specific industrial or economic sectors within it to adjust to the new conditions of international competition. Often such clauses provide a "price" that must be paid by a country invoking them, such as compensation in the form of alternative tariff reductions to take the place of those which are suspended.

(*f*) *Developing country preferences*

For many decades the developing countries who have chosen to participate actively in the international economic system, particularly the Bretton Woods system, have effectively advocated a principle by which the trade or other economic activity of developing countries should enjoy certain special privileges under the international or national rules. The most visible of these systems has been the development of the "Generalized System of Preferences". This was made a legal part of the GATT system by a 1971 waiver (for ten years) which became effectively permanent through a decision resulting from the Tokyo Round Agreements in 1979. The basic theory of the preference system is that States should be allowed to depart from most-favoured-nation obligations so as to allow them to reduce their tariff levels on the imports of goods when those goods originate in a developing country. This, it was thought, would give the exports of developing countries a certain competitive advantage in the industrial societies to which those exports are directed. Although the system has not worked as well as originally hoped, the general concept of providing special exceptions for developing countries in a variety of international economic rules is clearly central to much of the diplomatic dis-

course of international economic organizations today.

(g) Dispute settlement and rule application

While it is questionable whether the settlement of disputes is a fundamental norm, the vast majority of the international economic treaties which are general and multilateral contain provisions for extensive consultation and for dispute resolution. Specific procedures vary extensively but there seems to be a moderate trend toward the utilization of third party panels or tribunal-type committees, which in the first instance attempt to get the disputing parties to resolve their differences amicably (cf. → Conciliation and Mediation). Failing that, after hearing the parties' arguments, the panel or committee makes a ruling or finding with respect to whether there has been a departure from an international norm (cf. → Arbitration). Interestingly enough, in the context of economic affairs, there has occurred very little utilization of institutions for the general settlement of disputes in public international law, such as the → International Court of Justice. Most often, the treaties which establish the rules regarding economic affairs make specific provision for the resolution of disputes, the interpretation of treaty or other international economic norms (→ Interpretation in International Law), or the application of international rules relating to economic affairs through specialized procedures or tribunals or reference to governing bodies of the international economic organization itself.

F. Conclusion

Certainly many, if not all, of the principles of general international law apply to international economic law. However, as noted in earlier sections of this article, a number of characteristics of international economic law can be found to be different from many characteristics of public international law. It is not easy to foresee where the rules of international economic law and the international legal system of which they are a part will go in the future. New problems will require the alteration or refinement of the existing rules. The procedures need constant improvement so that they may become more efficient in inhibiting the growth of tensions and instability which can threaten even world peace.

League of Nations, Commercial Policy in the Inter War Period: International Proposals and National Policies (1942).

GATT, Basic Instruments and Selected Documents, 26th Supp. (1980) [Tokyo Round Agreements].

GATT, The Tokyo Round of Multilateral Trade Negotiations, Report by the Director General, 2 vols. (1979–1980).

G. SCHWARZENBERGER, The Province and Standards of International Economic Law, International Law Quarterly, Vol. 2 (1948) 402–420.

G. CURZON, Multilateral Commercial Diplomacy (1965).

G. SCHWARZENBERGER, The Principles and Standards of International Economic Law, RdC, Vol. 117 (1966 I) 1–98.

J.H. JACKSON, World Trade and the Law of GATT (1969).

K. KOCK, International Trade Policy in the GATT, 1947–1967 (1969).

K. DAM, The GATT; Law and International Economic Organization (1970).

G. MEIER, The Bretton Woods Agreement, 25 Years After, Stanford Law Review, Vol. 23 (1971) 235–275.

G. SCHWARZENBERGER, Equality and Discrimination in International Economic Law, Yearbook of World Affairs, Vol. 25 (1971) 163–181.

Société française pour le droit international, Aspects du droit international économique, Colloque d'Orléans (1972).

C.P. KINDLEBERGER, International Economics (5th ed. 1973).

J. GOLD, Law and Reform of the International Monetary System, Journal of International Law and Economics, Vol. 10 (1975) 371–421.

R.E. HUDEC, The GATT Legal System and World Trade Diplomacy (1975).

P. FISCHER, Das internationale Wirtschaftsrecht, Versuch einer Systematik, GYIL, Vol. 19 (1976) 143–176.

J.H. JACKSON, The Crumbling Institutions of the Liberal Trade System, Journal of World Trade Law, Vol. 12 (1978) 93–106.

D. CARREAU, P. JUILLARD and T. FLORY, Droit international économique (2nd ed. 1980).

Symposium, Codes of Conduct for Transnational Corporations, American University Law Review, Vol. 30 (1981) 903–1048.

P. VERLOREN VAN THEMAAT, The Changing Structure of International Economic Law (1981).

R.H. WESTON, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, AJIL, Vol. 75 (1981) 437–475.

E. MCGOVERN, International Trade Regulation: GATT, The United States and the European Community (1982).

P. PICONE and G. SACERDOTI, Diritto internazionale dell'economia (1982).

W. FIKENTSCHER, Wirtschaftsrecht, Vol. 1 (1983).

E.-U. PETERSMANN, International Economic Theory and International Economic Law, in: R.St.J. Macdonald

and D.M. Johnston (eds.), The Structure and Process of International Law (1983) 227–262.

J.H. JACKSON, J.-V. LOUIS and M. MATSUSHITA, Implementing the Tokyo Round: National Constitutions and International Economic Rules (1984).

JOHN H. JACKSON

ECONOMIC ORGANIZATIONS AND GROUPS, INTERNATIONAL

1. History and Typology

The term international economic organization denotes an association of States, established by agreement and possessing a permanent set of organs with autonomous functions and powers, which pursues common economic objectives by means of cooperation among its members. The historical emergence of international economic organizations coincides with the transition from mercantilism to economic liberalism in the 19th century (→ World Trade, Principles). The mercantilist doctrine and practices of States during the 15th to the 18th centuries identified national "wealth" with the accumulation of gold, silver and money, and emphasized the importance of governmental export promotion and import restrictions so as to secure a "favourable" balance of trade. This was seen as the sole means whereby a country without gold or silver mines could obtain a continuous net inflow of the precious metals essential to national wealth and power. The mercantilist view of the economy as a static "zero sum game", in which "what is given to someone, has to be taken away from somebody else" (J.B. Colbert), and its nationalistic perception of international economic relations as a struggle among rival sovereigns for the greatest national accumulation of precious metals, balance of trade surpluses and overseas colonies, ran counter to the idea of intergovernmental economic organizations.

The liberal economists from Adam Smith onwards, by demonstrating that the liberalization of mercantilist trade restrictions was in the national self-interest on the grounds that it tended to maximize a country's consumption possibilities (considered as the real wealth of nations) beyond domestic production possibilities, laid down the theoretical basis for the liberal international economy that arose during the second half of the 19th century. This liberal economic order rested on the shared perception of liberal trade as a dynamic "positive sum game" and on a legal and institutional framework characterized by numerous → customs unions (e.g. the → Zollverein (German Customs Union) of 1833 to 1871) and bilateral → commercial treaties with → most-favoured-nation clauses, freedom of payments at stable exchange rates based on the gold standard, a high degree of economic integration undistorted by governmental intervention, and an unwritten code of international good behaviour (e.g. → minimum standards and → international public order). Apart from the establishment of → international administrative unions for the common administration of certain resources (e.g. international river commissions and fishery commissions) and for the coordination of technical and legal activities (e.g. the → International Telecommunication Union, the → Universal Postal Union), multilateral efforts aiming at a substantive coordination of governmental economic policies remained rare exceptions (e.g. the Paris Sugar Convention of 1864, and the Latin Monetary Union of 1865 to 1921).

The post-1914 transition to systematic economic intervention by governments and the emergence of modern welfare States, which perceive "welfare" in terms of full employment, economic security and equitable income distribution rather than in terms of maximum consumption possibilities, engendered an increasing need to coordinate the external effects of State intervention within the context of international economic organizations. The abandonment of the gold standard necessitated multilateral rules and institutions for the regulation of balances of payments, currency values and exchange rates, foreign exchange restrictions, and international liquidity (→ International Monetary Fund). The trade protectionism of the inter-war period demonstrated that the benefits to be had from liberal trade and an international division of labour also required multilateral rules and institutions for non-discriminatory trade liberalization, coordination of trade policies and the settlement of international trade disputes (→ General Agreement on Tariffs and Trade (GATT)). Since the mere liber-

alization of tariffs and payments might not suffice to bring about an improved allocation of resources if other policy-induced domestic distortions continued to exist, and the gains from the reduction of such non-tariff distortions might be as great as those derived from tariff liberalization, it was also found to be in the national interest of States to harmonize their economic policies in other policy areas such as competition, traffic, industry, finance and commerce, fiscal and social policies (e.g. health regulations).

International economic organizations and groups can take a variety of forms. The progressive stages of economic integration can be ranked from the lowest to the highest forms starting from bilateral to multilateral preferential tariff systems and moving to → free trade areas (abolishing substantially all internal tariffs and quantitative restrictions), customs unions (free trade area plus a common external tariff), common markets (adding the coordination of monetary and fiscal policy) and finally total economic integration (the unification of economic policies). The distinction between partial tariff preferences, free trade areas and customs unions has also become part of international economic law (e.g. GATT, Arts. I and XXIV; → Economic Law, International). Both international law and economic theory favour non-discriminatory world-wide trade liberalization over discriminatory regional or sectoral organizations, since trade restrictions worsen the allocation of national and world resources by giving domestic producers a price premium over foreign producers, thus supporting inefficient production at the expense of domestic consumers. Political considerations and the common provision of "public goods" may, however, argue in favour of regional or sectoral economic organizations. Economic benefits may be derived from international integration in terms of production gains (arising from specialization according to comparative advantages, more efficient use of resources and a better exploitation of economies of scale), consumption gains (increased supply at lower prices), improvements in the terms of trade of economic groups, and various gains from a more competitive domestic economy (such as higher productivity, technological advances, and contribution to domestic price stability).

2. *Principal Organizations and Groups*

The "age of integration" since 1945 is characterized by numerous multilateral attempts to promote trade liberalization, a well-ordered monetary system and development financing within a framework of world-wide, transcontinental, regional and sectoral economic organizations and groups.

(*a*) *World-wide*

The GATT is the only international agreement that lays down a framework of multilateral rules for a world-wide liberalization of trade barriers and the harmonization of trade policies. It also provides a forum for continuous discussions on trade policy matters, negotiations on the reduction of trade barriers and the settlement of international trade disputes. It is supplemented by various sectoral trade organizations, such as international commodity organizations (→ Commodities, International Regulation of Production and Trade), as well as by functional trade organizations, such as the → Customs Cooperation Council. The → United Nations Conference on Trade and Development was designed to fill part of the void arising out of the repeated failures to set up a more comprehensive international trade organization (→ Havana Charter), and addresses itself mainly to trade and development issues of particular importance to → developing States.

The functioning of the multilateral rules and institutions for trade in goods and services depends on complementary rules and institutions for the free flow of payments for current international transactions and for predictable currency exchange rates as the monetary prerequisite for an international system of prices and competition. The essential objective of international monetary institutions such as the IMF and the → Bank for International Settlements is to support a smoothly functioning international monetary system and to assist in overcoming temporary balance of payments deficits which might impede the exchange of goods, services and capital among nations. The World Bank group (the → International Bank for Reconstruction and Development, the → International Development Association, and

the → International Finance Corporation) and the numerous → regional development banks serve the complementary task of mobilizing and lending resources to finance productive investments, particularly in developing countries. In addition to the various international trade and financial organizations or looser economic groups, such as the "Group of Ten" and the "Group of Twenty-Four" in the monetary field, numerous other world-wide international organizations are also concerned with international economic relations, including the → United Nations (particularly the → United Nations Economic and Social Council), the → International Energy Agency, the → Food and Agriculture Organization of the United Nations, the → United Nations Environment Programme, the → United Nations Industrial Development Organization, the →International Labour Organisation, and the institutions provided for under the 1982 Law of the Sea Convention (→ Law of the Sea).

(*b*) *Regional*

Regional economic organizations and groups have been established in increasing numbers and at various levels. At present, there exist more than a dozen agreements establishing free trade areas, customs unions or common markets in Western Europe, including the → Benelux Economic Union, the → European Communities, the → European Free Trade Association, and free trade areas among the → European Economic Community and each of the seven EFTA member countries. The United Nations Economic Commission for Europe (→ Regional Commissions of the United Nations), the → Organisation for Economic Co-operation and Development and the → Council for Mutual Economic Assistance are interregional economic organizations, in which some countries outside of Europe also participate. The EEC is linked by additional agreements aiming at the progressive establishment of free trade areas or customs unions with 12 Mediterranean countries and 63 African, Caribbean and Pacific Countries (→ European Economic Community, Association Agreements; → Lomé Conventions).

The largest number of regional economic organizations and groups exists among developing countries. In Africa, the main economic organizations at the regional and interregional level at present are: the United Nations Economic Commission for Africa, the → Organization of African Unity, the African Development Bank Group, the Association of African Central Banks, the Association of African Development Finance Institutions, the Association of African Trade Promotion Organizations, the Common Afro-Mauritian Organization, as well as various other economic organizations in the fields of transport and communications (e.g. the African Postal Union, the Pan-African Telecommunications Union), training and research (e.g. the African Institute for Economic Development and Planning), services (e.g. the African Reinsurance Corporation) and producers' and exporters' associations (Inter-African Coffee Organization, African Groundnut Council, African Timber Organization, West African Rice Development Association). The Lagos Plan of Action, adopted by the OAU Assembly of Heads of State in 1980, envisages measures for the setting up of an African common market as a first step towards the creation of an African economic community.

The major African economic organizations and groups at the subregional level are: in North Africa, the Maghreb Consultative Committee; in West Africa, the West African Economic Community, the → Economic Community of West African States, the Mano River Union, the Council of the Entente States, the Permanent Inter-State Committee on Drought Control in the Sahel, the Authority for the Integrated Development of the Liptako-Gourma Region, the West African Monetary Union (→ Monetary Unions and Monetary Zones) and the West African Clearing House (→ Clearing Agreements). In Central Africa, there exist at present the Central African Customs and Economic Union, the Economic Community of the Great Lakes Countries, the Central African Monetary System, the Central African Clearing House, the Development Bank of the Central African States and the Development Bank of the Great Lakes States. In Eastern and Southern Africa, there are the Eastern and Southern Africa Preferential Trade Area, the Southern African Development Coordination Conference, the East African Development Bank and the Customs Union between South Africa,

Botswana, Lesotho and Swaziland; the → East African Community was dissolved in 1977. There are further five Organizations for the development of river and lake basins: the River Niger Basin Authority (→ Niger River Régime), the Organization for the Development of the Senegal River, the Gambia River Development Organization, the Lake Chad Basin Commission (→ Lake Chad), and the Organization for the Planning and Development of the Kagera Basin (→ Regional Cooperation and Organization: African States).

In Latin America and the Caribbean, regional cooperation bodies with general competence are, in particular, the United Nations Economic Commission for Latin America, the Latin American Economic System (SELA) and the → Latin American Integration Association (LAIA), which replaced the Latin American Free Trade Area (→ Latin American Economic Cooperation). Regional economic organizations with specialized functions have been set up so as to promote monetary and financial cooperation (Inter-American Development Bank, Latin American Association of Development Finance Institutions, Latin American Export Bank) as well as sectoral cooperation in other fields (Group of Latin American and Caribbean Sugar Exporting Countries, Latin American Energy Organization, Union of Banana-Exporting Countries).

Numerous economic organizations exist at the subregional level: In Central America, there is the → Central American Common Market, the Central American Bank for Economic Integration, the Central American Central Banks System and the Central American Clearing House. In the Caribbean, there is the Caribbean Development and Cooperation Committee, the Caribbean Community, the East Caribbean Common Market, the Caribbean Development Bank and the Caribbean Investment Corporation (→ Caribbean Cooperation). In South America, the Andean Group States have set up an → Andean Common Market as well as other economic organizations for the promotion of financial, social and educational cooperation (e.g. the Andean Reserve Fund and Andean Development Corporation); the five States in the → La Plata Basin have established a régime as well as a Trust Fund for the Development of the River Plate Basin; among the eight States in the Amazon River Basin the → Treaty for Amazonian Cooperation has entered into force (→ Regional Cooperation and Organization: American States).

In Asia and the Pacific, the main economic organizations are: the United Nations Economic and Social Commission for Asia and the Pacific and the United Nations Economic Commission for Western Asia, the → Association of South-East Asian Nations, the Regional Cooperation for Development, the Trade Negotiations Group of Developing Countries of Asia and the Pacific, the Bangkok Agreement, the Asian Clearing Union, the Committee for Coordination of Investigations of the Lower Mekong Basin, the South Pacific Bureau for Economic Cooperation, the Asian Development Bank, and various other organizations such as the Asian Reinsurance Corporation, the South-East Asia Lumber Producers Association, the Association of Natural Rubber Producing Countries and the Asian and Pacific Coconut Community (→ Regional Cooperation and Organization: Asian States; → Regional Cooperation and Organization: Pacific Region).

The Arab States situated in Africa and Western Asia, while cooperating with other countries in these continents, have also established various economic organizations of their own: the Council of Arab Economic Unity, the Arab Common Market, the → Organization of Arab Petroleum Exporting Countries, the Gulf Co-operation Council, the Arab Organization for Agricultural and Mineral Resources and Industrial Development, the Arab Monetary Fund, the Arab Bank for Economic Development in Africa, the Arab Fund for Economic and Social Development, the Arab Fund for Technical Assistance to Arab and African Countries, and various other economic organizations including the Union of Arab Banks, the Arab Investment Company, the Inter-Arab Investment Guarantee Corporation, the Arab Bank for Investment and Foreign Trade and the Arab International Bank (cf. also → Arab States, League of).

In addition to the various regional economic organizations among developing countries, several interregional economic organizations and groups also exist between developing countries not belonging to the same geographic region: the Islamic Development Bank; the → Organization of Petroleum Exporting Countries' Fund for In-

ternational Development; the Trade Expansion and Economic Cooperation Agreement between India, Egypt and Yugoslavia; the African, Caribbean and Pacific (ACP) Group of States; various producers-exporters' associations of developing countries relating to petroleum, copper, bauxite, tungsten, iron ore, cocoa, tea and pepper; the developing countries participating in the GATT Protocol relating to trade negotiations among developing countries; and the Group of → Non-Aligned States, as well as the States members of the Group of 77, both of which have agreed on programmes of economic cooperation among their members.

3. *Comparative Legal Aspects*

The law and institutions of international economic organizations display numerous parallel developments and are confronted with similar problems. Most international economic organizations pursue the same objectives of promoting economic growth and stability by liberalizing integration methods and/or by coordination of economic interventions and planning. The liberalization of trade and production factors is carried out on the basis of agreed multilateral substantive principles and rules. These usually make use of the classical standards of international economic law, such as the most-favoured-nation clause or the "national treatment" standard, which can be applied to States with different economic and legal systems and form part of the law of most international economic organizations. The basic norms of substantive law consist of variations of the principles of freedom, equality and solidarity, and increasingly tend to complement the principles of freedom and formal equality by principles of substantive equality (e.g. the preferential treatment of developing countries) and solidarity (e.g. mutual assistance and mutual cooperation obligations in respect of policies which have external effects on other States). Organizations primarily aimed at coordinating domestic economic steering policies usually have few permanent substantive legal principles and rules, and instead rely on legal procedures and institutions set up to coordinate discretionary policies.

The competences of international economic organizations typically comprise → fact-finding functions, limited (quasi-) legislative functions (e.g. as regard the organization's implementing regulations and dispute settlement), and operational, administrative and/or supervisory functions. The economic steering measures of international organizations usually go no further than the exchange of information, consultation procedures, indicative advice and planning, together with the provision of financial incentives and conditions attached to it. Common policies, such as those typical of the European Communities, and the adoption of implementing rules may, however, also lead to → international legislation being enacted by economic organizations.

The institutional structure of economic organizations usually comprises the following types of organs: a general assembly; a board or council having a limited composition; a secretariat; specialized organs and, in a few organizations, interparliamentary and judicial organs.

The decision-making processes of the various organs reveal certain legal and institutional tendencies: the "pre-negotiation" of resolutions within and among informal groups; a tendency to seek unanimity or → consensus in the adoption of binding international regulations or economic steering measures; a proliferation of subsidiary and auxiliary organs dealing with the international coordination of national economic interventions with external effects; the increasingly varied character of legal instruments used; and a considerable increase in the direct effects of international measures with regard to private persons. The administrative and operational expenses of international economic organizations are traditionally financed by contributions from the member States or, as in the case of international financial organizations and the European Communities, by income from their own means or by means of international loans.

There is no "general law" of international economic organizations; each organization has its own legal system. The law of the world-wide and regional economic organizations does, however, often interact; it is also influenced by a certain "expansive logic" (i.e. spill-over) of economic integration processes. For example, customs unions and common markets like the EEC can hardly pursue their common policies without participating in other international economic organ-

izations such as GATT, which itself contains special provisions for free trade areas and customs unions (Art. XXIV). The various efficiency advantages of monetary cooperation (e.g. the reduction of transaction costs and exchange risks) have led most member countries of customs unions or common markets to participate also in (sub)regional monetary and financial arrangements. There are also close interrelations between the objectives and legal principles of regional economic organizations and the economic and legal systems of their member States: For example, the centralized national economic planning in Comecon member States inevitably leads to emphasis on national economic sovereignty and to the rejection of legally binding majority decisions by international organizations on subject-matters regulated by national central planning. The market economies and parliamentary democracies of EEC member States are reflected in EEC law and in the permanent legal guarantees for the "five economic freedoms" (of trade, services, movement of persons, payments and capital transfers), in European competition law, the independent supranational Commission of the European Communities and parliamentary and judicial Community organs (→ Court of Justice of the European Communities), as well as in the fact that countries without a system of parliamentary democracy are excluded from membership. The less developed economic, political and legal infrastructures of developing countries have often led to fragile legal and institutional structures within their respective regional economic organizations, which are not merely aimed at promoting mutual trade and industrialization but are often also motivated by policital considerations such as "collective self-reliance" and by the desire to strengthen the bargaining power of developing countries.

Differences in the law and institutions of economic organizations are thus often explicable in terms of the differences in their respective national infrastructures or degree of economic integration. The progression to higher stages of economic integration permits the removal of the regulatory deficiencies of lower forms of integration, such as the need to maintain internal trade controls within free trade areas so as to avoid "trade deflection" through imports from third countries via low-tariff members of the free trade area. But it also gives rise to additional regulatory needs. Thus, international competition rules for preventing private trade restrictions, which were not taken over from the Havana Charter (Arts. 46 to 54) into the GATT, were considered necessary in free trade areas (e.g. EFTA Agreement, Art. 15) and even more so in common markets (e.g. EEC Treaty, Arts. 85 to 94; → Antitrust Law, International). Greater homogeneity in the economic and legal systems of member States of regional organizations may also lead to more than sectoral cooperation or mere trade integration by also providing for "production factor integration" and/or "economic policy integration" within the framework of the same organization. The estimate that more than a third of trade within the EEC resulted from "net trade creation" (i.e. the replacement of domestic by partner-country sources of supply) with only a minor amount of "trade diversion" at the expense of third States (i.e. replacement of foreign by partner-country sources) bears out the legally recognized fact (see GATT, Art. XXIV) that the formation of regional economic groups need not necessarily have a negative impact on the world-wide economic system.

4. Evaluation

Since the negative experiences with monopolistic competition and nationalistic "beggar-thy-neighbour" policies between the two world wars, it has become universally recognized that many objectives of national economic policies can no longer be achieved without international economic organizations. Within these organizations, the external effects of national economic interventions can be coordinated continuously and a number of problems can be addressed which – because of their transnational nature – can be satisfactorily solved only by international cooperation. States perceive international economic organizations as an agreed framework for the multilateral pursuit of national interests in an interdependent world economy and as a prerequisite for maintaining their national economic orders as they interact with foreign economies. The evolution of the law of international economic organizations is accordingly characterized by a dynamic interplay between economic, political and legal principles and

its implementation depends on complementary domestic public and private law.

The pattern of international economic organizations reflects a "mixed" → international economic order based on self-generating markets, coordination between private economic actors in the forms of private commercial law, and between (inter)governmental economic agents in the forms of (inter)national economic law and organizations. The interposition of regional and sectoral economic organizations can contribute to the strengthening of the "layered" world-wide economic order. The legal principles and rules of international economic organizations function so as to constitute, delimit and protect economic freedoms, to coordinate autonomous economic activities and, by promoting legal continuity and security, to reduce the economic costs of uncertainty.

The achievement of the objectives of international economic organizations depends on whether their objectives, principles, rules, procedures, institutions and steering instruments form a mutually coherent system which must also be consistent with the domestic economic and legal structures of member States. A comparative legal analysis of these "infrastructural principles", objectives, substantive legal principles and rules, steering instruments, institutions, scope of operation, dispute settlement procedures and mutual coordination reveals important shortcomings in the law of many international economic organizations. The legal deficiencies (e.g. in the protection of market competition), the lack of coordination and insufficient conflict-resolution mechanisms demonstrate that the elaboration of a more coherent world-wide "economic integration law" remains a major policy task and a prerequisite for a better functioning of the international economic order.

International Organization and Integration, Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements, 4 vols. (1981–1983).

Economic Cooperation and Integration among Developing Countries, Report by the UNCTAD Secretariat, 3 vols. (1982).

H. MÖLLER, Internationale Wirtschaftsorganisationen (1961).

B. BALASSA, The Theory of Economic Integration (1962).

P. PESCATORE, Le droit de l'intégration (1972).

J. RIDEAU (ed.), Legal Aspects of Economic Integration, Hague Academy of International Law, Colloquium 1971 (1973).

E.-U. PETERSMANN, Wirtschaftsintegrationsrecht und Investitionsgesetzgebung der Entwicklungsländer (1974).

F. MACHLUP (ed.), Economic Integration, Worldwide, Regional, Sectoral (1976).

M.A.G. VAN MEERHAEGHE, A Handbook of International Economic Institutions (1980).

P. VERLOREN VAN THEMAAT, The Changing Structure of International Economic Law (1981).

E.-U. PETERSMANN, Participation of the European Communities in the GATT: International Law and Community Law Aspects, in: D. O'Keeffe and H.G. Schermers (eds.), Mixed Agreements (1983) 167–198.

ERNST-ULRICH PETERSMANN

ECONOMIC RIGHTS AND DUTIES OF STATES *see* Charter of Economic Rights and Duties of States; Economic Law, International; International Economic Order

EISLER CASE

Gerhart Eisler, an Austrian who was admitted into the United States in 1941 as a political → refugee (→ Aliens, Admission), attained a brief kind of fame when, on January 1, 1947, the House of Representatives' Committee on Un-American Activities summonsed him to appear before it. Events elsewhere in the world had signalled the beginning of what was to be called the cold war and Eisler, correctly as it turned out, was suspected of being the liaison man between the Comintern and the Communist Party of the United States of America.

On February 6, 1947 Eisler was arrested by United States → immigration authorities and brought before the Committee. Eisler refused to be sworn in before the Committee unless he were allowed to make a preliminary statement. When Chairman Thomas did not accede to this request, Eisler refused to testify, whereupon he was cited for contempt of Congress. While his contempt case was pending, Eisler was convicted of making a false statement on an application to depart from the United States which was then required for travel to Europe (U.S. v. Eisler, 75 F. Supp. 634 (D.D.C. 1947)). The indictment charged him with

concealing his Communist Party affiliations, his pre-1941 residence in the United States and his former use of various aliases.

Eisler thus had two separate appeal cases proceeding through the courts, albeit at a measured pace. By April 1949 the contempt of Congress case had been heard before a jury in a Federal District Court, which had found Eisler guilty. The decision had been affirmed by the Court of Appeals (U.S. v. Eisler, 170 F.2d 273 (D.D.C. 1948)) and the Supreme Court had granted a petition for *certiorari* (335 U.S. 857 (1948)) but the case had yet to be heard (see 338 U.S. 189 (1949)). The Court of Appeals on April 18, 1949 affirmed Eisler's conviction for making a false statement; when Eisler's motion for rehearing was rejected on May 6, he fled the United States on the Polish steamship *Batory*.

When Eisler's flight became known, the United States requested the British Government to detain Eisler on arrival (*en route* to Gdynia) and to extradite him to the United States (→ Extradition). Under a warrant issued under the Extradition Act of 1870 (33&34 Vict. c.52) Eisler was arrested and taken off the *Batory* while she was lying in Cowes Road, near Southampton (→ Ports). The Polish Government protested the action of the British Government (→ Protest), claiming that Britain was not entitled to assert its territorial jurisdiction over persons on board a foreign vessel for the purposes of extradition to a third State, and that Eisler was a political refugee who had claimed and had been granted asylum under the Polish flag (→ Asylum, Territorial; → Jurisdiction of States; → Territorial Sovereignty). The British Government denied there being any possibility of the principle of asylum being applied where foreign passengers on → merchant ships were involved, and pointed out that the Polish Government had also adhered to the same line in similar cases occurring within Polish → territorial waters. The British reply was well grounded, for the tendency in modern international law and practice has been to deprecate the notion that merchant ships may claim the benefits of sovereign immunity (→ State Immunity; cf. → State Ships).

On May 27, 1949 Eisler was brought to Bow Street Magistrate's Court in London to face extradition proceedings. The relevant extradition treaty in force between Great Britain and the United States was the so-called Dawes-Simon Treaty of December 22, 1931 (LNTS, Vol. 163, p. 59; → Extradition Treaties). However, the presiding magistrate, Sir Laurence Dunne, was guided and bound by the Extradition Act of 1870 (as amended), which determined the way the various British extradition treaties were to be applied.

No attempt was made to raise Eisler's contempt of Congress conviction before the Court, no doubt on the prudent grounds that the "political offences exception", one of the constituent elements in extradition law almost universally recognized, might otherwise have become an issue before the court. Instead, reference was made to sec. 8 of the 1873 Extradition Act (36&37 Vict. c.60) which named "perjury or subornation of perjury, whether by common or statute law" as being an extradition offence, which was also one of the offences listed in Art. 3 of the Dawes-Simon Treaty. It was thus established that the offence of perjury satisfied the "double-criminality rule", i.e. that the offence was a crime in both States. The difficulty in the Eisler case was that, although Eisler had not been convicted of perjury, the American application for his extradition specified "false statements under oath tantamount to perjury within the meaning of the United States–United Kingdom extradition treaty".

The Court, however, was not prepared to look beyond the definition of the offence contained in the Perjury Act 1911 (1&2 Geo., c.6), which required the offence to have been committed by a sworn witness in the course of judicial proceedings. Eisler's false statements had been made to an immigration officer whose work was "purely an administrative action". Thus, said Sir Laurence, it was "abundantly clear that in no circumstances whatever could that offence of which Mr. Eisler was convicted in America be brought under the technical head of perjury in this country".

The application having failed, Eisler was released forthwith; he later went on to work in East Germany as a propaganda specialist.

The decision in the Eisler Case appeared to surprise many observers in the United States who had believed in a "liberal" interpretation of the "double-criminality" requirement between the United States and Great Britain. It is clear,

however, that the "strict" interpretation of what constituted an extradition crime represented the orthodox approach in British courts.

The Eisler Case, though not untinged by political considerations, nevertheless well illustrates the definitional and technical difficulties involved in the law of extradition. In the absence of universally recognized definitions of individual crimes, requests for extradition are bound to require the sort of careful attention to detail which did not seem to loom very large in the Eisler Case.

G.A. FINCH, The Eisler Extradition Case, AJIL, Vol. 43 (1949) 487–491.
R.Y. JENNINGS, Decisions of English Courts During 1948–9, BYIL, Vol. 26 (1949) 468.
G.W. KEETON, The Eisler Case, The Solicitor, Vol. 16 (1949) 146.
D.E. DRAYTON, Application of the United States Concerning Gerhart Eisler, Cornell Law Quarterly, Vol. 35 (1950) 424–437.
P.E. JACOB, International Extradition: Implications of the Eisler Case, Yale Law Journal, Vol. 59 (1950) 622–634.
W. GOODMAN, The Committee (1968) 200–205.
M.C. BASSIOUNI, International Extradition and World Public Order (1974) 346–350.

JONATHAN S. IGNARSKI

EMBARGO

1. *Notion and Historical Development*

Under traditional international law, embargo has the technical meaning of a detention in port of ships under foreign flag in times of peace by way of → reprisal. Since the 1930s the term has become a description for unilateral or collective restrictions on the export and/or import of goods, materials, capital or services to or from a specific country or group of countries for political or security reasons. The term comes from Spanish and Portuguese (*embargar* is to hinder or detain).

The trade embargo used today is derived from the embargo on ships that was mainly practised in the 17th, 18th and 19th centuries. However, the two should be considered distinctly, as an embargo on ships flying a foreign flag will directly raise questions of international law, whereas a trade embargo will do so only indirectly, being technically directed at nationals of the State imposing it as a measure of municipal law. Both are measures taken by a State for foreign policy (not strictly economic) reasons, resulting in discrimination against another State (→ States, Equal Treatment); thus, certain behaviour will be urged upon the State concerned, by inflicting economic damage.

2. *Embargo on Ships*

An embargo involving the detention or seizure of ships of a foreign power (sometimes called hostile embargo) has been mostly applied in order to compel a State to make → reparation. Typical is the Sicilian Sulphur Monopoly case, where Great Britain placed an embargo on Sicilian ships in 1840 after the Naples sulphur monopoly had been unilaterally transferred to a French company. The vessels were restored only after the Kingdom of the Two Sicilies had agreed to comply with treaty obligations concerning British monopoly rights. In the 20th century, embargoes have also been used by belligerents against neutral powers to induce them to cooperate with → economic warfare measures. The old practice of laying an embargo on the merchant ships of an adversary in anticipation of → war became obsolete after the entry into force of Hague Convention VI (→ Prize Law; → Hague Peace Conferences of 1899 and 1907).

An embargo on ships is to be distinguished from a detention for other reasons. Under the right of → angary, a belligerent may seize neutral property in case of necessity only against payment of compensation. Unlike a → blockade or pacific blockade an embargo is normally applied within the territory of the State inflicting it and not on the → high seas or in the → territorial waters of another State. Under both embargo and pacific blockade, however, any vessel detained has to be restored to the rightful owner (though without compensation) after settlement of the dispute.

Because an embargo on ships entails considerable curbs on free trade and shipping, its use has been limited or prohibited in many bilateral treaties. Under general international law it violates the right to → innocent passage, and possibly also the prohibition of the → use of force if enforced on the high seas, as well as infringing the property rights of the foreign owner

(→ Expropriation and Nationalization). Its possible use is thus limited to cases of → sanctions within the framework of the → United Nations or reprisals. Although presently deemed inexpedient, embargo on ships could be revived under certain circumstances, like similar institutions previously considered dormant, such as the right of angary.

3. *Trade Embargo*

(*a*) *Notion*

A modern trade embargo is applied by prohibiting *vis-à-vis* another State either the export or import of certain or all goods, materials or technology (export/import embargo), by refusing to allow financial transactions, investments or loans (capital embargo), by enjoining the use of ships or aircraft registered in the embargoing State or the use of port facilities (transportation embargo) or by a combination of these measures. The choice of individual measures will be determined to a considerable extent by the degree of dependence of the adversary; there is a marked tendency today to single out high technology goods or know-how, certain commodities and raw materials and the flow of capital. An embargo on the latter can have far-reaching effects on world trade. An embargo can be part of a → boycott aimed at isolating another State, or of a blockade if physical enforcement action is taken beyond the territorial limits of the embargoing State.

A trade embargo is a discriminatory governmental restriction on foreign trade, ordered in reaction to unlawful or objectionable conduct by another State with the intention of forcing this State to adopt a certain course of conduct by inflicting damage. Potential damage suffered by the imposing State itself and by third States is often accepted as unavoidable. As politically motivated restrictions, embargoes have to be distinguished from similar measures – generally applied without discrimination – which relate to health requirements, protection of the cultural heritage or other public policy matters. A State may, for example, impose general arms transfer regulations or measures based on general economic policy. Likewise, general protectionist measures and counter-measures (such as tariffs or exchange controls) cannot be considered as embargoes.

As a part of economic warfare, embargoes are frequently used in wartime. Thus, the particular techniques of modern embargoes have been developed during both World Wars. In the → trading with the enemy legislation of many States, embargoes are still a major weapon. In the 1982 conflict between the United Kingdom and Argentina over the → Falkland Islands (Islas Malvinas), for example, both sides declared an import embargo on the basis of existing legislation, supplemented among other things by the freezing of assets and the denial of transport facilities.

(*b*) *Recent cases*

Since World War II there have been many cases of embargo. From 1947 onwards, the United States, under regulations and economic crisis legislation laid down during the war, set up the strategic export embargo as a weapon in the cold war against the communist countries of eastern Europe. Widespread support for this policy was secured by the Foreign Assistance Act of 1948 and the Mutual Defense Assistance Control Act of 1951, linking United States economic, financial or military aid with participation in the programme. Since 1949, informal cooperation under a secret → gentlemen's agreement between the United States and 14 other Western nations to date is effected through a Co-ordinating Committee (COCOM) in Paris. The strategic embargo is implemented by national legislation. Because of the Korean War, the United States also imposed a very strict embargo on China in 1950 that was maintained until the 1970s.

Between 1946 and 1948 a collective American, French and British embargo against Spain sought to put pressure on the Franco régime. From 1948 to 1955 the USSR, joined by the other members of the → Council for Mutual Economic Assistance (Comecon) limited trade with and capital movements to Yugoslavia by several embargoes which had the intensity of a boycott. The States of the Arab League in 1951 instituted their system of boycott against Israel which includes various embargo measures (→ Israel and the Arab States; → Arab States, League of). The United Kingdom from 1951 to 1954 declared an embargo on Iran,

supplemented by private measures in the style of a boycott implemented by oil companies, because of the nationalization of the oil industry in Iran. The first specific oil embargo was imposed on Israel by the Soviet Union in 1956 in connection with the Suez crisis (→ Suez Canal). Albania has been subject to embargo by the Comecon States since 1961 because of its alliance with → China. The United States in 1960/61 instituted import, export and capital embargoes against Cuba partly because of nationalization of United States corporate property. In 1962, this embargo was transformed into a collective decision of the → Organization of American States and temporarily took the form of a blockade (→ Cuban Quarantine). Following a recommendation of the → North Atlantic Treaty Organization, the Federal Republic of Germany from 1962 to 1966 imposed an embargo on the export of steel pipes to the Soviet Union. The Arabian oil producers in 1967 decided on their first oil embargo against the United States, the United Kingdom and the Federal Republic of Germany in connection with the Six-Days-War (→ Organization of Arab Petroleum Exporting Countries). In 1973/74 the oil export embargo by the same States against the United States, the Netherlands and South Africa following the Yom-Kippur War showed the serious consequences an embargo can have on the world economy.

The United States in 1978 placed a total embargo on imports from Uganda because of → human rights violations during the Amin régime. After Soviet military intervention in Afghanistan (→ Non-Intervention, Principle of), the United States in 1980 applied a grain embargo to the Soviet Union. As a consequence of the → United States Diplomatic and Consular Staff in Tehran Case in 1980, the → European Communities supported the embargo measures taken by the United States, including an assets freeze that proved a serious test of international banking rules, with a collective embargo against Iran. In connection with the 1981/82 events in Poland, the United States embargoed the delivery of machines and equipment for the construction of a natural gas pipeline to Western Europe from Siberia; for the same reason the → European Economic Community imposed a selective import and export embargo on the Soviet Union and Poland. During the 1982 Falklands/Malvinas conflict, New Zealand, Canada and the EEC supported the United Kingdom by imposing an import embargo, prompting Argentina to retaliate with a counter-embargo including the revocation of landing rights for European airlines. Partly because of Libya's involvement in the Chad conflict, the United States in 1982 declared an oil import embargo combined with an export embargo on such things as oil industry technology to Libya.

A collective embargo is theoretically a more powerful enforcement measure, especially if taken within the UN framework; it can be applied after the → United Nations Security Council has passed a decision to this effect pursuant to Art. 41 of the → United Nations Charter. So far, binding United Nations embargo decisions have been taken only in 1966 and 1968, concerning → Rhodesia/Zimbabwe after its unilateral declaration of independence (UN Security Council Res. 221 and 232 (1966) and UN Security Council Res. 253 (1968)). The → United Nations General Assembly, on the other hand, has frequently over the years recommended (non-binding) embargo measures, directed especially at South Africa, but without any implementation.

An indemnity for losses incurred by third States indirectly suffering from embargoes has been considered in connection with the United Nations sanctions against Rhodesia, which placed a heavy burden on the neighbouring States (see Art. 50 of the UN Charter).

Arms embargoes (→ Arms, Traffic in) are designed to contribute to a peaceful resolution of → armed conflicts or → civil wars by preventing the use of such arms abroad. In the case of discriminatory application of an arms embargo there is a danger, however, of *de facto* participation in a conflict by assisting or injuring one of the parties. Arms embargoes imposed by the UN Security Council do not carry this risk. The United Nations embargoes against Portugal in 1962 because of its colonial policy and against South Africa in 1964 because of its policies on → Apartheid and → Namibia did not, however, have binding effect and accordingly did not enjoy widespread recognition.

Frequently, embargoes are designed to limit specific undesirable activities undertaken or tolerated by another State, such as embargoes on the

export of nuclear materials (see the 1978 Guidelines by the London Nuclear Suppliers' Group), United States embargoes on the export of technical devices capable of being used in terrorist or internal repressive actions (→ Terrorism), or embargoes on the export of narcotics (see the 1931 Geneva Narcotics Convention). If not applied in a discriminatory manner, these embargoes fall in the same category as similar measures taken for public policy reasons.

(c) *Legality*

It is generally recognized as proper if a State within its domestic competence carries out certain foreign trade measures in order to advance its own economic or political interests. Except for the special obligations to be respected under the law of → neutrality, there is no general or fundamental rule requiring economic equality or non-discrimination. In various multilateral and bilateral treaties, however, States have agreed to liberalize trade and/or payments on a most-favoured-nation basis, obligations that can place limits on the legality of embargoes as highly discriminatory acts. Examples are the → most-favoured-nation clause in Art. I of the → General Agreement on Tariffs and Trade as well as similar pledges of non-discrimination in various bilateral → treaties of friendship, commerce and navigation. Whereas older treaties of this type often did not provide for exceptions, modern treaties usually contain safety clauses stipulating exceptions at least for reasons of national security, foreign policy generally or → ordre public. Thus, besides the saving clauses in Arts. XI, XII, XIX and XXIII for special economic reasons, Art. XXI of GATT provides a broad basis for security exceptions. Argentina unsuccessfully proposed to limit the application of Art. XXI of GATT when in 1982 the EEC, Canada and New Zealand had relied on this article in justifying their import embargo without being directly involved in the Falklands/Malvinas conflict.

In the Articles of Agreement of the → International Monetary Fund, there are no express security exceptions authorizing members to restrict capital transfers, although the interpretation given to the Agreement by the rulings of the Executive Directors provides a practical basis for such restrictions, provided they are notified to and not objected to by the IMF. Likewise, according to Arts. 36, 223 and 224 of the EEC Treaty, certain obligations can be waived if protective measures like an embargo are deemed necessary. The question whether the Community or the member States are competent to decide on such measures (EEC Treaty Arts. 113, 224 and 235) is gradually being resolved in favour of the European Communities Commission.

Questions of compatibility with public international law can arise when an embargo is designed and likely to have a serious impact on the domestic policies of another State, when it implies a high degree of coercion, when its purposes are not deemed to be proper or when in relation to third States it defies traditional rules of jurisdiction by its extraterritorial application (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). Apart from the prohibition of the use of force that is not applicable to non-military means of coercion, the principle of non-intervention in the internal affairs of another State (Art. 2(7) of the UN Charter) will have a bearing on the legality of an embargo. Although resolutions of the UN General Assembly have attempted to define limits of → economic coercion permissible under non-intervention standards (e.g., Res. 2131(XX), Res. 3171(XXVIII), Res. 3281(XXIX)), the criteria to be applied to embargoes (e.g. means employed, intensity of coercion, goals, degree of dependency) will in normal cases hardly lead to a determination of illegality.

Third States not themselves subject to an embargo tend to consider the extraterritorial application of embargo measures as an interference in their internal affairs. Special legislation has been passed by several States to block the extraterritorial application of embargoes and similar measures by other States (→ Antitrust Law, International). In the 1982 gas pipeline case, the United Kingdom used its Protection of Trading Interests Acts of 1980. The United States embargo measures, aimed at stopping the transfer of American technology destined for the Siberian gas pipeline, affected exports of several European corporations. The Western European States considered the measures, unilaterally imposed for United States foreign policy reasons, unacceptable and accordingly ordered or encouraged com-

panies to disregard the embargo. The EEC launched an official protest against the embargo's application to its corporations as illegally affecting Community commercial policy.

Generally, embargoes have to be considered as no more than → unfriendly acts. In the rare cases where an embargo might violate treaty obligations or the principle of non-intervention, justification may possibly be provided by the law of reprisals, if the activity of the embargoed State itself has to be considered a violation of international law. As in the case of the 1980 Iran embargo following the hostage crisis, reprisals by third States are also legitimate if taken in response to a violation of a fundamental norm of international law. An embargo resorted to in connection with collective enforcement measures under Arts. 41 and 42 of the UN Charter or Art. 28 of the OAS Charter cannot give rise to legal objections.

(*d*) *Effectiveness*

Trade embargoes are usually administered under national regulations by way of elaborate lists placing goods, materials or technology in certain categories subject to special licensing or a total import or export prohibition. Re-export or end-use certificates are required to identify the final destination of goods. Under the Western strategic embargo, various lists exist. The internationally agreed COCOM-list defines a minimum obligation of the participating States that is periodically revised; in individual cases, exceptions to the embargo can be authorized. Each State transforms this obligation into its legal system by way of national lists that can contain additional items; in the case of the United States there are several lists for security as well as for foreign policy purposes, using different criteria. The loss of effectiveness resulting from lists that differ from country to country is evident and unavoidable at least as far as foreign policy-related items are concerned. Nevertheless, United States authorities have frequently tried to make up this deficiency by exerting an important – and mostly extraterritorial – indirect influence (moral embargo) on corporations operating abroad. This is done by applying pressure on United States parent companies or by soliciting "voluntary" submission to United States regulations from wholly foreign-owned companies (e.g., by threatening to place them on black lists, with the consequent denial of "export privileges" to the United States or interruption of supply of goods manufactured in the United States). The degree of additional effectiveness obtainable will have to be carefully weighed against the possible international tensions caused by such indirect embargo measures.

It is hard to forecast the likely economic effects of an embargo. The various factors (e.g. import or export dependency, possibilities for internal or import substitution and time element) are not easy to evaluate and are subject to change. Practice has shown embargoes to be economically ineffective in peacetime for a variety of reasons, and their political value in contributing to the intended result has likewise been limited. Embargoes must, however, be considered as legitimate instruments of the → peaceful settlement of disputes by way of economic coercion, their use being greatly preferable to other forceful means. However, the overall damage to the international economic and social welfare often tends to outweigh the possibly positive symbolic effects on the international system.

L. DUBOIS, L'embargo dans la pratique contemporaine, AFDI, Vol. 13 (1967) 99–152.

G. ADLER-KARLSSON, International Economic Power, The U.S. Strategic Embargo, Journal of World Trade Law, Vol. 6 (1972) 501–517.

R. HASSE, Theorie und Politik des Embargos (1973).

J.J. PAUST and A.P. BLAUSTEIN, The Arab Oil Weapon – A Threat to International Peace, AJIL, Vol. 68 (1974) 410–439.

I.F.I. SHIHATA, Destination Embargo of Arab Oil: Its Legality under International Law, AJIL, Vol. 68 (1974) 591–627.

B. LINDEMEYER, Schiffsembargo und Handelsembargo (1975).

A.F. LOWENFELD, Trade Controls for Political Ends, International Economic Law, Vol. 3 (1977).

F. GIANVITI, Le blocage des avoirs officiels iraniens par les Etats-Unis, Revue critique de droit international privé, Vol. 69 (1980) 279–303.

E. GORDON, The Blocking of Iranian Assets, IntLawyer, Vol. 14 (1980) 659–688.

B. ENGELS, Die Zukunft des Embargos in den internationalen Beziehungen (1981).

B. LINDEMEYER, Das Handelsembargo als wirtschaftliches Zwangsmittel der staatlichen Außenpolitik, Recht der internationalen Wirtschaft, Außenwirtschaftsdienst des Betriebs-Beraters (1981) 10–23.

M.P. MALLOY, Embargo Programs of the United States

Treasury Department, ColJTransL, Vol. 20 (1981) 485–516.

J.F. MURPHY and A.T. DOWNEY, National Security, Foreign Policy and Individual Rights: The Quandary of United States Export Controls, ICLQ, Vol. 30 (1981) 791–834.

E.U. PETERSMANN, Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarechts, Zeitschrift für vergleichende Rechtswissenschaft, Vol. 80 (1981) 1–28.

W.A. KEWENIG and A. HEINI, Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht und im Internationalen Privatrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 22 (1982).

P.J. KUYPER, Community Sanctions against Argentina: Lawfulness under Community and International Law, in: D. O'Keefe, H.G. Schermers, Essays in European Law and Integration (1982) 141–166.

H.H. TITTMANN, Extra-territorial Application to U.S. Export Control Laws on Foreign Subsidiaries of U.S. Corporations: An American Lawyer's View from Europe, IntLawyer, Vol. 16 (1982) 730–737.

A.E. STENT, Technology Transfer to the Soviet Union (1983).

Stiftung Wissenschaft und Politik (ed.), Wirtschaftssanktionen im Ost-West-Verhältnis (1983).

HANS G. KAUSCH

EMIGRATION

1. *Notion and Terminology*

Emigration entails → immigration and is thus part of the broader problem of migration (cf. → Migration Movements). From the viewpoint of international law emigration is relevant only if it transcends national → boundaries.

Emigration is usually defined as the voluntary removal of an individual from his home State with the intention of residing abroad. However, not all emigration is voluntary; there sometimes exists forced emigration, even mass emigration (→ Denationalization and Forced Exile). Emigration may also be due to flight for political reasons or expulsion (→ Aliens, Expulsion and Deportation). One then speaks of → refugees or exiles. A special kind of expulsion is the enforced transfer of populations (→ Population, Expulsion and Transfer). Exchange of populations always takes place on the basis of → treaties. In the case of cession there often exists a right of option to emigrate for the inhabitants of the ceded territory (→ Option of Nationality). When the treaty of cession allows the inhabitants to retain the → nationality of the ceding State, the acquiring State may expel those who make use of the option to retain the old nationality.

Expellees must also be regarded as refugees. Another category of emigrants, especially in the case of → decolonization, are repatriates, i.e. nationals of the former colonial power who return to the mother country after the country of their residence has become independent (→ Repatriation; → Colonies and Colonial Régime).

2. *History*

The Greek word for freedom "eleuthería" comes from "to go where one wills". In his dialogue with Criton, Socrates made the laws speak thus: ". . . we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city and made our acquaintance, he may go where he pleases and take his goods with him. None of our Laws will forbid him or interfere with him . . . ."

The English Magna Carta of 1215 guaranteed the general freedom to leave and to return to the Kingdom unless it be in time of → war and "excepting prisoners and outlaws according to the laws of the land". This right does not appear in later versions of the Carta and the writ *ne exeat regno* was introduced – but later fell itself into disuse. A tax for leaving the country or upon the property the emigrant took with him – the *gabella emigrationis* – was levied by some States. A more modern version was the Reich Flight Tax (*Reichsfluchtsteuer*) levied by National Socialist Germany on emigrants. The Peace Treaty of Westphalia (→ Westphalia, Peace of (1648)) pronounced the right of religious → minorities to emigrate. Of the founding fathers of → international law, Francisco de Vitoria, Hugo Grotius and Emer de Vattel defended the right to emigrate as a natural right (→ Natural Law; → History of the Law of Nations). The French Constitution of 1791 proclaimed the freedom of everyone to stay or to leave "without being halted or arrested unless in accordance with the procedures established by the Constitution".

The greatest mass movements of modern times,

amounting to many millions of persons, have been the expulsion of ethnic Germans from Poland, Czechoslovakia and Hungary to Germany following the decisions of the Potsdam Conference between the major Allied Powers of August 2, 1945 (→ Potsdam Agreements on Germany) and the movement of Moslems from India to Pakistan and of Hindus from Pakistan to India following the partition of India in 1947.

3. *Current Legal Situation*

Judge Inglès of the Philippines, who prepared on behalf of the United Nations Sub-Commission for the Prevention of Discrimination and the Protection of Minorities (→ Discrimination against Individuals and Groups; → Human Rights, Activities of Universal Organizations) a study on "Discrimination in respect of the Right of Everyone to Leave any Country and to Return to his Country", states that the right of nationals to leave a country may be found in the constitutions or laws of 24 States, while such right has been established in the judicial interpretation of 12 more; the right of non-nationals (→ Aliens) to leave the country of their residence exists in the laws of 20 States and in the judicial interpretation of 12 more. This does not mean however, he declares, that the right is not recognized in other States.

The Universal Declaration of Human Rights of 1948 (→ Human Rights, Universal Declaration) proclaims in Art. 13(2): "Everyone has the right to leave any country, including his own, and to return to his country." Art. 12(2) of the International Covenant on Civil and Political Rights of 1966 (→ Human Rights Covenants) contains a similar provision but goes on to say in para. 3: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant" (→ Ordre public (Public Order)). In the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (→ Racial and Religious Discrimination) the States parties undertake in Art. 5: "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of: . . . (d) (ii) The right to leave any country, including one's own, and to return to one's country."

Protocol No. 4 to the → European Convention on Human Rights of 1966 similarly states in Art. 2(2): "Everyone shall be free to leave any country, including his own." The 1980 draft declaration on the human rights of individuals who are not citizens of the country in which they live, submitted by the United Nations Commission of Human Rights to the General Assembly (UN Doc. E/CN.4/1336), provides in Art. 4: "Notwithstanding any distinction which a State is entitled to make between its citizens and non-citizens, every non-citizen shall enjoy at least the following rights, always respecting the obligations imposed upon a non-citizen by Art. 2" (i.e. observance of the laws and refraining from illegal acts prejudicial to the State) *inter alia* "the right to leave the country and to return to his own country".

For travel beyond frontiers a → passport is normally required. Efforts have been made to facilitate the travel of emigrants. Thus as a result of a conference held in 1929 under the auspices of the → League of Nations a "*carte de transit*" was devised. The issue of a passport is usually a matter of discretion but this discretion is not unlimited and, in countries where the rule of law prevails, is subject to control, normally by judicial authorities. Thus the Supreme Court of India held in 1967 in Sawhney v. Associate Passport Officer ((1967) AIR (S.C.) 1835) that the individual has the right to travel abroad and that the refusal of the government to issue a person with a passport is a denial of the right to personal liberty and equality before the law guaranteed by the Constitution of India. In the United States it has been held that the discretion of the Secretary of State to issue passports is subject to the scrutiny of the courts. (Perkins v. Elg, 307 U.S. 325 (1933); Bauer v. Acheson, 106 F.Supp. 449 (1952); Schachtmann v. Dulles, 225 F.2d 938 (1955); Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Haig v. Agee, 453 U.S. 280 (1981).)

Even in countries which grant a right of emigration this right may be denied in case of criminal prosecution, and is subject to considerations of

national security and public order, and to the fulfilment of obligations *vis-à-vis* the State, such as military and tax obligations, and obligations *vis-à-vis* other persons, such as maintenance obligations.

4. *Special Legal Problems*

Diplomatic and consular officials and the members of their families have the right to leave the territory of the receiving State even in time of → armed conflict according to → customary international law, to the → Vienna Convention on Diplomatic Relations of 1961 (Art. 44) and to the → Vienna Convention on Consular Relations of 1963 (Art. 26) (→ Diplomatic Agents and Missions, Privileges and Immunities).

Refugees receive protection and assistance from the Office of the United Nations High Commissioner for Refugees (→ Refugees, United Nations High Commissioner). It assists in the resettlement of those refugees who cannot or do not want to stay in a country of first asylum (→ Asylum, Territorial). For this purpose the Office cooperates with the → Inter-Governmental Committee for Migration at Geneva which effects the transportation. That organization assists not only refugees but also nationals of the member States in their emigration.

When the Soviet Union did not allow Soviet wives of foreigners to emigrate the → United Nations General Assembly adopted a resolution (Res. 285(III) of June 25, 1949) and permission was subsequently forthcoming.

A special case is migration for employment (→ Migrant Workers). The Migration for Employment Convention (Revised 1949) of the → International Labour Organisation (Convention No. 97) provides in Art. 4: "Measures shall be taken as appropriate . . . to facilitate the departure, journey and reception of migrants for employment."

The Treaty of Rome establishing the → European Economic Community as amended provides in Art. 3(c) for "the abolition, as between Member States, of obstacles to the freedom of movement of persons, services and capital". Arts. 48 to 51 deal with the freedom of movement of workers. According to Directive 64/240 the member States recognize the right of Community nationals who wish to take up salaried employment in another member State to leave, with their families, the territory of their home State.

As was said above, exchange of populations is always based on treaty. The most important treaties in this field are the Treaty between Greece and Bulgaria of November 27, 1919 and the Convention of Lausanne between Greece and Turkey of January 30, 1923. The latter, which affected two million persons, was followed by a number of agreements relating to the property of the emigrants, of which the Convention of Ankara of June 10, 1930 is the most important (cf. → Aliens, Property). The Convention of 1923 provided for the emigration of persons of the Greek Orthodox faith from Turkey to Greece and of Moslems from Greece to Turkey, although Orthodox persons established in Istanbul and Moslems established in Western Thrace were exempt. The → Permanent Court of International Justice was called upon to render an advisory opinion as to the correct interpretation of the term "*établis*" as used in the Lausanne Convention (→ Exchange of Greek and Turkish Populations (Advisory Opinion)). The claims of the emigrants to property left behind became claims of the State to which they emigrated. → Mixed commissions consisting of representatives of the parties and of neutral States were established to supervise and facilitate the emigration.

5. *Evaluation*

Some theorists, especially those of the natural law school, regard the right of emigration as a natural, human right. According to traditional international law emigration is, however, a matter of municipal, not of international law. There exist, it is true, widespread treaty obligations which grant the right to emigrate. In the absence of treaty obligations the emigration of nationals is, it is submitted, still a matter of domestic law, with the possible exception of the prohibition of racial discrimination. The emigration of aliens, on the other hand, can hardly be prevented under international law, except for reasons of national security or public order, criminal prosecution, outstanding obligations *vis-à-vis* the State or maintenance obligations, and, in the case of enemy aliens, in time of war (→ Enemies and Enemy Subjects).

France, Ministère de l'économie nationale, Les Transferts Internationaux des Populations (1946).
D.J. INGLÈS, Study of Discrimination in Respect of the Right to Leave Any Country Including His Own and to Return to His Country (1964).
D.D. HARTMANN, Ausreisefreiheit, Jahrbuch des öffentlichen Rechts, Neue Folge, Vol. 17 (1968) 437–480.
V.P. NANDA, The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations, Denver Journal of International Law and Policy, Vol. 1 (1971) 109–122.
R. HIGGINS, The Right in International Law of an Individual to Enter, Stay and Leave a Country, International Affairs, Vol. 49 (1973) 341–357.
A. CASSESE, International Protection of the Right to Leave and to Return, in: Studi in Onore di Manlio Udina, Vol. 1 (1975) 217–229.
A. DE ZAYAS, International Law and Mass Population Transfers, Harvard ILJ, Vol. 16 (1975) 207–258.
The Right to Leave and to Return, Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19–21 June 1972 (1976).
R. AYBAY, The Right to Leave and the Right to Return, Comparative Law Yearbook, Vol. 1 (1977) 121–136.
J.A. NAFZIGER, The Right of Migration under the Helsinki Accords, Southern Illinois University Law Journal (1980) 395–438.
S. JÄGERSKIÖLD, The Freedom of Movement, in: L. Henkin (ed.), The International Bill of Rights (1981) 166–184.
P. BOLDAX, The Right to Travel and Passport Revocation, Brooklyn Journal of International Law, Vol. 8 (1982) 391–428.

PAUL WEIS

ETAT RUSSE v. LA ROPIT

1. Historical Background

In the aftermath of the Russian revolution in 1917, Western countries faced not only the problem of → recognition of the new Soviet State, but also the legal difficulties consequent upon recognition.

One aspect of this problem was the uncertain legal position of Russian companies whose management had fled to Western Europe after expropriation decrees were promulgated by the Soviets (→ Expropriation and Nationalization). Managers in many cases transferred the company's seat and residuary financial resources and enlarged existing branches of Russian companies or founded new ones, often with the help of Western share-holders and creditors. Before the recognition of the Soviet Union it had been easy for courts to ignore the Soviet expropriation legislation, but afterwards they were obliged to address the question whether these laws had any effect on the legal situation of the formerly Russian companies now relocated in Western States. Etat Russe v. La Ropit was one of the first decisions by a court on these novel questions.

2. Facts

By a decree of January 26, 1918 the Soviet Government nationalized the entire Russian merchant marine. Some ships belonging to a Russian Navigation Company known as "Ropit" were able to escape → sequestration and berthed in France and England. The company continued to carry on business in France, with the financial support of French citizens. Thereafter the company applied for the recognition of its provisional administration in France, which was granted by a decision of the Commercial Tribunal of Marseille in 1923. After the recognition of the Soviet Union by the French Government in 1924, the Soviet Government intervened as a third party demanding that the decision of 1923 in favour of "La Ropit" be quashed. It claimed ownership of the vessels on the grounds that after France's recognition of the Soviet Union, the nationalization decree of 1918 had become applicable. The latter had extinguished the company's legal personality and had vested its rights of ownership in the Soviet Government. The Soviet Government's claims failed in all three instances, mainly on the same grounds, but with differences in the courts' reasoning.

3. The Decisions

In its decision of April 23, 1925 the Tribunal of Commerce in Marseille stated firstly that after the *de jure* recognition of the Soviet Government the French courts could no longer ignore Soviet laws when faced with a legal problem governed by foreign legislation. The Court nevertheless pointed out the principle of public law which prevented it from applying laws which were either contrary to French → *ordre public* (public order) or exclusively political in nature. Since the Tribunal found both criteria to have been met, the action failed, because the Soviet Union had

not acquired any rights in connection with La Ropit under their nationalization legislation. This reasoning was generally accepted in both of the stages of appeal.

The Cour d'Aix, in its decision of December 23, 1925, held the Soviet decree of nationalization a "confiscation pure and simple, an act of force against the individual with a view to abolishing private property and establishing the dictatorship of the proletariat". In thus offending the very bases of French law, the decree could not be given effect outside its territory, all the more where the interests of French citizens were involved (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). In rejecting the more political and moral considerations of the lower instance decisions, the Cour de Cassation in its decision of March 5, 1928 pointed out that it did not want to deny the Soviet State the rights of → sovereignty. It therefore underlined that foreign legislation had to be applied by French courts unless it contradicted principles and legal provisions which were held to be of substantial importance for the national *ordre public*. In contrast to the earlier decisions, the court abstained from venturing a political evaluation and instead offered detailed reasoning explaining why the Soviet laws were contrary to French *ordre public*. On the basis of Art. 545 of the Civil Code it had always been a principle in French law that no one in France could be forced to give up his or her property except when this was in the public interest and in return for fair and prior compensation. As the Soviet nationalization decrees were not in accordance with this principle, because they did not provide for the payment of fair compensation to the owners who were dispossessed, the French courts could not recognize the use of such a method for the acquisition of property. Accordingly, the Soviet Government was denied the right of intervention as a third party.

It should be noted here that not only French courts were faced with the consequences of the Russian expropriations. In the Jupiter Cases, litigated before English courts, the Soviet Union claimed ownership of a vessel in light of its nationalizations. The Courts denied this claim and pointed out, *inter alia*, that it was unclear whether the Soviet decrees were meant to affect property outside the Soviet Union and that English courts could not, in any case, give effect to such decrees since the vessel had not been within the jurisdiction of the Soviet Union when the decrees were issued. In courts of the United States similar questions arose. In the Sokoloff Case a main issue was whether the recognition of the Soviet Union had retroactive effects with regard to nationalization decrees preceding recognition. The decision was that American courts would apply Soviet law but that they could not vest ownership in the Soviet Union in respect to goods situated within the United States at the time of the ligitation.

Etat Russe presented a complex combination of problems of recognition with issues involving the review of acts of States by the courts of third States (→ International Law and Municipal Law: Conflicts and Their Review by Third States). Whereas the latter aspect has received much attention in recent years, the decision in Etat Russe remains of interest because of its special setting in the context of recognition and its consequences.

L'Etat Russe v. La Ropit, Tribunal de Commerce de Marseille, April 23, 1925, Clunet, Vol. 52 (1925) 391–395; Cour d'Aix (1st ch.), December 23, 1925, Clunet, Vol. 53 (1926) 667–671 = Annual Digest, Vol. 3 (1925–1926) 25–26; Cour de Cassation, March 5, 1928, Clunet, Vol. 55 (1928) 674–675 = Annual Digest, Vol. 4 (1926–1927) 66–67.

The Jupiter, No. 1, July 17, 1924; No. 2, February 9, 1925; No. 3, June 30, 1927; Annual Digest, Vol. 4 (1926–1927) 137–143.

Boris N. Sokoloff v. The National City Bank of New York, 239 N.Y. 158, 145 N.E. 917 (1924).

F.F. CRANE, Le Statut du Gouvernement Soviétique en Angleterre et en Amérique, Clunet, Vol. 52 (1925) 344–350.

A. PRUDHOMME, La reconnaissance en France du Gouvernement des Soviets et ses conséquences juridiques, Clunet, Vol. 52 (1925) 318–330.

B. TRACHTENBERG, La situation légale des Sociétés russes en France, Clunet, Vol. 53 (1926) 572–577.

SABINE THOMSEN

EUROPEAN COMMISSION OF HUMAN RIGHTS

The → European Convention on Human Rights (ECHR) marks an important development

within the field of public international law. The ECHR was signed in November 1950 by the then 15 member States of the → Council of Europe and entered into force on September 3, 1953 when it had been ratified by ten States.

The rights protected by the ECHR are rights which can be characterized as traditional civil and political rights. Important innovations within the protection of → human rights, however, are the control and enforcement machinery established by the ECHR, including the possibility for individuals who consider their rights violated under the ECHR to address themselves directly to the European Commission of Human Rights.

It is noteworthy that from the beginning, as the ECHR was being drafted, these new features were recognized as central issues. On September 8, 1949, by its recommendation No. 38, the Consultative Assembly of the Council of Europe drew attention to the creation of a machinery for the implementation of the rights and to the right of individual petition.

After the entry into force of the ECHR the members of the first Commission were elected and the Commission's first session was held in Strasbourg from July 12 to 17, 1954.

1. Composition

The Commission consists of a number of members equal to that of the high contracting parties (ECHR, Art. 20). As of July 1983, there were 21 members. The members are elected by the Committee of Ministers of the Council of Europe by an absolute majority from lists of three names put forward by each member State's delegation to the Consultative Assembly. They are elected for a period of six years and may be re-elected. During their term of office Commission members cannot be removed against their will.

According to the ECHR no two members of the Commission may be nationals of the same State (Art. 20), and in fact the Commission has always been composed of a single member from each State party to the Convention. This does not, however, mean that members are or can be considered as representing their respective national States. They sit on the Commission in their individual capacity (Art. 23), which means that a member may not receive instructions from either his own State or any other institution or person. Apart from this stipulation the ECHR does not contain any further provisions on the general independence of the members. The members are, however, entitled to the privileges and immunities provided for in Art. 40 of the Statute of the Council of Europe and the agreements made thereunder (→ International Organizations, Privileges and Immunities); these are specified in the Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (UNTS, Vol. 250, p. 32). In order to secure their complete freedom of speech and complete independence in the discharge of their duties, Art. 3 of the Protocol grants members immunity from legal process in respect of their acts as members of the Commission.

The members are not only independent but must also be impartial in the performance of their duties. The rules in this respect are laid down in the Commission's Rules of Procedure. Before taking up his duties, each member must solemnly declare that he will exercise his duties impartially (Rule 2). Moreover, a member may not take part in the examination of an application before the Commission where he has any personal interest in the case or where he has participated in any decision on the facts on which the application is based as adviser to any of the parties or as a member of any tribunal or body of inquiry. In cases of doubt with regard to these provisions and in any other circumstances which might appear to affect the impartiality of a member in his examination of an application, the Commission as a whole will decide whether or not the member can take part in the proceedings. Against this background it can be concluded that the Commission is an independent and impartial organ which is composed of members chosen for their personal qualifications.

The Commission does not sit permanently but is in session for ten to twelve weeks per year, normally for two-week sessions at a time.

2. Purpose

The task of the Commission is to examine alleged breaches of the provisions of the Convention. If the Commission accepts a petition alleging such a breach, it tries, after having investigated the facts of the case, to secure a friendly settlement of the matter together with the parties. If a

friendly settlement is not secured, the Commission draws up a report and states its opinion as to whether the facts found disclose a breach of the ECHR (Arts. 28 and 31).

The Commission cannot take up cases of possible breaches of the ECHR on its own initiative. In order to exercise its functions, it must receive an application alleging a breach of the ECHR either from a contracting State or from an individual.

Any State party to the ECHR may refer to the Commission any alleged breach of the rules of the ECHR by another State party to the Convention (Art. 24). However, it is not only States which may bring a case before the Commission. One of the major innovations in public international law established by the ECHR is the possibility for an individual to complain directly to an international organ (i.e. the Commission) against a State, including his own, if he considers that his human rights have been violated and the State is responsible for this violation. The right of individual petition does not, however, apply automatically against any State which has become a party to the ECHR. Complaints can only be made against States which, by special declaration under Art. 25, have accepted this right of individual petition. By 1983 seventeen States had made such declarations accepting the Commission's jurisdiction.

3. Procedure

The procedure followed by the Commission is in principle divided into two stages: the procedure on the admissibility of the application and, once the application has been declared admissible, the procedure on its merits. The main rules are laid down in the ECHR, supplemented by the Commission's Rules of Procedure, and, with few exceptions, are the same for inter-State and individual applications.

If an application alleging a breach of the ECHR is brought before the Commission by a State, the President of the Commission will give notice of such application to the State against which the claim is made and will invite it to submit its observations on the admissibility of the application. The observations so obtained must be communicated to the State bringing the application, which may submit written observations in reply. Before deciding upon the admissibility of the application, the Commission may invite the parties to submit further observations and in practice obtains such observations at an oral hearing before the Commission. As of 1983, fourteen inter-State applications relating to six cases had been submitted.

Individual applications are normally introduced by the applicant personally by means of an informal letter. The Commission's permanent secretariat currently deals with about 2500 such complaints per year. Some 2000 of these complaints will not, however, be formally registered as applications; these may, for instance, be complaints by one person against another private person or they may be complaints against a State outside Europe. There are also complaints which are made against State parties to the ECHR where it is absolutely clear that some formal requirement has not been fulfilled. In these circumstances, the secretariat will write to the complainant and explain that his complaint has no possibility whatsoever of being declared admissible by the Commission. The secretariat will further inform the complainant that his complaint will not be registered as an application unless he insists on having the case dealt with by the Commission. The secretariat itself does not have any competence to reject or dismiss applications.

The remaining 500 or so cases each year will be registered as formal applications after the secretariat has obtained the necessary information from the applicant by asking him to fill in a form and has provided the necessary documentation which includes the relevant national court decisions.

When an application has been registered, a member of the Commission will be appointed as rapporteur in the case. The rapporteur will analyse the application and, with the assistance of the secretariat, will draft a report to the Commission. The report contains a summary of the facts of the case and the rapporteur's proposal on whether the application should be declared inadmissible or whether it should be communicated to the government involved for its observations in the case before a decision on the admissibility of the application is made by the Commission.

The issues to be considered in the proposal by the rapporteur and by the Commission are whether the applicant can legitimately claim to

have been the victim of an alleged violation and whether the application fulfils the formal conditions for being declared admissible.

According to Art. 25 of the ECHR, the Commission may receive petitions from any person, → non-governmental organization or group of individuals claiming to be the victim of a violation of the Convention, provided that the State against which the complaint has been lodged has recognized the competence of the Commission to receive individual applications. It follows from this rule that the ECHR does not recognize anything in the nature of an *actio popularis*. The Commission may only deal with an application if the applicant himself can claim to have been the victim of the alleged violation of the ECHR. In the jurisprudence of the Commission and the Court it has not, however, been asserted that the applicant himself must have been the direct victim of an alleged violation. Certain extensions have been accepted, for instance that parents may bring an application on behalf of their minor children. It is also accepted that a close relative, e.g. a spouse can be considered as an indirect victim, having thereby the right to bring an application.

The problem surrounding the interpretation of the concept of victim was dealt with by the Commission and the Court in a case against the Federal Republic of Germany (Klass and Others v. Federal Republic of Germany, Application No. 5029/71; Decisions and Reports, Vol. 1, p. 20; Commission Report, March 9, 1977, Court Series B 26, p. 11; Judgment, Court Series A 28). In this case five lawyers alleged that their telephone conversations had been secretly intercepted by the German authorities. The lawyers had requested confirmation of the interpretation by the authorities but the authorities, in accordance with German law, had refused to inform them whether such interception had in fact taken place. The applicants alleged that their rights to private life and correspondence under Art. 8 of the ECHR had been interfered with. Since some of the lawyers were also advocates, they submitted that their telephone conversation with clients had probably been subject to secret surveillance. The Federal Government argued that the application should be declared inadmissible because the applicants could not prove that they had in fact been subject to secret surveillance. The Commission declared the application admissible, taking the view that the applicants had to be considered as if they were victims. When the case was brought before the Court, it held that the "menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8" (Court Series A 28, p. 20).

According to Arts. 26 and 27 of the ECHR the following requirements must be fulfilled for an application to be declared admissible:

For both inter-State and individual applications:

(a) All domestic remedies must have been exhausted according to the generally recognized rules of international law (→ Local Remedies, Exhaustion of).
(b) The application must be brought within a period of six months from the date on which the final municipal decision was taken.

For individual applications:

(a) The application must not be anonymous.
(b) The application must not be substantially the same as a matter which has already been examined by the Commission.
(c) The application must not be incompatible with the provisions of the Convention.
(d) The application must not be manifestly ill-founded.
(e) The application must not be an abuse of the right of petition (→ Abuse of Rights).

The rule on the exhaustion of local remedies is in conformity with the general principle of international law that no State shall be held responsible before an international organ until it has had the possibility to do justice through its own national courts or organs for any wrong committed. In order to exhaust local remedies an applicant must have brought his case to the highest national organ or court which is competent to deal with the matter. An applicant is, however, only obliged to exhaust the local remedies in so far as such remedies can be considered effective and adequate in the case in question.

An application is inadmissible if it is incompatible with the provisions of the Convention. This is the case if the application is brought against a

person or an institution for which no State party to the Convention can be held responsible (incompatible *ratione personae*). If an application alleges a violation of a right which is not protected by the provisions of the Convention it is incompatible *ratione materiae*. Finally, if an application concerns acts, decisions, facts or events prior to the date of ratification of the Convention by the State against which the application is brought, the application is incompatible *ratione temporis*. Some States, when accepting the right of individual petition under Art. 25, have made specific → declarations that the acceptance of individual applications may only relate to decisions, facts or events posterior to the date of the declaration under Art. 25 – which means that applications relating to earlier events will be declared incompatible *ratione temporis* even if they relate to a period after the ratification by the State in question.

If a State has not made such a declaration when accepting the individual applications under Art. 25, specific problems arise under the six months rule. This problem has been considered in a number of applications against France after she accepted the right of individual petition as of October 2, 1981 without making a specific declaration as described above. France ratified the Convention on May 2, 1974, which meant that the Commission could deal with applications related to the period after 1974. In the leading case (X v. France, Application No. 9687/81) the facts of the case related to the period between 1974 and 1981. The final municipal decision in the case was taken in March 1979 and the application was introduced in November 1981. The Commission decided that the application in this situation was not incompatible *ratione temporis*. It further decided, however, that when applying the six months rule the six months should be calculated from the final national decision and not (as the applicants submitted) from the date of acceptance of the individual application. The application was consequently declared inadmissible on the grounds that the six months rule had not been observed.

Finally, if the Commission in its examination at the admissibility stage finds that an application shows no sign of any breach of the Convention and that a more detailed examination is unnecessary, it will declare the application inadmissible as being manifestly ill-founded.

The Commission has in its practice declared more than 95 per cent of all applications inadmissible under Arts. 25, 26 and 27.

The Commission's first examination of an individual application is based on the material provided by the applicant. The majority of the applications submitted do not fulfil the formal requirements and are therefore declared inadmissible at this stage. If a case is not declared inadmissible, it will be communicated to the government against which the application is made. The government will normally be asked to submit its observations both on the question of admissibility and on the merits of the application. After the applicant has had the possibility of giving his comments to the government's observations, there will normally be an oral hearing before the Commission which relates to both the admissibility and the merits of the case.

After this procedure the Commission will take its decision on the admissibility of the case. If the case is declared inadmissible, this will be the final decision against which there is no appeal. If the case is declared admissible the Commission, together with the parties, must undertake an examination of the merits. In most cases this examination is based on written material provided by the parties. The Commission does, however, take an active role and will often put questions to the parties. At this stage the Commission may also decide to hear witnesses or to undertake investigations, for instance in a prison in the country against which the application is made. According to Art. 28 of the Convention, it is a duty of the State concerned to furnish the Commission with all necessary facilities for the investigations the Commission may wish to undertake.

When the Commission has finished its examination of a case, it will take a provisional decision as to whether any violation of the rules of the Convention has been found, and thereafter it will approach the parties in order to try to reach a friendly settlement of the dispute. The way in which the friendly settlement negotiations are conducted may vary from case to case, but the Commission will often play an active part in them. If an agreement is reached between the

parties, the Commission must approve the conditions of the settlement before it becomes final. To gain approval, a settlement must be fully in accordance with respect for human rights as defined in the Convention. There is therefore no danger, for instance, of an applicant being forced to accept an unfair settlement. If a settlement is reached, the terms of the settlement are set out in a brief report which is published.

If the attempts to settle the case fail, the Commission takes its final formal decision as to whether a violation of the Convention has been found and draws up its report. The report must contain a statement of the facts as established by the Commission and a legal opinion as to whether these facts show a violation of the Convention by the authorities of the State concerned. This report is sent to the Committee of Ministers of the Council of Europe. Within a period of three months the case can be referred to the → European Court of Human Rights by the Commission, by a State whose national is alleged to be a victim, by a State which referred the case to the Commission or by the State against which the complaint is lodged (Art. 48). If the case is not referred to the Court, the Committee of Ministers decides by a two-thirds majority whether there has been a violation of the Convention (Art. 32).

4. Evaluation

Since the Commission took up its work in 1958, it has considered 13 inter-State applications (the 14th is under consideration in 1984) and more than 10 000 individual applications as of 1983. During this period the European Convention has become the most important and effective system for the international protection of human rights. The Commission has played an important role in this development. Although only a few per cent of the individual applications have been declared admissible, the jurisprudence of the Commission has played an important role in the protection of human rights in the member States. In a number of important cases friendly settlements have been reached which have involved important changes in the legislation of the States concerned. The results which so far have been obtained have been based on the confidence and the cooperation of the parties and particularly of the respondent governments concerned. The role of the Commission *vis-à-vis* governments is not that of prosecutor against accused but is characterized by a combined effort to examine and when necessary to satisfy a complaint before it. It is of further importance that the Commission acts as a judicial and totally impartial organ and is always objective in its examination of cases.

The main criticisms which have been levelled against the Commission in recent years relate to the length of the proceedings before the Commission and the confidentiality of its proceedings. It is true that the proceedings before the Commission in many cases are too lengthy. The procedure prescribed by the Convention is, however, complicated, and in serious cases which raise important issues for the individuals and the States involved the necessarily thorough investigation will take some time before reaching a sufficiently solid basis of fact for conclusions to be safely drawn. Nevertheless several attempts have been made, with some degree of success, to expedite the procedure.

In accordance with Art. 33, the proceedings before the Commission are confidential. This rule creates difficulties in some cases. It is understandable in the light of the public interest involved in some cases that the need for greater publicity of the Commission's proceedings is often expressed. On the other hand, confidentiality frequently may facilitate a friendly settlement of a case. It cannot, however, be excluded that a more acceptable balance between publicity and confidentiality might be attained by means of changes in the Convention.

European Commission of Human Rights, Collection of Decisions, Vols. 1–46 (1960–1974).

European Commission of Human Rights, Decisions and Reports (since 1974).

European Commission of Human Rights, Annual Review (since 1972).

R. DUPUY, La Commission européenne des droits de l'homme, AFDI, Vol. 3 (1957) 449–478.

F. MONCONDUIT, La Commission européenne des droits de l'homme (1965).

H. DANELIUS, Conditions of Admissibility in the Jurisprudence of the European Commission of Human Rights, Revue des droits de l'homme, Vol. 2 (1969) 284–336.

G. LODIGIANI, La Commissione nella Convenzione europea dei diritti dell'uomo (1969).

J. RAYMOND, Comment s'exerce la fonction de conciliation de la Commission européenne des droits de l'homme, Revue des droits de l'homme, Vol. 2 (1969) 259–266.

K. CHRYSOSTOMIDES, "Competence" and "Incompatibility" in the Jurisprudence of the European Commission of Human Rights, ZaöRV, Vol. 33 (1973) 449–488.

A. CASSESE, Le droit de recours individuel devant la Commission européenne des droits de l'homme, in: Les clauses facultatives de la Convention européenne des droits de l'homme (1974) 45–68.

C. ZANGHI, Osservazioni sulla composizione della Commissione europea dei diritti dell'uomo, Revista de diritto europeo, Vol. 14 (1974) 329–341.

G. PERRIN, La Commission européenne des droits de l'homme, Zeitschrift für Schweizerisches Recht, Vol. 94 (1975) 431–463.

S. TRECHSEL, Das Verfahren vor der Europäischen Menschenrechtskommission, Zeitschrift für Schweizerisches Recht, Vol. 94 (1975) 407–429.

H.C. KRÜGER, The European Commission of Human Rights, Human Rights Law Journal, Vol. 1 (1980) 66–85.

L. MIKAELSEN, European Protection of Human Rights: The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States (1980).

F. SCHELLENBERG, Das Verfahren vor der Europäischen Kommission und dem Europäischen Gerichtshof für Menschenrechte (1983).

CARL AAGE NØRGAARD

EUROPEAN CONVENTION ON HUMAN RIGHTS (1950)

1. History: (a) Drafting history. (b) Ratification. (c) The formation of the Convention organs. – 2. Status of the ECHR in International and Municipal Law: (a) The ECHR as a treaty. (b) The nature of the treaty obligations as to individual rights. (c) Status of the ECHR in municipal law. – 3. Interpretation of the ECHR: (a) General principles. (b) The nature of the States' obligations. (c) Interpretation of restrictions. – 4. Exceptional Restrictions: (a) Emergency. (b) No freedom for the destruction of rights. – 5. Evolution of Convention Rights in the Jurisprudence of the Court and Commission: (a) Elementary human rights. (b) The right to liberty. (c) Judicial guarantees. (d) Private and family life. (e) Fundamental freedoms. – 6. Evaluation.

1. History

(a) Drafting history

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in Rome on November 4, 1950 after a comparatively short drafting period (ETS, No. 5; UNTS, Vol. 213, p. 221). It is clearly influenced by the Universal Declaration of Human Rights adopted by the → United Nations General Assembly on December 10, 1948 on the basis of a draft for which R. Cassin of France was mainly responsible (→ Human Rights, Universal Declaration (1948)). But even before the Declaration was adopted, proposals for a European Charter of Human Rights were presented to the Congress of the European Movement in The Hague in May 1948 (→ European Integration). The Statute of the → Council of Europe of May 5, 1949 expressly recognizes the obligation of each member State to respect → human rights and fundamental freedoms. After this Statute had come into force, the Consultative Assembly of the Council of Europe adopted on September 9, 1949 a draft prepared by its legal committee on the basis of a report by P.H. Teitgen, formerly French Minister of Justice. The Committee of Ministers of the Council of Europe created a Committee of Experts and later called a Conference of Senior Officials in June 1950, which annexed a draft convention to its report. The Committee of Ministers adopted a revised text, which was then submitted to the Consultative Assembly. Several amendments proposed by the Assembly were not accepted by the Ministers, and the Convention was signed substantially in its earlier version. The Assembly's proposed amendments concerned the addition of the rights to property, to education, and to vote, which were referred for further study by the Ministers and were later included in the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed on March 20, 1952.

(b) Ratification

The ECHR came into force on September 3, 1953, after the ratification by ten States: the United Kingdom in 1951; Norway, Sweden and the Federal Republic of Germany in 1952; the

Saar (as associated member of the Council of Europe at the time; → Saar Territory), Ireland, Greece, Denmark, Iceland, and Luxembourg in 1953 (→ Treaties, Conclusion and Entry into Force). Since the ratification by Liechtenstein in September 1982, it is now in force for 21 States. Additional members include: Turkey (1954), the Netherlands (1954), Belgium (1955), Italy (1955), Austria (1958), Cyprus (1962), Malta (1967), France (1974), Greece (1974, again, after it had denounced the Convention in 1969), Switzerland (1974), Portugal (1978) and Spain (1979). The Saar ceased to be an independent member of the Convention after it became an integral part of the Federal Republic of Germany in 1956.

The First Protocol of March 20, 1952 (ETS, No. 9) entered into force on May 18, 1954. As of January 1, 1984 it has not been ratified by Liechtenstein, Spain and Switzerland. Protocol No. 2 of May 6, 1963 (ETS, No. 44), which grants the → European Court of Human Rights the jurisdiction for advisory opinions under very restricted conditions, came into force on September 21, 1970 (→ Advisory Opinions of International Courts). It has been ratified by all Convention countries. Protocol No. 3 of May 6, 1963 (ETS No. 45) amended several articles concerning the procedure of the → European Commission of Human Rights. It came into force on September 21, 1970 and was ratified by all States who were then members of the Convention. Portugal and Spain ratified the thus amended Convention as did Switzerland who, however, also deposited an instrument of ratification for Protocol No. 3 in 1974. Protocol No. 4 of September 16, 1963 (ETS No. 46) guarantees the right to liberty of movement and restricts the right of expulsion (→ Aliens, Expulsion and Deportation; → Denationalization and Forced Exile). It entered into force on May 2, 1968, but has not been ratified by Cyprus, Greece, Liechtenstein, Malta, Spain, Switzerland, Turkey, and the United Kingdom. Protocol No. 5 of January 20, 1966 (ETS No. 55) amended some articles concerning the composition of the organs. It has been in force since December 20, 1971 and was ratified by all countries who were then members of the Convention. Protocol No. 6, outlawing the death penalty by amending Art. 2 of the Convention, was opened for signature on April 28, 1983 (ETS No. 114).

(c) The formation of the Convention organs

The European Commission of Human Rights was established on May 18, 1954, the European Court of Human Rights on January 21, 1959. Declarations under Art. 25 recognizing the right to individual application (→ Individuals in International Law) were in force for six countries as provided for in Art. 25(4) on July 5, 1955 (Sweden, Ireland, Denmark, Iceland, Belgium, and the Federal Republic of Germany). After France's recognition of the right to individual petitions in 1981 there remain only four countries against whom individuals cannot raise a complaint before the European Commission of Human Rights (Cyprus, Greece, Malta and Turkey). The Court's jurisdiction has been recognized by all member States except Turkey and Malta. For Greece and Cyprus only inter-State applications under Art. 24 may eventually be referred to the Court. An application brought before the European Commission of Human Rights under Arts. 24 or 25 and not referred to the Court will according to Art. 32 be finally decided by the Committee of Ministers of the Council of Europe.

2. Status of the ECHR in International and Municipal Law

(a) The ECHR as a treaty

The ECHR is a → treaty concluded under the rules of → international law and thus creates obligations as between the different member States. Except by special agreement, State parties undertake not to "avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention" (Art. 62; → Interpretation in International Law).

The machinery of collective enforcement through the Convention organs on the basis of individual or State applications (Arts. 24, 25) is the peculiar feature of the ECHR. The Court has held that the ECHR "creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'"

(Case of Ireland v. U.K., A 25 (1978) p. 90). The Commission recognized as early as 1962 that an application of one State against another under Art. 24 is predicated upon a violation of the "public order of Europe" (Austria v. Italy, YB, Vol. 4 (1961) pp. 116, 140). Good examples of inter-State complaints in which the States introducing the application lacked individual interest are the proceedings initiated by Denmark, the Netherlands, Norway and Sweden against Greece in 1967 (YB, Vol. 11 (1968 II) p. 690 et seq.) and the applications brought by the same States and France against Turkey (Nos. 9940-44/82). Both complaints were related to certain practices of the military governments in the countries against which the applications were filed. The finding of grave violations by the Commission against Greece led to her leaving the Council of Europe and denouncing the Convention until the Greek military government was replaced in 1974.

(*b*) *The nature of the treaty obligations as to individual rights*

Art. 1 of the ECHR makes it clear that the rights guaranteed to individuals under the treaty are individual rights created by public international law. The wording "shall secure" ("reconnaissent") as opposed to the earlier draft "undertake to secure" ("s'engagent à reconnaître") shows that these rights are created by the ratification of the Convention and must be respected by the State immediately without any additional act of implementation (Case of Ireland v. U.K., A 25 (1978) p. 91). Without the recognition of the right to individual application the rights of the individual can be protected before the Convention organs only by other States (Art. 24).

It is a different matter, however, whether the ECHR creates an obligation under public international law to make it as such internally applicable. Such an obligation may well be created by a treaty (→ International Law and Municipal Law). While Arts. 1 and 13 could at first sight be interpreted as also containing such an obligation, the practice of States shows clearly that many of them, particularly the United Kingdom and the Scandinavian States, do not interpret the Convention to go that far. The Court has stressed that the intention of the drafters finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law, but it has clearly rejected the argument that a formal obligation to that effect exists (Case of Silver and others, A 61 (1983) para. 113).

(*c*) *Status of the ECHR in municipal law*

As explained above, the way in which the rights guaranteed in the ECHR are in fact secured is left to the member States. It thus follows that there exist important differences as to the internal applicability of the text of the ECHR. While the treaty provisions are applied as municipal law in so far as they are self-executing in most member States (→ Self-Executing Treaty Provisions), this is not true for Denmark, Iceland, Ireland, Norway, Sweden and the United Kingdom. In Austria the ECHR has the rank of constitutional law. In Belgium, Luxembourg, the Netherlands and France it has a rank superior to statutes, but in some countries it is doubtful whether courts can give effect to that status by disregarding a statute.

In several countries municipal courts have developed an extensive case law based on the ECHR. This is especially true for Austria and Switzerland. In Switzerland a constitutional complaint to the Federal Tribunal against cantonal acts may be based on the Convention.

3. *Interpretation of the ECHR*

(*a*) *General principles*

In its report in the case of Golder v. U.K. adopted on June 1, 1973, the Commission found it appropriate to express itself on the principles of interpretation of the Convention (Report, Court Series B 16, p. 33 et seq.). The question before the Commission was whether Art. 6 of the Convention guarantees the right of access to a court in the matters falling under the provision. This right is not expressly mentioned but was seen by the applicant to follow from the wording in its proper context. The Commission stated that the ECHR must be interpreted "objectively" and not by reference to what may have been the understanding at the time of its ratification. It added that the provisions should not be interpreted restrictively so as to prevent its aims and objects from being achieved (ibid., p. 34). The Commission concluded that the right of access to a court is

guaranteed by Art. 6 in civil matters. The Court followed the Commission in underlining that this "is not an extensive interpretation" but one "based on the very terms of Article 6 § 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty . . . and to general principles of law" (A 18 (1975) p. 18). It was the Tyrer Case, concerning the issue of corporal punishment (birching) ordered by judicial authority which gave to the Commission and the Court the occasion to underline "that the Convention is a living instrument which must be interpreted in the light of present-day conditions" (A 26 (1978) p. 15). The commonly accepted standards in the penal policy of the member States had to be taken into account. Commission and Court reached the conclusion that birching was degrading punishment in the sense of Art. 3. In the Marckx Case, which raised the issue of the family rights of illegitimate mothers, the Court again referred to the development of the law in the member States (A 31 (1979) p. 19), as it did in the Dudgeon Case in which it found the criminal law of Northern Ireland making homosexual acts of adults in private an offence to be in violation of Art. 8 (A 45 (1981) p. 23 et seq.). The general approach taken by Commission and Court has been sometimes criticized because the Convention would be used as a vehicle for legislative reform for which it was not intended (Separate Opinion of Judge Fitzmaurice, Tyrer Case, A 26 (1978) p. 32). However, a treaty containing a Bill of Rights and providing for a judicial machinery to implement it is by its very nature bound to develop with changing social conditions as does a constitutional Bill of Rights.

(*b*) *The nature of the States' obligations*

The obligations of the member States under the ECHR are primarily to respect the individual rights guaranteed therein. The rights are in the first instance "negative rights" against the State, as is typical for fundamental rights in the liberal tradition. However, the wording of the Convention shows that some rights carry with them a positive obligation for the State. According to Art. 2, "[e]veryone's right to life shall be protected by law". It follows that the legislature is under an obligation to protect the right to life. The Court has recognized that Art. 8 requires positive action by the State to regulate and protect family life (Marckx Case, A 31 (1979) p. 15). In the Airey Case it was held that Ireland had violated her obligation to make existing court remedies in matters of family law effectively available either through a legal aid system or by other means (A 32 (1979) pp. 15, 17). It is evident that the several rights concerning judicial procedures guaranteed in Art. 6(3) create positive obligations to act on the part of State organs, for example to provide for an effective defence counsel (Artico Case, A 37 (1980) p. 16). When three British workers brought an application alleging the violation of Art. 11 because of their dismissal on the basis of a closed shop agreement and their refusal to join a specific trade union, the Commission and Court had to clarify the obligations of the State in that context. The Commission held that the State is under an obligation to protect trade union freedom against this sort of interference by private employers (Report of December 14 (1979) p. 34 et seq.). The Court stated that it was the domestic law in force at the relevant time that made lawful the situation against which the applicants complained. The responsibility of the respondent State for any resulting breach of the Convention rests on this basis (Case of Young, James and Webster, A 44 (1981) p. 20; → Responsibility of States: General Principles). It follows from this decision that legislation which makes legal the interference with Convention rights by private individuals may well constitute a violation by the State concerned.

(*c*) *Interpretation of restrictions*

Where the ECHR contains specific restrictive clauses as in paras. 2 of Arts. 8 to 11, there is no room for any implied limitations (Golder Case, A 18 (1975) p. 21). They may only exist where rights are not clearly defined by the ECHR but guaranteed in a less precise manner (ibid., p. 18 et seq.). According to paras. 2 of Arts. 8 to 11, restrictions or limitations must be "in accordance with the law" or "prescribed by law" ("prévues par la loi") and "necessary in a democratic society" for the protection of certain interests. When the Commission was first confronted with a system of secret surveillance, it held that the phrase "in accordance with the law" must be taken to mean

"that the law sets up the conditions and procedures for an interference" (Case of Klass and others, Court Series B 26, p. 37, Report of March 9, 1977). The Court stressed that any individual measure has to comply with the strict conditions and procedures laid down in the legislation itself without deciding whether this is part of the requirement (A 28 (1978) p. 22). In the Sunday Times Case both Commission and Court held that common law rules can fulfil the requirement "prévue par la loi". The Court identified two requirements under the "prescribed by law" criterion. The law must be accessible and the norm must be formulated with sufficient precision to enable the citizen to regulate his conduct accordingly. He must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The Court recognizes, however, that absolute certainty is unattainable and that the law must be able to keep pace with changing circumstances and that vague terms which need interpretation cannot be avoided (A 30 (1979) p. 30 et seq.). The requirement is, however, of considerable importance because it excludes restrictions which find no basis in law.

The second condition for limitations of the rights according to paras. 2 of Arts. 8 to 11 is that they are "necessary in a democratic society" for the specific aims mentioned there. The aims such as public order (→ Ordre public (Public Order)), and the rights and freedoms of others are broadly formulated and have not given rise to problems. What is "necessary" may, however, frequently be open to doubt. Commission and Court have recognized that the national organs enjoy a certain "margin of appreciation" as to the necessity in question. According to the Court, this does not mean that the supervision by the Convention organs is limited to ascertaining whether a State exercised its discretion "reasonably, carefully and in good faith". Even a State so acting remains subject to the control as to the compatibility of the conduct with the ECHR. Also, the power of appreciation is not always the same (Sunday Times Case, A 30 (1979) p. 36). Important in judging necessity is whether a standard of proportionality has been respected by the national organs (ibid., p. 42; Dudgeon Case, A 45 (1981) p. 23 et seq.). Of course, there are no easy answers to the scope within which the Convention organs will exercise their supervisory power. It seems clear that as in national systems protecting fundamental rights the control must go further than establishing a certain reasonableness. Whether there is a "pressing social need" (Dudgeon Case, A 45 (1981) p. 24) must be established by the Commission and the Court taking into account that the Convention does not require uniformity, but also that it seeks to protect against arbitrary restrictions which may also be the consequence of outdated legislation.

4. Exceptional Restrictions

(a) Emergency

Art. 15 gives the right to take measures derogating from the Convention where they are strictly required by → war or other emergency threatening the life of the nation. The Commission and the Court have asserted their responsibilities to test the compatibility of the measures with Art. 15, again leaving a certain margin of appreciation to the national organs (Case of Ireland v. U.K., A 25 (1978) p. 77 et seq.). No derogation is possible from the articles protecting the most elementary human rights (Art. 15(2)). The Secretary-General of the Council of Europe must be kept fully informed of any derogating measures.

(b) No freedom for the destruction of rights

Art. 17 restricts Convention rights to the extent that they should be used to undertake any activity or perform any act "aimed at the destruction of any of the rights and freedoms set forth" in the ECHR. The Commission applied Art. 17 when the German Communist Party brought an application against its prohibition in 1957 (YB, Vol. 1 (1955–1957) p. 222). The article was again used when in 1979 Dutch applicants complained against their conviction for inciting racial hatred and against the prohibition of their association to participate in local elections (Glimmerveen and Hagenbeck v. Netherlands, DR 18 (1979) p. 187). The Court clarified in the Lawless judgment that Art. 17 cannot be construed as depriving an individual of the rights guaranteed by Arts. 5 and 6 of the Convention even if he has been involved in activities which may be considered as aimed at the

destruction of the rights in question (Lawless Case, A 3 (1960), p. 45 et seq.). This is of great importance for the measures taken against terrorists which can never disregard the guarantees of the ECHR on the basis of Art. 17 (Ensslin, Baader, Raspe v. Federal Republic of Germany, DR 14 (1978), p. 64 et seq.; → Terrorism).

5. *Evolution of Convention Rights in the Jurisprudence of the Court and Commission*

(*a*) *Elementary human rights*

Violations of the right to life were established by the Commission in its report of July 10, 1976 in the case of Cyprus against Turkey (Applications Nos. 6780/74 and 6950/75, pp. 110 et seq., 119). In 1982 the Commission declared admissible an application alleging a violation of Art. 2(2) because of the use of lethal force to execute an arrest (Farrell v. U.K., No. 9013/80).

The prohibition of → torture has led to several decisions. In the Greek Case as well as in the Case of Ireland v. U.K. the notions of inhuman treatment and of torture became relevant. The Commission found cases of torture on a large scale in the former case (YB, Vol. 12 (1969), The Greek Case, p. 186 et seq.). In the latter the Commission found that the application of specific "disorientation" or "sensory deprivation techniques" over many hours constituted torture (YB, Vol. 19 (1976) pp. 788 et seq., 793 et seq.). On the other hand, the Court was of the opinion that they did not occasion suffering of the particular intensity and cruelty implied by the word torture and concluded that they amounted to inhuman and degrading treatment (A 25 (1978) p. 66 et seq.).

Expulsion or → extradition to a country where an individual is threatened with treatment contrary to Art. 3 may amount to a violation of Art. 3 by the member State responsible for the extradition or expulsion (Applications Nos. 1465/62 and 7216/75 by unnamed persons against the Federal Republic of Germany, YB, Vol. 5 (1962) pp. 256, 260; DR 5 (1976) p. 137; → Aliens, Expulsion and Deportation).

Corporal punishment ordered by judicial authority was found to be degrading treatment in violation of Art. 3 (Tyrer Case, A 26 (1978) pp. 14 et seq., 17).

(*b*) *The right to liberty*

Art. 5 protecting the right to liberty has led to many decisions. The notion of liberty was at issue in the Guzzardi Case in which Commission and Court found that detention on a small part of an island of 2.5 square kilometres under constant police supervision constituted a deprivation of liberty (A 39 (1980) p. 32 et seq.). Since no ground for a deprivation of liberty under Art. 5 applied in the case, there was a violation of that guarantee. Art. 5(3) provides that everyone arrested on suspicion must be brought before a judge or "other officer authorized by law to exercise judicial power". In countries where the municipal law does not require a judge to decide immediately on detention it becomes very important whether the "officer" under Art. 5(3) must fulfil specific conditions. Commission and Court have accepted the District Attorney in the canton of Zurich as officer in that sense (Schiesser Case, A 34 (1979) p. 11 et seq.). He is an independent investigating and prosecuting authority with clearly defined powers as to detention. The Swedish prosecutor, on the other hand, was not seen as falling under Art. 5(3) (Skoogström Report of July 15, 1983). Detention on remand must be limited under Art. 5(3). The State has a specific responsibility for detained people waiting for trial. Art. 5(4) introduces the writ of habeas corpus into the ECHR. Control over the lawfulness of detention must be wide enough to bear on the essential conditions. The Commission and the Court found a violation of Art. 5(4) where under English law the substantial reasons for detaining a mentally ill person could not be reviewed by courts in habeas corpus proceedings (Case of X v. U.K., A 46 (1981) p. 25).

(*c*) *Judicial guarantees*

Art. 6 contains important judicial safeguards. The provision is applicable in criminal cases and para. 3 contains specific minimum rights. Para. 1 also applies to the determination of civil rights and obligations. This means that private lawsuits are covered but also those procedures before administrative courts and tribunals which are decisive for civil rights. The Court has held this to be the case for disciplinary procedures terminating or suspending the right of a medical doctor to

practice (König Case, A 27 (1978) p. 29 et seq.; Case of Le Compte, Van Leuven and De Meyere, A 43 (1981) p. 19 et seq.) and also for the granting of an expropriation permit settling the lawfulness of an eventual expropriation (Case of Sporrong and Lönnroth, A 52 (1982) p. 29 et seq.; → Expropriation and Nationalization).

Art. 6(1) guarantees access to court and a judgment "within a reasonable time". Several cases before the Commission and the Court have established instances of excessive delays in proceedings. In one case a criminal trial lasted for 17 years (Eckle Case, A 51 (1982)). The tribunal must be independent and impartial. The impartiality was violated where a former prosecutor who had dealt at least formally with the case became presiding judge (Piersack Case, A 53 (1982), p. 13 et seq.).

Art. 6(2) contains the important principle of the presumption of innocence, which may also be violated by decisions on the costs of criminal proceedings terminated without conviction (Minelli Case, A 62 (1983)). Art. 6(3)(c) guarantees the right to an effective defence before the criminal court. If necessary a defence counsel must be appointed free of charge (Pakelli Case, A 64 (1983)). The overall guarantee in Art. 6 is that to a "fair" trial. The Commission has found a violation of that right where people were tried in their absence without having been given notice of the proceedings and without any possibility of reopening the trial (Colozza and Rubinat v. Italy, Report of May 5, 1983).

(*d*) *Private and family life*

Art. 8 protects private and family life, home and correspondence. Measures of secret telephone surveillance have been examined on the basis of that article (Case of Klass and others, A 28 (1978) p. 20 et seq.; Malone v. U.K., Report of December 17, 1982). The prohibition of homosexual acts between consenting adults in private was considered to be a violation of Art. 8 (Dudgeon Case, A 45 (1981) p. 18 et seq.). The necessity for a mother formally to recognize her illegitimate child before family law relationships came into existence interfered with her rights under Art. 8 (Marckx Case, A 31 (1979) p. 16 et seq.). The parents' rights to ensure education in conformity with their religious and philosophical convictions (Art. 2, 1st Protocol) must be seen together with Art. 8. The State must ensure that information or knowledge in schools be conveyed in an "objective, critical and pluralistic manner", and that no "aim of indoctrination" be pursued. On this basis compulsory sex education was held to be compatible with the Convention (Case of Kjeldsen, Busk Madsen and Pedersen, A 23 (1976) p. 26). Corporal punishment in schools can violate the rights of the parents under Art. 2, 1st Protocol (Case of Campbell and Cosans, A 48 (1982) p. 14 et seq.).

(*e*) *Fundamental freedoms*

In several judgments on freedom of expression and of the press the Court has stressed the fundamental character of this freedom for a democratic society. It "constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man". It is applicable not only to information and ideas "that are favourably received or regarded as inoffensive . . . but also to those that offend, shock or disturb the State or any sector of the population" (Handyside Case, A 24 (1976) p. 23).

The main difficulties arise of course as to the possible restrictions (cf. *supra*, p. 10). The prohibition against publishing an article because such publication would constitute contempt of court was, under very specific circumstances, held to be a violation of Art. 10 because the interference was found not to be necessary (Sunday Times Case, A 30 (1979) p. 35 et seq.). The Commission has held that a conviction for distributing leaflets to soldiers encouraging them to disaffection was covered by Art. 10 para. 2 (Arrowsmith v. U.K., DR 19 (1978) p. 5 et seq.). Freedom of religion and belief does not cover each act motivated or influenced by a religion or a belief (ibid., p. 19). When the Church of Scientology was restricted as to advertising for the sale of specific instruments, the Commission did not consider that advertising as covered by Art. 9 (DR 16 (1979) pp. 68, 72). The freedom of assembly can be restricted to preserve public order. The test of proportionality must be applied here (Rassemblement Jurassien v. Switzerland, DR 17 (1979) p. 93; Christians against Racism and Fascism v. U.K., DR 21 (1980) p. 138). The freedom to join a trade union

is violated if one is compelled to join a union under the threat of dismissal (cf. *supra* section 3(b); Case of Young, James and Webster, A 44 (1981) p. 22 et seq.).

6. *Evaluation*

The system created by the ECHR is the only example of judicial protection of human rights and fundamental freedoms by international law which may be assimilated with constitutional procedures of the same sort known in several countries. The protection of human rights in the → United Nations is of very different nature (→ Human Rights, Activities of Universal Organizations). It is due mainly to the comparative homogeneity of the Western European States that a meaningful system of effective protection could be created. Sometimes, the difficult procedure is seen as a luxury. However, this impression would seem to be clearly contradicted by the impact the procedure has had on national legislation and jurisprudence. The development of common European standards concerning the basic rights of the individual is certainly of great importance for the shaping of a European identity. It is no surprise that the → European Communities are considering a possible accession to the ECHR and that the → Court of Justice of the European Communities considers the rights guaranteed therein as part of the common constitutional traditions of the member States, the observance of which it is bound to ensure (→ Internationale Handelsgesellschaft Case). Certainly the ECHR, as does the EC, stands for a regional development which will most probably never be accepted as part of global international law. Since the scope of common values concerning the position of the individual between the different member States of the international community is very small at the present time, regional developments indeed seem preferable (cf. also → American Convention on Human Rights). Otherwise international institutions cannot be used for the subject-matter concerned. By creating and developing the ECHR including the Commission and the Court, the European States have given an example of great importance for all countries willing to abide by the rule of law.

Council of Europe, Collected Edition of the "Travaux préparatoires", Vols. 1–5 (1975–1979).

Council of Europe, Bibliography relating to the European Convention on Human Rights (1978).

Publications of the European Court of Human Rights, Series A: Judgments and Decisions [cited A].

Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents.

European Commission of Human Rights, Collection of Decisions, Vol. 1–46 (1960–1974).

European Commission of Human Rights, Decisions and Reports (since 1974) [cited DR].

Yearbook of the European Convention on Human Rights [cited YB].

H. MIEHSLER and H. PETZOLD (eds.), European Convention on Human Rights, Texts and Documents, 2 vols. (1982).

European Commission of Human Rights, Stocktaking on the European Convention on Human Rights, A Periodic Note on the Concrete Results Achieved under the Convention, Latest Issue (1984).

H. GOLSONG, Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention (1958).

K.J. PARTSCH, Die Rechte und Freiheiten der Europäischen Menschenrechtskonvention (1966) (also in: F.L. Neumann, K.A. Bettermann, H.C. Nipperdey, Die Grundrechte, Vol. 1 (1966) 235–492).

H. GURADZE, Die Europäische Menschenrechtskonvention, Kommentar (1968).

J.E.S. FAWCETT, The Application of the European Convention on Human Rights (1969).

H. WALTER, Die Europäische Menschenrechtsordnung (1970).

F. CASTBERG, The European Convention on Human Rights (1974).

S. TRECHSEL, Die Europäische Menschenrechtskonvention, ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozeßrechte (1974).

F.G. JACOBS, The European Convention on Human Rights (1975).

U. HOFFMANN-REMY, Die Möglichkeiten der Grundrechtseinschränkung nach den Art. 8–11 Abs. 2 der Europäischen Menschenrechtskonvention (1976).

H. MOSLER, R. BERNHARDT and M. HILF (eds.), Grundrechtsschutz in Europa (1977).

D. PONCET, La protection de l'accusé par la Convention européenne des droits de l'homme (1977).

A.H. ROBERTSON, Human Rights in Europe (2nd ed. 1977).

D. BRAENDLE, Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention (1978).

P. VAN DIJK and G.J.H. VAN HOOF, De europese conventie in theorie en praktijk (1979).

G. GREGORI, La tutela europea dei diritti dell'uomo (1979).

E. LINDE, I.I. ORTEGA and M. SÁNCHEZ MORÓN, El sistema europeo de protección de los derechos humanos, Estudio de la Convención y de la jurisprudencia del Tribunal Europeo de Derechos Humanos (1979).

L. MIKAELSEN, European Protection of Human Rights,

The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States (1980).
J. DE D. PINHEIRO FARINHA, Convenção europeia dos direitos do homen. Anotada (1980).
G. BISCOTTINI, La Convenzione europea dei diritti dell' uomo nell'applicazione giurisprudenziale in Italia (1981).
S. ERÇMAN, European Convention on Human Rights, Guide to Case Law, Key to Case Law (1981).
C. MORRISSON, JR., The Dynamics of Development in the European Human Rights Convention System (1981).
H. PETZOLD, The European Convention on Human Rights, Cases and Materials (4th ed. 1981).
H.-E. KITZ, Die Notstandsklausel des Art. 15 der Europäischen Menschenrechtskonvention (1982).
I. MAIER (ed.), Protection of Human Rights in Europe, Limits and Effects (1982) [also in German].
A.Z. DRZEMCZEWSKI, European Human Rights Convention in Domestic Law (1983).
F. ERMACORA, M. NOVAK and H. TRETTER, Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte (1983).
P. VAN DIJK, Theory and Practice of the European Convention on Human Rights (1984).

Periodical articles have been excluded from the above list. See, in particular, Europäische Grundrechte Zeitschrift, Human Rights Law Journal.

JOCHEN ABR. FROWEIN

EUROPEAN COURT OF HUMAN RIGHTS

1. General Characteristics. – 2. The Judges. – 3. Independence, Immunities and Conflicts of Interest of Judges. – 4. Jurisdiction of the Court. – 5. Jurisdiction and Admissibility. – 6. Competence as regards Additional Protocols. – 7. Interpretation and Revision of Judgments. – 8. Legal Aid for Applicants. – 9. Advisory Competence. – 10. Judicial Organization and Procedure: (a) Deliberations and judgment. (b) Registrar. (c) Chambers. (d) Proceedings. – 11. Methods of Interpretation. – 12. Authority and Execution of Judgments. – 13. Evaluation.

1. General Characteristics

The European Court of Human Rights was established under the → European Convention on Human Rights and Fundamental Freedoms which was signed in Rome on November 4, 1950 and entered into force on September 3, 1953. The Convention devotes Arts. 19, 32, and 38 to 59 to the Court, which was set up on January 21, 1959.

The creation of the European Court of Human Rights expresses, as its President Cassin put it, the common wish of the countries of Western Europe to establish an international legal order which would guard against certain State acts detrimental to the dignity of human beings. The initiative followed a period which had revealed more than ever the value of an effective respect for → human rights. The greatest obstacle to overcome was the traditionally domestic character of the relationship between the State and its nationals. The system of the European Convention on Human Rights implies that the doctrine of → domestic jurisdiction does not apply in the area of human rights (see "Belgian Linguistic" Case, February 9, 1967, A 5). To transform the relationship between the State and its nationals into international legal obligations authorizing the interference by States into the traditionally national domain of others was a legal revolution. But to give an international organization the jurisdictional power of supervision and control was an even more profound change.

The Court has jurisdiction over States in the area of human rights, as regards not only their administrative and executive acts but also the acts of the judicial and legislative branches. The Court shares with the → European Commission of Human Rights, albeit in the final stage, the competence to ensure by judicial ruling the implementation of the collective guarantee of human rights and fundamental freedoms set forth in the Convention.

The Court's judgments, whilst never involving an interpretation of the Convention *in abstracto*, by their very nature are not limited to the individual interest of the petitioner. Their function is to serve the interest of the European legal order, as indicated by the statement of purpose enunciated in the Preamble and Arts. 24 and 60 of the Convention. An application may be lodged by one Contracting State against another Contracting State alleging a breach of the Convention, whoever the victims may have been and whatever their nationality (Art. 24). It is the protection of human rights as such which is at issue and which is upheld by the Court's judgment (see Ireland v. United Kingdom, January 18, 1978, A 25). Art. 60 of the Convention is even more revealing. The Court may not give the Convention an interpreta-

tion which would have the effect of limiting the human rights guaranteed by the internal laws of the Contracting States or by the provisions of any other treaty to which they may be parties.

The Court has full jurisdiction and is independent in the performance of its functions. It is composed of judges whose independence is guaranteed by its judicial character. Reasons must be given for the Court's judgment (Art. 51(1)). The Court may not vary its decision, except in the case of revision or interpretation (see section 7 *infra*). The decision of the Court is final (Art. 52) and not open to appeal. It is binding on the parties and on the Court itself; between the parties it has the effect of *res judicata*.

The Court is an international judicial body of a regional character. Only States may be brought before it. It is subject to the fundamental rule of international jurisdiction that it may not hear an individual petition unless domestic remedies have been exhausted (Art. 26; → Local Remedies, Exhaustion of). Like the → International Court of Justice (ICJ), its jurisdiction is optional. It can only hear matters referred to it if the Contracting State in question has recognized the jurisdiction of the Court (Art. 46).

The Convention contains few provisions regarding the organization of the Court. This technique is illustrative of the wish of the Contracting States to leave great flexibility to the Court in settling its status. The Court is master of its own rules, procedure (Art. 55) and consequently practice – without, however, being able to impose on the Contracting States any obligations over and above those contained in the Convention read in the light of its Preamble. While remaining careful not to exceed its powers under the Convention, the Court has used its rule-making competence to fill gaps in the Convention, thereby improving the administration and effectiveness of international justice.

The Rules of Court, as revised on November 24, 1982, entered into force on January 1, 1983 and comprise 67 articles. On June 22, 1983, the Court adopted a Resolution on its internal judicial practice, which is mainly concerned with procedure during the deliberations stage. This Resolution also deals with the participation of substitute judges in deliberations, the role of *amici curiae* and the translation of judgments into non-official languages.

2. *The Judges*

The Court is composed of a number of judges equal to the number of members of the → Council of Europe (Art. 38). Originally composed of 15 judges, the Court counted 21 judges as at January 1, 1984. The Court cannot include more than one national from the same State (Art. 38). The members of the Court are elected by the Parliamentary (Consultative) Assembly of the Council of Europe, by a majority of votes cast, from a list of three names presented by each of the member States of the Council. Each State has to present at least two candidates of its own nationality (Art. 39(1)). This system differs from that governing the composition of the → Court of Justice of the European Communities. The European Court of Human Rights may lack judges having the nationality of one or a number of Contracting States, which is at present only the case with Liechtenstein, the Assembly of the Council of Europe having elected as judge in respect of that State a Canadian citizen from among the candidates presented.

Candidates must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence (Art. 39(3)). Members of the Court are elected for nine-year terms and may be re-elected (Art. 40(1)). A judge remains in office until his successor has been sworn in (Rule 2(3)); after replacement he continues to deal with cases he already has under consideration (Art. 40(6)). The Court is renewed by a third of its membership every three years.

By secret ballot, the Court elects its President and Vice-President for a term of three years; they may be re-elected. The Court also elects its Registrar and Deputy Registrar for a period of seven years; they may be re-elected.

Taking as their inspiration the system of the ICJ, the Convention and the Rules of Court provide that when the bench does not include an elected judge having the nationality of a given State party or if the judge called upon to sit in that capacity is unable to do so or withdraws, the President of the Court shall invite the State in question to declare within 30 days whether it

intends to designate another elected judge or, as an *ad hoc* judge, another person possessing the necessary qualifications. So far, *ad hoc* judges have been called upon to sit four times, the judge of the State Party's nationality having felt obliged in each of these instances to withdraw. In such cases, *ad hoc* judges usually continue to sit for the judgment relating to the award of "just satisfaction" when this is subject to separate proceedings (Art. 50).

3. Independence, Immunities and Conflicts of Interest of Judges

The Contracting States decided, in view of the requirements of independence and impartiality inherent in the very character of judicial office, that it was unnecessary to state explicitly in the Convention that a judge sits in an individual capacity and that he enjoys the complete independence postulated by the Convention, *vis-à-vis* the State which proposed him for election and any other interests outside his judicial functions. This was solemnly affirmed before the Court was even constituted by the unanimous declaration of the Committee of Ministers in December 1958 (Assembly Doc. 918.1).

During their tenure of office, the judges of the Court enjoy the privileges and immunities set out in Art. 40 of the Statute of the Council of Europe, signed in Paris on September 2, 1949. These privileges and immunities have been defined in the Fourth Additional Protocol to the General Agreement on the Privileges and Immunities of the Council of Europe, signed in Paris on December 16, 1961. Arts. 5 and 6 of this Protocol refer to the Contracting States' wish to ensure the complete independence of the judges. During the exercise of his mandate, an *ad hoc* judge enjoys the same immunities as an elected judge. Only the Court in plenary session has authority to lift the immunity of a judge (Protocol, Art. 7).

The case-law of the Court reveals the extreme importance which it attaches to judicial independence and impartiality as one of the conditions of a "fair hearing" as guaranteed in Art. 6(1) of the Convention. The Court has gone so far as to reiterate publicly the maxim that "justice must not only be done; it must also be seen to be done". In the Piersack Case (October 1, 1982, A 53) a magistrate who had earlier been involved in the case as a member of the public prosecutor's office later presided over the national court which had to determine matters of fact and guilt. The European Court held that a "fair hearing" required not only that the judge in question should refrain from taking a personal position or being involved in the prosecution, but also that the structure of the system should allay fears that the judge did not offer adequate guarantees of independence.

No judge may participate in the consideration of a case in which he has a personal interest or in which he has previously participated as agent, adviser or advocate for a party or a person having an interest in the matter, or as member of a tribunal, a commission of enquiry, or in any other capacity (Rule 24(2)). Such matters constitute grounds for a judge's withdrawal.

The Convention does not specify any particular functions or professions which are incompatible with the duties of a judge. In view of this silence, the Court has not felt entitled in principle to lay these down in its Rules, but it has defined obstacles to the exercise of certain functions by a judge. Thus a judge may not sit while he is a member of a Government or holds a post or exercises a profession which is incompatible with his independence and impartiality (Rule 4).

On the other hand, the Convention does not prevent judges from exercising any other profession outside their function as a judge on the Court. (The → Inter-American Court of Human Rights, strongly influenced in its structure by the European Court, leaves its judges the same latitude.) This option follows from the fact that the office of judge is not a permanent one. Also, the judges do not receive a salary, but rather "compensation" for each day of duty, to be fixed by the Committee of Ministers of the Council of Europe (Art. 42). This approach contrasts with the rules applicable to the ICJ, the → Court of Justice of the European Communities and the Benelux Court (→ Benelux Economic Union, College of Arbitrators and Court of Justice).

4. Jurisdiction of the Court

The jurisdiction of the Court is limited by two fundamental provisions in the Convention. Art. 44 provides that only the Contracting States and

the Commission have the right to bring a case before the Court, and Art. 47 lays down that the Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement. It follows from the first of these provisions that the Court may not be directly seised by an individual petitioner, and from the second that the Court may not entertain any matter that has not first been referred to and examined by the Commission. That concession was demanded by some of the Contracting States as a guarantee to preserve State → sovereignty.

Art. 24 of the Convention provides that any Contracting State may refer to the Commission any alleged breach of the provisions of the Convention by another Contracting State. There is no obligation on the complainant State to show that it has an interest (see Case of Ireland v. the United Kingdom, January 18, 1978, A 25).

Art. 25 also allows the Commission to receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights set forth in the Convention. But here there are two important restrictions. The petitioner must claim to be a "victim", and the Contracting State complained against must have declared that it recognizes the competence of the Commission to receive such applications. As at August 1, 1984, 17 of the 21 Contracting States had made a declaration of this type. Cyprus, Greece, Malta and Turkey have so far not made such declarations.

For the acceptance of the Court's compulsory jurisdiction, an additional declaration is necessary under Art. 46(1) of the Convention. This declaration may be made unconditionally, or on condition of → reciprocity on the part of several or certain of the other Contracting States, or for a specified period (Art. 46(2)). Ireland, the Netherlands and Switzerland have made the declaration for an indefinite period. The other Contracting States have made the declaration for periods of between two to five years, and on expiry have up till now renewed their declaration without interruption. To date, 19 States – all the member States of the Council of Europe except Malta and Turkey – have accepted the compulsory jurisdiction of the Court. If a State has not declared its acceptance of the compulsory jurisdiction of the Court, a case against that State may still be referred to the Court if it gives an *ad hoc* consent for the purposes of that particular case (Art. 48).

Art. 48 and, indirectly, Art. 24 deal with the referral of a case to the Court by a Contracting State. Art. 24 allows any Contracting State to refer to the Commission any alleged breach of the provisions of the Convention by another Contracting State. Art. 48 enumerates, without prejudice to referral by the Commission, the cases in which an "interested" Contracting State may bring a case before the Court:

(a) When the victim is its national (Art. 48(b)). This is reminiscent of → diplomatic protection.

(b) When the Contracting State first referred the matter to the Commission (Art. 48(c)). It was by virtue of this Article that Ireland brought before the Court on March 10, 1976, a complaint against the United Kingdom with the purpose of ensuring the respect in Northern Ireland of the obligations undertaken by the respondent government in its capacity as a party to the Convention (Case of Ireland v. the United Kingdom, January 18, 1978, A 25).

(c) When the complaint has been lodged against the Contracting State (Art. 48(d)).

In case of doubt or dispute as to whether a Contracting State has the right to bring a case before the Court, the question is submitted by the President to the plenary Court for decision (Rule 34).

In the context of individual applications under Art. 25(1), the condition that there should be a "victim" has generated an important body of case law (Airey Case, October 9, 1979, A 32; Artico Case, May 13, 1980, A 37; Adolf Case, March 26, 1982, A 49). Art. 25 clearly requires that an individual must claim to be in fact harmed by the violation he alleges, and that the measure must have been applied to his detriment (Case of Klass and Others, September 6, 1978, A 28). But the Court does not exclude the possibility that the very existence of a law may violate the rights of an individual if he or she is directly affected by the law in the absence of any specific measure of execution. In the Dudgeon Case (October 22, 1981, A 45), which related to Northern Ireland law making certain homosexual acts between consenting adult males criminal offences, the Court stated that the law by its very existence repre-

sented a permanent interference with the applicant's right to respect for his private life.

Although a Contracting State can bring a case before the Court only in the limited circumstances enumerated in Art. 48 of the Convention, it can still refer a case to the Commission without having to show an interest. It is enough for the State to believe that a violation of the provisions of the Convention may be imputed to another Contracting State. The provision that governs the lodging of State applications with the Commission is thus very wide. Moreover, Art. 48 opens the door of the Court to the State which instituted a case before the Commission. Whether the Commission has been seised by an individual or by a Contracting State, it retains the power of decision as to referral of the case to the Court. The Commission and the Court thus share the role of guardian of the European public order in the area of human rights.

If the Commission declares admissible an application, whether from a Contracting State or an individual, it places itself at the disposal of the parties with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention (Art. 28). If a settlement is not achieved, the Commission draws up a report stating its opinion as to whether the Convention has been breached. The report, which remains confidential at this stage of the procedure, is transmitted to the Committee of Ministers of the Council of Europe (Art. 31). However, before the expiry of a three-month period running from the date of transmission of the report, the Commission may bring the case before the Court (Art. 32). If the Commission does not refer the case before the expiry of this period, it is the Committee of Ministers which has to take the decision whether there has been a violation. If it finds a violation, the Committee of Ministers will prescribe a period during which the respondent State must take any measures required by the decision of the Committee. Experience has shown that the decisions taken by the Committee of Ministers are not always free of political influences.

The Commission does not follow any legal criterion when deciding whether to bring a case before the Court or to leave it to the Committee of Ministers. As it explained in the Lawless Case, when the Commission decides to refer a case to the Court, "it does so because it believes that the purposes of the Convention will be best served in the particular case by reference of the case to the Court for final adjudication, and for no other reason". (Hearing of October 3 and 4, 1960, B 1, p. 245.) Once the case has been referred to the Court, the Commission's report becomes public.

5. Jurisdiction and Admissibility

The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention which the Contracting States or the Commission may submit to it (Art. 45). This broad provision by necessary implication includes a reference to Arts. 32 and 48, which determine the cases that may be brought before the Court. The Court may consider all questions of fact and law which arise while a matter is under examination. In addition to the conditions placed on the Court's jurisdiction which have already been described, the full jurisdiction of the Court can operate only within the framework of the particular case. These limits are circumscribed by the Commission's decision on the admissibility of the application. The Court is not completely free to make its own assessment of the conditions of admissibility of the application referred to it. Its competence is limited to the facts and circumstances invoked in the complaint made to the Commission and found by the Commission to be admissible. The decision of the Commission on admissibility determines the subject-matter of the dispute before the Court. It is only within this framework that the Court, once a case has been duly brought before it, may take cognisance of questions of fact and law (Handyside Case, December 7, 1976, A 24, pp. 19 to 20; Ireland v. the United Kingdom Case, January 18, 1978, A 25, p. 63; Case of Klass and Others, September 6, 1978, A 28, p. 17). Complaints rejected by the Commission as inadmissible may not be entertained by the Court. On the other hand, those upheld by the Commission can be contested anew before the Court (Guzzardi Case, November 6, 1980, A 39, p. 39; Case of Foti and Others, December 10, 1982, A 56, p. 14).

One may observe that the Commission, which delivers separate "rulings" as to the admissibility of a petition and as to the facts and circumstances

assessed in the light of the Convention, does not distinguish between a lack of jurisdiction and the inadmissibility of a specific complaint.

The Court is not bound by the legal characterization given by the Commission to the facts and circumstances, nor evidently by that propounded by the applicant or the Government. There have been many cases in which it has evaluated the facts differently from the Commission (Case of Engel and Others, June 8, 1976, A 22, p. 37; Handyside Case, December 7, 1976, A 24, pp. 19 to 20; Guzzardi Case, November 6, 1980, A 39, pp. 21 to 23). A complaint is characterized by the facts and circumstances it denounces and not by the legal arguments which it invokes (Case of Le Compte, Van Leuven and De Meyere, June 23, 1981, A 43, p. 18; Case of Campbell and Cosans, February 25, 1982, A 48, pp. 18 to 19). The Court is empowered to rule on any basic question on which the Commission has pronounced, whether the latter had deemed the allegation founded or not.

The Court's jurisdiction extends to giving rulings, *in limine litis* and under the conditions laid down in Rule 47, on preliminary exceptions that relate to the three-month period provided for under Art. 32(1) of the Convention. It also extends to rulings on the conditions of reciprocity stipulated by the Contracting States in their declarations made under Art. 46, and on the failure of the friendly settlement which the Commission is obliged to attempt (Arts. 30 and 47). Grounds of inadmissibility which the respondent State has not previously raised before the Commission at the stage of its initial examination are precluded from the Court's consideration (Artico Case, May 13, 1980, A 37; Case of Foti and Others, December 10, 1982, A 56, pp. 16 to 17).

The Convention also contains a number of conditions for the admissibility of a complaint that primarily concern the Commission. But here a distinction must be recalled concerning the Court's power of control: although decisions by the Commission that a complaint is inadmissible are not reviewable by the Court, the Court deems itself competent to adjudicate anew on claims of inadmissibility which the Commission rejected. The case-law of the Court has been consistent in this respect since the decision of June 18, 1971 in the "Vagrancy" Cases (De Wilde, Ooms and Versyp Case, A 12) where the Belgian Government reproached the Commission for not having rejected the complaint for failure to exhaust domestic remedies. The Court held that the rule dispensing States from answering for their acts before an international body before having had the opportunity to remedy the situation within their internal legal order, was one of the generally recognized rules of international law to which Art. 26 of the Convention expressly referred. The rule delimited the area within which the Contracting States had agreed to answer for wrongs of which they stood accused before the Convention institutions (Arts. 49 and 50). The Court therefore declared itself competent to consider the issue of non-exhaustion of remedies.

Art. 64 of the Convention provides that any Contracting State may, when signing the Convention or depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The Court will take account of the reservation in accordance with the principles of international law (→ Treaties, Reservations).

6. Competence as regards Additional Protocols

The Court is also competent to rule on the application of additional protocols to the Convention. Arts. 1 to 4 of Protocol No. 1 of March 20, 1952, and Arts. 1 to 5 of Protocol No. 4 of September 16, 1963, are considered by the Contracting States as Articles additional to the Convention. Thus the provisions of the Convention also apply as regards the rights guaranteed by these Protocols. Protocols Nos. 5 and 6 contain the same clause concerning the application of the provisions of the Convention. Protocol No. 7, embodying an identical clause, has been open for signature by member States of the Council of Europe since November 22, 1984; it will enter into force after the deposit of seven instruments of ratification.

7. Interpretation and Revision of Judgments

In Rule 56 of the Revised Rules of Court, the Court laid down a procedure permitting each

Contracting State party to a case and the Commission to request the interpretation of a judgment. The request is communicated, as appropriate, to all other State parties, to the Commission and to the applicant. The request for interpretation is submitted for examination to the Chamber which rendered the judgment on the merits, composed as far as possible of the same judges (Rule 56(4)). The Court received a request by the Commission to interpret the judgment it had delivered in the Ringeisen Case (June 22, 1972, A 15) concerning the "just satisfaction" to be afforded to the applicant. The request concerned the method of calculation. The Court gave its decision in a judgment pronounced on June 23, 1973 (A 16).

A State party or the Commission may also request the revision of a judgment upon discovery of a fact which might by its nature have a decisive influence and which was unknown at the time the judgment was delivered (Rule 57). The request must be made within six months after the State party or the Commission, as the case may be, acquired knowledge of the fact (Rule 57(1)). Here again, the request is, as far as possible, brought before the same Chamber as made the original judgment. So far, the Court has had no request for revision presented to it.

8. Legal Aid for Applicants

At the request of an applicant, the President of the Court may grant free legal aid to the applicant for the purposes of his representation before the Court, provided the conditions laid down in Rule 4(2) of the Addendum to the Rules of Court (Rules on Legal Aid to Applicants) have been satisfied. Before legal aid is granted, the Registrar invites the agents of the States parties and the delegate(s) of the Commission to submit their written comments. If the applicant received a grant of legal aid before the Commission, this grant automatically continues in force unless the President of the Court decides otherwise (Addendum to Rules, Rules 3 and 5).

9. Advisory Competence

Apart from its jurisdiction to deliver judgments in contentious matters, the Court is competent to give advisory opinions by virtue of Protocol No. 2 of May 6, 1963. It may, at the request of the Committee of Ministers of the → Council of Europe, give advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols. But these opinions may not deal with questions relating to the content or scope of the rights and freedoms defined in Chapter 1 of the Convention and in its Protocols. Advisory opinions are subject to further restrictions laid down in Art. 1 of Protocol No. 2. The procedure is governed by the Rules of Court (Rules 58 to 66). Experience shows that the Committee of Ministers is reluctant to have recourse to the advisory competence of the Court, despite the advantages offered by such a procedure, which could strengthen the Convention's system of protection. It is to be regretted that so far no interpretation has been sought of Art. 54 of the Convention, which relates to the supervision of the execution of judgments of the Court, where there has been a certain unevenness.

10. Judicial Organization and Procedure

(a) Deliberations and judgment

After a first examination of the matter by the members of the Chamber or by the plenary Court prior to the hearing, on the basis of the report of the Commission and the documents filed in the written procedure, the Court usually holds a public hearing. Thereafter, deliberations *in camera* take place leading to preliminary conclusions but without a final vote. On this basis, a draft of the judgment is prepared. This draft is discussed again and reworked in the course of a second round of deliberations which ends with a final vote, which is taken in inverse order of rank among the Court members (Rule 20(2)).

The decisions of the Court are taken by a majority of the judges present (Rule 20(1)). If voting is equal, the President has the casting vote (Rule 20(3)). The judgment indicates the number of judges constituting the majority.

Art. 51 of the Convention expressly preserves the right of a judge to deliver a separate opinion if he disagrees with the result or the rationale of the decision. Rule 52(2) allows any judge who has taken part in the consideration of a case to annex his own opinion to the judgment, whether it be dissenting or concurring.

If the Court finds that there has been a violation of the Convention, Art. 50 obliges it to rule on a second basic question: is a "just satisfaction" due to the injured party? It usually makes its ruling by the same judgment. If the question is not ready for decision, the Court reserves it.

The Court may strike out a case if the State which has brought the case before the Court decides not to proceed, or if there has been a friendly settlement or an arrangement (Rule 48). It does, however, reserve the right to continue the examination despite the State's discontinuance, by virtue of its duty to ensure the observance of the engagements undertaken by the Contracting States under the Convention (Convention, Art. 19; Rule 48(4)). The issues for decision by the Court concern public policy (in French: *ordre public*), and the Court has often rejected requests that cases be struck out.

The official languages of the Court are French and English. A party may however request, and the President of the Court authorize, the use of another language, particularly during the oral hearings (Rule 27(2) and (3)). In the absence of a contrary decision in the judgment, both the English and French texts are authentic. In the interests of execution of the judgment by the government of any State found in violation, an unofficial translation of the judgment into that State's language, should it not be an official one, is published under the responsibility of the Registrar with the authorization of the President.

(*b*) *Registrar*

The Registrar and Deputy Registrar of the Court are elected by the Court for renewable seven-year periods (Rules 11 and 12). The Registrar plays an important role beyond the organization and activities of the Registry and the responsibility he has for cases brought before the Court or to be brought before it (Rule 14). He is present at deliberations, prepares drafts for judgments in the light of these, and has custody of the Court's archives. He is also responsible for the classification of the Court's case-law for the benefit of members of the Court and the publication of its judgments.

(*c*) *Chambers*

For the examination of each case, the Court is composed of a Chamber of seven judges chosen by lot (Art. 43). The number is manifestly insufficient in view of the number of States represented on the Court. The Chamber now contains no more than a third of the total number of judges. Also, the system can create differences in decided case-law between the plenary Court and a Chamber and between the Chambers themselves. This danger is, however, largely reduced by the Court's practice of generally relying in its judgments on its former case-law.

The Chamber must include an elected judge having the nationality of the State allegedly in violation. If this judge is prevented from taking part or declares himself disqualified to sit, the State in question can choose either another elected judge or an *ad hoc* judge (Rules 21(3) and 23(1)). If the case pending before a Chamber raises one or more serious questions affecting the interpretation of the Convention, the Chamber may, whatever the circumstances, refer the case to the plenary Court. The relinquishment of jurisdiction is obligatory if the resolution of a question may lead to a result inconsistent with a previous judgment (Rule 50). The quorum of the plenary Court is 12 judges (Rule 17(1)).

(*d*) *Proceedings*

The provisions relating to procedure, contained in Title II of the Revised Rules of Court, do not prevent the Court from derogating from them for the consideration of a particular case, under conditions prescribed by Rule 26. It may exceptionally decide by virtue of this provision that there is no need for a hearing. This happened in the cases of Luberti (February 23, 1984, A 75), Skoogstrom (October 20, 1984, A 83), and McGoff (October 26, 1984, A 83). Moreover, the President of the Chamber may, having consulted the agents of the governments, the Commission's delegate and the applicant, decide whether a written procedure is necessary.

The oral proceedings before the Court are public, with full arguments heard from all sides concerned. The hearings and oral arguments are usually preceded by written memorials from the respondent government and the applicant(s). Witnesses or experts may be heard, although this is rare, since the Court's procedure is preceded by the Commission's fact-finding process.

Unlike the procedure before the Commission and the Committee of Ministers, which sit *in camera*, the Court's procedure is public in the absence of exceptional circumstances (Rule 18). The pronouncement of judgment is always public. From the moment a case is referred to the Court, the hitherto confidential report of the Commission is made public, as are the memorials and documents of the Court proceedings. Judgments are made public by the Registry as soon as they are pronounced. The separate opinions of judges, concurring or dissenting, are made public under their names with the text of the judgment.

The adversarial character of the proceedings before the Court has distinct aspects. The oral proceedings are wholly adversarial in cases brought by one Contracting State against another, that is to say in proceedings between States (Arts. 24 and 48). By contrast, since Art. 44 of the Convention provides that only the Contracting States and the Commission shall have the right to bring a case before the Court (in French: "se présenter devant la Cour"), the individual applicant does not have the status of a "party" before the Court (Arts. 25 and 48). The individual applicant is, however, the real adversary of the respondent State, and is moreover described as the "injured party" in Art. 50 of the Convention, which concerns the "just satisfaction" that he may claim. Also, thanks both to successive modifications of the Rules of the Commission and the Court and to the case-law of the Court, a remedy has been found for the anomalous situation in which the applicant was not allowed himself to set out his grievances and his arguments at the Court hearings. After many years during which an expedient was adopted, which involved the delegate of the Commission being assisted at the Court hearing by the applicant's adviser, the revised Court Rules now open the doors of the Court to a certain extent to the applicant. Rule 33(3)(d) provides that the individual who lodged the complaint with the Commission shall be invited by the Registrar to notify him if he wishes to take part in the proceedings pending before the Court and, if so, of the name of the person appointed to represent him. The President may authorize him to conduct the defence of his interests himself with the assistance of counsel, the whole procedure being under the supervision of the Court alone. The wish is often expressed that the Convention be amended to enable the individual applicant, as a party to the proceedings, to stand on equal footing with the other parties, a principle enshrined by Art. 6 of the Convention itself for the legal procedures of national law. Preferably, *locus standi* before the Court should be granted to the individual applicant and laid down in the Convention, but the pragmatic solution already reached has to a large degree remedied an abnormal and surprising situation.

Since the entry into force of the Revised Rules of Court in 1983, the author of the individual application is now enabled, normally through his advocate, to take part in the written and oral proceedings of the Court (Rule 30), as are the representatives of the government and the delegate of the Commission. This delegate describes the matter objectively, including the conclusions the Commission expressed in its report. If an important minority of the Commission's members have dissented from the proposed solution, the Commission's practice, with the agreement of the Court, is to have the conclusions of the minority set out by a second delegate.

The new Court Rules have also given a new legal foundation to a procedural initiative at hearings which was inaugurated by the Court in the Case of Young, James and Webster (August 13, 1981, A 44), the so-called "closed-shop" case. In that case, the Court agreed to hear a third party, a qualified representative of the Trades Union Congress, on questions of fact, practice and law of the respondent State. Rule 37(2) has given effect to and regulated this practice by empowering the President "in the interest of the proper administration of justice (to) invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned other than the applicant."

11. Methods of Interpretation

The Court accepts the principles of interpretation of the → Vienna Convention on the Law of Treaties (→ Interpretation in International Law). It referred in its judgment in the Golder Case (February 21, 1975, A 18, p. 14) to Arts. 31 to 33

of the Vienna Convention, which it held to constitute "in essence generally accepted principles of international law". It has regard to "good faith" and the "ordinary meaning to be given to the terms of the treaty in their context". Its interpretation is guided by the object and purpose of the Convention, which are closely linked.

The aim of the Convention is the safeguarding of human rights and fundamental freedoms (Preamble, para. 4) by the collective guarantee of certain of the rights set out in the Universal Declaration of Human Rights (para. 6; → Human Rights, Universal Declaration (1948)).

Both the Preamble to the Statute of the Council of Europe and the Preamble to the Convention itself throw light on the evolutive and progressive aim of the Convention. The Preamble to the Convention, which in the terms of Art. 31 of the Vienna Convention is included within the context of the European Convention, effectively deals with the realization not only of the safeguarding of human rights but also their "development"; the Preamble also expresses the determination "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration"; a similar wish appears in the Preamble to the Statute of the Council of Europe itself, notably where the High Contracting Parties express the wish for the "further realisation" of the ideals of "individual freedom, political liberty and the rule of law".

This clear and repeated expression of the will of the Contracting States has led the European judges (inspired by the object and purpose of the Convention) to give to certain notions and institutions referred to in the Convention an interpretation which the Court itself describes as "autonomous" (see particularly the Case of Engel and Others, June 8, 1976, A 22, p. 34; König Case, June 28, 1978, A 27, pp. 29–30; Deweer Case, February 27, 1980, A 35, p. 22; Öztürk Case, February 21, 1984, A 73, p. 18). This autonomy of the Convention means that the notions cannot be identified, in the view of the Court, with homonymous concepts in national legal systems, but that they must be uniformly interpreted, subject to a certain relativity inherent in each case, by the institutions entrusted with applying the Convention.

The doctrine of the Court is echoed by Paul Reuter, who writes in his commentary on the Vienna Convention on the Law of Treaties:

> "En de nombreuses dispositions, la Convention retient comme un élément déterminant, ou au moins important, de solution des problèmes qu'elle considère, l'objet et le but du traité; ce n'est pas une dérogation au principe de l'autonomie de la volonté, mais bien au contraire sa consolidation objective: l'objet et le but du traité sont les éléments essentiels qui sont pris en considération par la volonté des parties" (La convention de Vienne sur le droit des traités, 1970, p. 17).
>
> ("In many provisions, the Convention sets up the object and purpose of the treaty as a determining, or at least important, element in resolving the matters with which it deals; this does not involve a derogation from the principle of the autonomy of will, but on the contrary its objective consolidation: the object and purpose of the treaty are the essential elements which are taken into consideration by the will of the parties.")

The Court's interpretation reveals itself as a teleological one. This interpretation is generally extensive in the affirmation of the right or freedom in question.

Art. 6 of the Convention requires particular procedural guarantees when a Court is called upon to determine either "civil rights and obligations" (Art. 6(1)) or a "criminal charge" (Art. 6(1) to (3)). The Court has given these two notions a scope which, in many aspects, diverges from the meaning they have in the law of most of the member States of the Council of Europe.

The teleological character of the Court's interpretation had important consequences for the notion of dispute over "civil rights and obligations" in the Ringeisen judgment (July 16, 1971, A 13). This interpretation was confirmed and developed in the König judgment (June 28, 1978, A 27). The Court in that judgment stated: "In these conditions, it is of little consequence that here the cases concern administrative measures taken by the competent bodies in the exercise of public authority . . . All that is relevant under Article 6(1) of the Convention is the fact that the object of the cases in question is the determination of rights of a private nature" (A 27, p. 32).

It is also by taking the object and purpose of

the Convention into consideration as a matter of priority that the Court has given an extensive autonomous interpretation to the notion of "criminal charges" or "offences" in Art. 6(1), (2) and (3). According to this interpretation, the "charge" may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" (Corigliano Case, December 10, 1982, A 57; Eckle Case, July 15, 1982, A 51, p. 33; see also Case of Foti and Others, December 10, 1982, A 56, p. 18).

To determine whether there has been a "criminal charge" within the meaning of Art. 6 of the Convention, the Court stated in the Adolf judgment: "The prominent place held in a democratic society by the right to a fair trial favours a 'substantive', rather than a 'formal' conception of the 'charge' referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question" (March 26, 1982, A 49, p. 15).

In interpreting the second element laid down in Art. 6(1), that is the "criminal" nature of the charge, the Court has also affirmed the teleological and progressive character (of the principle) that guides it. In the Engel judgment, after observing that "if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal . . . , the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will", the Court added that "a latitude extending thus far might lead to results incompatible with the purpose and object of the Convention" (June 8, 1976, A 22, p. 34).

The Court applies in its case-law the same teleological and progressive doctrine of interpretation, but in the sense that exceptions allowing restrictions or limitations on the rights and freedoms are to be construed narrowly. The Court in the Klass judgment stated that a clause, "since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted" (September 6, 1978, A 28, p. 21. See also the Case of Ireland v. the United Kingdom, January 18, 1978, A 25, p. 74; the Sunday Times Case, April 26, 1979, A 30, p. 41; Case of Silver and Others, March 25, 1983, A 61, pp. 37 to 38). There is a natural similarity with the general principle of law which imposes a restrictive interpretation on provisions of criminal law.

Significant limitations on the guarantee of fundamental rights are found in the second paragraphs of Arts. 8 to 11 of the Convention. These limitations restrict the exercise of the rights concerned. Regard should also be had to the similar restrictions laid down in Art. 1 of the First Additional Protocol and Art. 2(3) and (4) of the Fourth Additional Protocol.

The justification for the restrictions provided for in the Convention derives from the obligations inherent in the organization of social life and the conflict between individual rights and liberties and certain aspects of the public interest or rights of third parties in society. But in such cases the text of the Convention itself explicitly imposes imperative conditions for the justification of the limitations which may be allowed to the rights guaranteed. The restrictions must be "necessary in a democratic society". In its case-law, the Court has attached great importance to these criteria. In the Sunday Times Case, the Court set out its doctrine as follows: "It must now be decided whether the 'interference' complained of corresponded to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', whether the reasons given by the national authorities to justify it are 'relevant and sufficient under Article 10(2)' " (April 26, 1979, A 30, p. 38, citing the Handyside Case, December 7, 1976, A 24, pp. 22 to 24). Here, as in the enunciation of many other rules contained in the Convention, the Court tempers the absolute character of the rule by appealing to the principle of proportionality with regard to the object pursued (Dudgeon Case, October 22, 1981, A 45, p. 21; Case of Young, James and Webster, August 13, 1981, A 44, p. 25).

The interpretation of the Court is not static, but takes into account changes in the corpus of society; it is evolutive. In the Tyrer Case, which concerned corporal punishment by birching under Isle of Man legislation, the Court declared that the Convention was a "living instrument which . . . must be interpreted in the light of present-day conditions", adding that "the Court cannot but be influenced by the developments

and commonly accepted standards in the penal policy of the member States of the Council of Europe" (April 25, 1978, A 26, pp. 15 to 16). In the Marckx judgment, the Court said the Convention "must be interpreted in the light of present-day conditions", adding that "the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve . . . towards full juridical recognition of the maxim *mater semper certa est*" (June 13, 1979, A 31, p. 19).

The abandonment of sovereign power by the Contracting States and their adhesion to a European system of collective judicial guarantee instituted by the Convention was possible only by reason of their agreement on the essential principles of respect for human rights in domestic law. Here again, the Preamble gives an echo. The governments are "resolved as the Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom, and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration".

This sum of national rights constitutes a "common law" expressed to a great extent in the Convention, which thereby takes on the character, for the Contracting States and their nationals, of a true European public order.

Reference back to the domestic law of the Contracting States in the interpretation of the Convention and its Protocols does not reduce the scope of the Convention; indeed it is inherent in the guarantees of the Convention. Close links exist between fundamental rights common to the constitutional laws of the member States and the expression given to them in the Convention, as interpreted in the judgments of the Court. International law doubtless takes precedence over domestic law, but the Court's case-law shows that in this area there is an interaction of two closely associated systems of guarantee.

The Court has not confined itself to referring back, in its interpretation of the Convention, to the domestic law of the Contracting States. In certain cases, it has allowed national authorities a limited area of discretion in laying down the restrictions to be placed on the rights guaranteed by the Convention. This is the doctrine of the "margin of appreciation", common to the case-law of the European Commission of Human Rights and the Court.

The "margin of appreciation" which the Court allows to the national authorities does not contradict the teleological and progressive interpretation reflected in its case-law. It rests, in fact, on objective elements: first, because it derives from the system of double competence in the application of the Convention; secondly because the national authority is presumed to have a more complete knowledge of the facts.

In the Ireland v. the United Kingdom judgment, the Court drew attention to some basic features of the Convention laying particular emphasis on the fact that "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States", and that "it creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement' " (January 18, 1978, A 25, p. 90). Subsequently, referring to the preparatory works of the Convention, the Court formally pointed out that "the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States" (p. 91).

It will be observed that the Court generally adopts a technique which consists of referring in the judgment to its own case-law in support of the rule which it pronounces and of the reasoning which leads there. It cites the "precedents". It goes without saying that these have neither the form nor the character of common law precedent. But there is proof here of the Court's concern for judicial certainty and a means for the Court to indicate the continuity of its interpretation and thereby to reinforce its authority.

12. Authority and Execution of Judgments

The judgments of the Court do not annul a judicial decision, legislation or any other act of the authorities of the State in question. They are

declaratory of the law and state an obligation, founded in the Convention.

The judgments of the Court are not valid *erga omnes*. The parties undertake by virtue of Art. 53 of the Convention to abide by the decision of the Court in any case to which they are parties, which means that the judgments of the Court have, through their treaty derivation, the force of *res judicata* for the Contracting State in question. The judgments are not open to *exequatur* proceedings.

The Court's judgment is not enforceable as such, but the treaty system implies its automatic and voluntary execution. Good faith is presumed in the execution, although the Contracting States have taken precautions to ensure that governments implement the judgment. They may be called to account. Art. 54 entrusts the Committee of Ministers, as executive organ of the Council of Europe with the supervision of the execution of judgments. The Article does not explicitly provide sanctions for failure to execute judgments, but it does make clear the States' obligation to redress the situation judged illegal under the Convention.

The absence of any specific sanctions expressly set out in the Convention, save for the extreme cases provided for in Art. 15 of the Statute of the Council of Europe and the possible international responsibility of the State in question, should not be interpreted as altering the compulsory character of the obligations contained in the system of execution of the Court's judgments. The system deliberately relies on the good faith of the Contracting States in the performance of their obligations, but has institutionally organized the supervision of the performance of their engagements.

In the execution of a judgment, one must distinguish between the granting of just satisfaction to an injured party by virtue of Art. 50 of the Convention, and the consequences of the judgment on the domestic law of States. The Committee of Ministers has encountered few difficulties concerning private interests in its supervisory function. But as regards the execution of judgments on fundamental matters of general importance which are the consequence of a Court's judgment, the question is more complex.

When the Court has held that a situation in domestic law is incompatible with the Convention, the State in question is bound not only to give the injured petitioner "just satisfaction" fixed by the Court (Art. 50), but also to carry out the necessary modifications to its internal legal order (Art. 53). The State must ensure that the processes of its domestic law do not remain founded on provisions which are inconsistent with the Court's judgment. The State is thus obliged to eliminate any effects held by decision of the Court to be contrary to the Convention.

This is what national authorities did following the judgment of the Court in the Piersack Case (October 1, 1982, A 53), which concerned a judge who had presided over an assize court having been involved earlier in the same matter as a member of the public prosecutor's office. The Belgian Minister of Justice instructed the *procureur général* (State prosecutor) attached to the Belgian Court of Cassation to challenge before the latter Court the judgment of the assize court which had sentenced the accused to hard labour. That judgment was quashed and the matter sent back to a differently composed assize court.

Situations which the Court has condemned as incompatible with the Convention can, however, be of two types. It may be that, as in the Piersack Case just cited, the domestic law of the State in question itself offers the means, through the normal functioning of its institutions, of rectifying the wrong which the Court has found. In such a case, as soon as the national remedies have worked in a satisfactory manner, execution of the judgment requires no more than the possible award of a just satisfaction to the injured party. On the other hand, the Court's judgment may have declared incompatible with the Convention not simply the State's manner of applying the law but the very existence of the law which has been applied (Golder Case, February 21, 1975, A 18; Deweer Case, February 27, 1980, A 35). In these circumstances, the law must be either repealed or amended. The Court has even held that the very existence of a rule of law, whether applied or not, may violate the Convention (Dudgeon Case, October 22, 1981, A 45; see also Malone Case, August 2, 1984, A 82; cf. the Sunday Times Case, April 26, 1979, A 30).

On balance, the practice of States is positive. It shows that States are fully conscious of their obligations, although there have been hesitations in governmental attitude and delays in parliamen-

tary procedure in some cases. In such cases, one might wish for greater insistence and authority by the Committee of Ministers in exercising its supervisory function over the execution of the Court's judgments. It is the Committee's duty to ensure that the State in question does not remain passive, allowing a violation of the law denounced by the Court to continue.

It is not the duty of the Court to indicate, explicitly or implicitly, the time-limits for the repeal or amendment of a law or other measure which it judges to be contrary to the Convention. By doing so, it would encroach on the competence of the Committee of Ministers. The States also have a margin of discretion in choosing the appropriate solution to redress situations declared by the Court to be incompatible with the Convention, provided this remains in conformity with the substance of the Court's decision.

Resolutions of the Committee of Ministers taken in the exercise of its duty of supervising the execution of the Court's judgments (Art. 54) can generally be divided into two categories in cases where the violation of the Convention has its origin in the functioning of the national system. There are, firstly, the question of the "just satisfaction" that may be due to an applicant by virtue of Art. 50 and, secondly, the measures with general effect that need to be taken to redress a situation.

The practice of the Committee of Ministers consists of adopting a resolution with an annex. The resolution first refers to the just satisfaction received by the applicant by virtue of Art. 50. Then the government in question is invited to inform the Committee of the measures taken following the judgment, having regard to its obligation under Art. 53 to abide by the judgment. The State's reply, describing the measures taken in its institutional system or its practice, generally with the date of their implementation, appears in an annex to the Committee's resolution.

Finally, the Committee of Ministers declares that it has taken note of the information given to it by the government and concludes that the Committee has fulfilled its functions under Art. 54 of the Convention in the instant case.

It can be deduced from these acts and this practice that States held to account have interpreted the obligation to abide by the Court's decisions as including the obligation to remedy the situation by bringing their legal procedures into conformity with the Convention.

As illustrations of the practical efficacy of the system provided for under Arts. 53 and 54 of the Convention, it is possible to cite many examples. Among them are:

(i) Promulgation of the Belgian Act of August 6, 1971 on vagrancy after the judgment in the De Wilde, Ooms and Versyp Case (June 18, 1971, A 12).

(ii) Amendment of the law of the Federal Republic of Germany on the payment of legal costs following the judgment in the Case of Luedicke, Belkacem and Koç (November 28, 1978, A 29), which confirmed the rule of free interpretation services in criminal proceedings.

(iii) Amendment of the United Kingdom's Prison Rules of 1964 as regards a prisoner's right to consult a lawyer on the possibility of bringing a civil action, following the Golder judgment (February 21, 1975, A 18).

(iv) Adoption of the Homosexual Offences Order of 1982, modifying the law in Northern Ireland after the judgment in the Dudgeon Case (October 22, 1981, A 45).

(v) Adoption of the Contempt of Court Act 1981 in the United Kingdom as a result of the Sunday Times judgment (April 26, 1979, A 30).

(vi) Institution of a scheme of civil legal aid and advice in Ireland, following the Airey Case (October 9, 1979, A 32).

The extent to which the decisions of the Court and the Commission have influenced British legislation and jurisprudence in particular was acknowledged by Lord Carrington, former British Foreign Secretary, when he served as President of the Committee of Ministers.

13. Evaluation

The rapid growth in the list of cases today poses serious difficulties for the Court. During the first 15 years of the Court's existence, from 1959 to 1973, 17 judgments were given, whereas 92 had been delivered by November 1, 1984, at a time when a good number of other cases were pending. There are problems of organization to avoid slowing down even further a procedure which is already very slow for applicants, particularly be-

cause of the rule of exhaustion of domestic remedies. Further problems arise from the character of the Court itself, whose judges are not full-time. Many of them are university professors or judges of high-level national courts. It may be that the structure of the Court will develop in the direction of having full-time judges. Such a modification would require an amendment to the Convention (Art. 42).

A connected problem is the length of the procedure. Today, the overloading of the Court taken together with the availability of the judges make it impossible to expect less than a year to pass between the referral to the Court and the delivery of judgment. One must add to that the period during which admissibility is examined by the Commission, the time devoted to the Commission's report to the Committee of Ministers (Art. 31) and the three-month period laid down in Art. 32 before the case can be brought before the Court.

Whatever guidance the Court's case-law may give for the national courts of the Contracting States, the latter courts still necessarily face many problems of interpretation. Protocol No. 2, which reserves to the Committee of Ministers the right to put requests for → advisory opinions on the legal interpretation of the Convention to the Court, is of strictly limited use. It does not offer any solution to the problems increasingly posed to national courts. It has frequently been suggested that the Court should be empowered to give a preliminary ruling on the interpretation of the substantive-law provisions of the Convention and its Protocols (along the lines of Art. 177 of the treaty establishing the → European Economic Community), whenever such an issue is raised before the national courts of a Contracting State recognizing the right of individual petition and the jurisdiction of the Court. A solution of this nature, which would favour legal certainty, would doubtlessly offer the advantage of avoiding many cases coming to the Court.

The time seems to have come to examine the ways in which the Court's judgment could be made binding *erga omnes*. This desire has often been expressed in the Parliamentary Assembly of the Council of Europe. Practice has shown that the Contracting States' undertaking to abide by the Court's decisions (Art. 53), combined with the duty of supervision by the Committee of Ministers (Art. 54), constitutes a system which has not shown any serious gaps so far. It is understandable that in the first years of the functioning of the Court, which brought profound modifications in national legal traditions, recourse should have been made to this system. One must ask, however, whether it is wise to confer this duty of supervision permanently on an organ of a fundamentally political nature. In the interests of legal certainty, it seems desirable today, now that the Court's authority and case-law have acquired respect in Europe, to introduce a procedure which would make the Court's judgments self-executing.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS, No. 5; UNTS, Vol. 213, 221–271.

European Court of Human Rights, Revised Rules of Court (adopted on 24 November, 1982), Council of Europe Doc. Cour (82) 107.

Publications of the European Court of Human Rights, Series A: Judgments and Decisions (cited A).

Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents (cited B).

M.A. EISSEN, La Cour européenne des droits de l'homme: de la Convention au Règlement, AFDI, Vol. 5 (1959) 618–658.

H. GOLSONG, Implementation of International Protection of Human Rights, RdC, Vol. 110 (1963) 1–151.

W.J. GANSHOF VAN DER MEERSCH, La Convention européenne des droits de l'homme a-t-elle, dans le cadre du droit interne, une valeur d'ordre public?, in: Les Droits de l'Homme en droit interne et en droit international, Acte du 2e colloque international sur la Convention Européenne des Droits de l'Homme, Vienne, 1965 (1968) 155–251.

W.J. GANSHOF VAN DER MEERSCH, René Cassin, juge international, in: René Cassin, Amicorum Discipulorumque, Vol. 1, Problèmes de protection internationale des droits de l'homme (1969) XXXV–LI.

H. MOSLER, L'influence du droit national sur la Convention européenne des droits de l'homme, in: Miscellanea, W.J. Ganshof van der Meersch, Vol. 1 (1972) 521–543.

M.A. EISSEN, Communication sur l'autorité des arrêts et décisions des organes de la Convention, Revue des droits de l'homme, Vol. 6 (1973) 747–752.

R. KOVAR et al., Colloque de Grenoble, 1973, L'efficacité des mécanismes juridictionnels de protection des personnes privées dans le cadre européen, Revue des droits de l'homme, Vol. 6 (1973) 603–799.

H. ROLIN, L'autorité des arrêts et décisions des organes

de la Convention Européenne des Droits de l'Homme, Revue des droits de l'homme, Vol. 6 (1973) 729–746.

F. CASTBERG, The European Convention on Human Rights, T. Opsahl and T. Ouchterlony (eds.) (1974 revised edition).

W. SCHMID, Die Wirkungen der Entscheidungen der europäischen Menschenrechtsorgane, Thesis, University of Zurich (1974).

F.G. JACOBS, The European Convention on Human Rights (1975).

J.R. MÜLLER, Die Anwendung der Europäischen Menschenrechtskonvention in der Schweiz, Zeitschrift für Schweizerisches Recht, Vol. 94 (1975) 373–405.

E.A. ALKEMA, De Europese Conventie voor de rechten van de mens en de Nederlandse rechtsorde, Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, Vol. 73 (1976) 85–206.

H. GOLSONG, L'effet direct, ainsi que le rang en droit interne, des normes de la Convention européenne des droits de l'homme et des décisions prises par les organes institués par celle-ci, in: Les recours des individus devant les instances nationales en cas de violation du droit européen, Colloque organisé par l'Institut des études européennes, Université Libre de Bruxelles, 1975 (1978) 59–83.

J. VELU, Les voies de droit ouvertes aux individus devant les instances nationales en cas de violation de la Convention européenne des droits de l'homme, in: Les recours des individus devant les instances nationales, Colloque organisé par l'Institut des études européennes, Université Libre de Bruxelles, 1975 (1978) 187–243.

A. DRZEMCZEWSKI, The Authority of the Findings of the Organs of the European Human Rights Convention in Domestic Courts, Legal Issues of European Integration, Vol. 1 (1979) 1–30.

V. EVANS, On the Practice of European Countries where Direct Effect is Given to the European Convention on Human Rights in Internal Law, Council of Europe, Directorate of Human Rights, Proceedings of the Colloque about the European Convention on Human Rights in Relation to other International Instruments for the Protection of Human Rights, Athens, 1978 (1979) 109–198.

H. WALDOCK, Die Wirksamkeit des Systems der Europäischen Menschenrechtskonvention, Europäische Grundrechte Zeitschrift, Vol. 6 (1979) 599–603.

H. MOSLER, Problems of Interpretation in the Case Law of the European Court of Human Rights, in: Essays on the Development of the Legal Order, in Memory of H.F. van Panhuys (1980) 149–167.

H. WALDOCK, The Effectiveness of the System set up by the European Convention on Human Rights, Human Rights Law Journal, Vol. 1 (1980) 1–12.

H. MOSLER, Der Europäische Gerichtshof für Menschenrechte nach zwanzig Jahren, in: Recht als Prozeß und Gefüge, Festschrift für Hans Huber (1981) 595–605.

U. SCHEUNER, Die Fortbildung der Grundrechte in Internationalen Konventionen durch die Rechtsprechung, Zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in: Staatsrecht – Völkerrecht – Europarecht, Festschrift für Hans-Jürgen Schlochauer (1981) 899–926.

J. VELU, Les effets directs des instances internationales en matière de droits de l'homme (1981).

A. DRZEMCZEWSKI, The European Human Rights Convention: Articles 28 and 54, Topical Law, Vol. 4 (1982) 71–78.

W.J. GANSHOF VAN DER MEERSCH, La garantie des droits de l'homme et la Cour européenne de Strasbourg, Journal des Tribunaux, Vol. 101 (1982) 102–115.

T.A. O'DONNELL, The Margin of Appreciation Doctrine, Standards in the Jurisprudence of the European Court of Human Rights, Human Rights Quarterly, Vol. 4 (1982) 474–507.

H.A. STÖCKER, Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik, Neue Juristische Wochenschrift, Vol. 35 (1982) 1905–1909.

W.J. GANSHOF VAN DER MEERSCH, Le respect des droits fondamentaux de l'homme, condition exigée du droit des Etats européens, Revue de droit international et de droit comparé, Vol. 60 (1983) 9–30.

W.J. GANSHOF VAN DER MEERSCH, Réflexions sur les restrictions à l'exercice des droits de l'homme dans la jurisprudence de la Cour européenne de Strasbourg, in: Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler (1983) 263–279.

P. MAHONEY, Developments in the Procedure of the European Court of Human Rights: the Revised Rules of Court, Yearbook of European Law, Vol. 3 (1983) 127–167.

F. RIGAUX, L'interprétation judiciaire d'une norme empruntée à un autre ordre juridique, in: Liber Amicorum Frédéric Dumon, Vol. 2 (1983) 1203 et seq.

V. BERGER, Jurisprudence de la Cour européenne des droits de l'homme (1984).

A. DRZEMCZEWSKI, L'impact de la Convention européenne des droits de l'homme dans les pays de Common Law (1984).

K.W. WEIDMANN, Der Europäische Gerichtshof für Menschenrechte auf dem Weg zu einem europäischen Verfassungsgerichtshof (1985).

W.J. GANSHOF VAN DER MEERSCH

EUROPEAN RECOVERY PROGRAM

1. Concept

The European Recovery Program, better known as the Marshall Plan, was the response of the United States Government to the economic

deterioration and chaos in Europe after World War II. This comprehensive → foreign aid agreement was launched as a simple proposal by the United States Secretary of State George C. Marshall at a commencement address at Harvard University on June 5, 1947 (DeptStateBull. (1947) p. 1159), largely reflecting the ideas of George Kennan. The → economic and technical aid provided to Western Europe by the four-year emergency plan exceeded $13 000 million (1948 to 1952). Outright grants accounted for most of the aid, the rest being in loans (→ Loans, International; → State Debts). Only the Federal Republic of Germany was required pursuant to the → London Agreement on German External Debts (1953) to repay $1000 million; her repayments were completed in 1966. Aid was also offered to the Soviet Union and to the Eastern European States, but it was turned down in the wake of the cold war.

2. Historical Background

The Marshall Plan had modest precedents in the aid programmes developed by the United States after World War I, which included cancellation of → foreign debts and the granting of new loans (→ Dawes Plan; → Young Plan). After World War II the economic and political situation in Europe was far worse. The physical destruction of industries was enormous, but not as serious as the general economic dislocation. The balance of payments deficit of European countries with the United States amounted to thousands of millions of dollars. Unemployment was rampant and tariffs were increasing. The urgent goal was to restore confidence and revive intra-European trade, but it was apparent that aid to individual countries could not bring lasting recovery unless administered so as to coordinate the reconstruction of capital equipment.

Reacting to Marshall's speech, the Foreign Ministers of France (Bidault), the Soviet Union (Molotov) and the United Kingdom (Bevin) met in Paris from June 27 to July 2, 1947. The Soviet Union and other Eastern European States declined to participate in any coordinated effort. Thus at the Paris Economic Conference that immediately followed (July 12 to September 22, 1947), only 16 West European States participated: Austria, Belgium, Denmark, France, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey and the United Kingdom. Spain was not invited because of her government. Although the Federal Republic of Germany did not then exist, the British and French, two of the Occupying Powers, were represented at the Conference (→ Germany, Legal Status after World War II; → Germany, Occupation after World War II); at first reluctant to contemplate a resurgence of German industrial might, they soon realized the dangers of an economic vacuum in Germany and gradually abandoned the wartime plan to dismantle German industry and the policy of taking → reparations in kind.

The Paris Conference set up an interim Committee of European Economic Cooperation (CEEC; → Regional Cooperation and Organization: Western Europe). Charged with developing a recovery programme, the CEEC presented a report to the United States Government on September 22, 1947 outlining four main lines of action: a strong production effort designed to restore agricultural and industrial output to prewar levels; the creation and maintenance of internal financial stability; the establishment of a continuing organization to promote production and trade; and an attempt to solve the dollar deficit through expansion of exports. While the work of the CEEC was in progress, parallel studies were unfolding in the United States; it was estimated that the programme would require between $12 500 and $17 200 million in grants and loans from the United States Treasury, and roughly $5800 million from the → International Bank for Reconstruction and Development and other sources. However, Congressional approval of the necessary appropriations was uncertain; it was clear that Congress would approve aid only as the "spark which can fire the engine". Interim aid was also necessary to help Europe over the winter of 1947, and a special session of Congress approved a grant of $522 million to France, Italy and Austria (Foreign Aid Act of 1947, Public Law 389, and Supplemental Appropriations Act, Public Law 393, 80th Congress, 1st session) and subsequently a further $55 million (Public Law 470, 80th Congress, 2nd session).

3. *Execution of the Plan*

On April 3, 1948 Congress enacted the Economic Cooperation Act (Public Law 472, 80th Congress, 2nd session; AJIL, Vol. 43, Supp. (1949) p. 64) as Title I of the Foreign Assistance Act of 1948.

The Economic Cooperation Administration (ECA) with headquarters in Washington was established to administer the Plan (Section 104). In Europe the CEEC had met on March 15, 1948 to plan a permanent Organisation for European Economic Co-operation (OEEC) (see → Organisation for Economic Co-operation and Development). By May the OEEC was exercising responsibility for recommending the division of aid. Thus the Europeans cooperated amongst themselves instead of sending individual representatives to Washington to handle their aid → negotiations bilaterally, as they had done during the war.

The conditions for aid were clearly laid down in Section 115 of the Economic Cooperation Act, which required participating countries to assume multilateral obligations "to accomplish a joint recovery program based upon self-help and mutual cooperation". Moreover, each participating country had to conclude a bilateral agreement with the United States, making appropriate provision *inter alia*:

- to promote industrial and agricultural production, in particular of coal, steel, transportation facilities and food;
- to stabilize its currency and balance the budget;
- to reduce trade barriers;
- to facilitate the transfer of strategic goods to the United States;
- to place in a special account a deposit, to be used for expenditures consistent with the purposes of the Act;
- to establish schedules of availabilities of resources required by the United States as a result of deficiencies, and to guarantee the right of access to American citizens and enterprises (→ Foreign Investment); and
- to submit to the → International Court of Justice or to → arbitration any disputes espoused by the United States Government involving compensation of a United States national for governmental measures affecting his property rights, including → concessions (→ Aliens, Property; → Diplomatic Protection; → Expropriation and Nationalization).

Such bilateral → treaties were concluded by the end of July 1948 with all the participating States and with the western zones of occupation in Germany.

Section 112 of the Act was designed to minimize the impact of procurement upon the domestic American economy. Section 111 further stipulated that at least half the commodities procured within the United States be transported on United States vessels.

The first Marshall Plan shipments sailed in June 1948. Between 1948 and 1952 about $3200 million were allocated to the United Kingdom, $2700 million to France, $1500 million to Italy, $1400 million to the western occupation zones of Germany and to the incipient Federal Republic of Germany, $1100 million to the Netherlands, $700 million to Greece, $680 million to → Austria, $560 million to Belgium-Luxembourg, $270 million to Denmark, $250 million to Norway, $220 million to Turkey, $150 million to Ireland, $110 million to Sweden and $220 million to other countries. Over 70 per cent of the aid was granted in the first two years of the Program. Commodities were procured 69.7 per cent from the United States, 11.8 per cent from Canada, 7.7 per cent from Latin America, 4.6 per cent from participating countries and 6.2 per cent from other countries.

Procurements were transacted on the basis of "Procurement Authorizations" issued by the ECA to participating States, which in turn issued "Sub-Authorizations" to their importers, who negotiated, for example, with American export firms through accredited American banks. Financial technicians in the ECA and OEEC also conceived a new intra-European payments system, the European Payments Union (EPU), established on July 7, 1950 as a clearing home for international trade.

Aid was received by 15 of the original 16 OEEC members (the exception being Switzerland), by the western zones of Germany and the Federal Republic of Germany (admitted as mem-

ber of OEEC on October 31, 1949) including → Berlin, and by → Trieste (admitted as member of OEEC on October 14, 1949). After Yugoslavia broke with the other Communist-bloc countries, she applied to Washington for Marshall Plan aid and eventually received $109 million from the ECA. Most of the aid provided was in the form of grants. Only about $1,300 million were genuine loans, negotiated on a government-to-government basis.

4. Evaluation

The Economic Cooperation Act was set up to promote "economic cooperation in Europe which is essential for lasting peace and prosperity" (Sec. 112(a)). In 1949 Section 112(a) of the Act was strengthened by the addition of the sentence "It is further declared to be the policy of the United States to encourage the unification of Europe". Thus, → European integration owes part of its impetus to the Marshall Plan, which engendered the OEEC, the EPU, the Steering Board for Trade, the European Productivity Agency and other joint undertakings. Of particular importance was the gradual integration of Western Germany into the Western European system on a basis of cooperation and full equality. Proposals for greater integration in the military sphere also emerged during the Marshall Plan period (→ European Defence Community; → Western European Union; → North Atlantic Treaty Organization).

By mid-1947 any expectations of → Great Power collaboration in post-war Europe had been dashed (Yalta Conference (1945); → Potsdam Agreements on Germany (1945)). As a reaction to the Soviet Union's policies in Eastern Europe the United States developed the policy of "containment", otherwise known as the Truman doctrine. The Powers moved from cooperation to confrontation.

There had been at the outset some hope on the American side that a comprehensive programme of assistance to all European States might prevent the consolidation of the division of Europe and that Eastern European participation in the European Recovery Program would allow these countries to abandon near-exclusive Soviet orientation of their economies. There had also been discussions about using → United Nations machinery to administer the Marshall Plan. The Economic Commission for Europe (ECE), established by the → United Nations Economic and Social Council in May 1947, would have seemed a logical vehicle for developing European planning efforts (→ Regional Commissions of the United Nations). Yet Foreign Ministers Bevin and Bidault preferred to circumvent ECE because they considered its proceedings were likely to be delayed by Soviet obstruction. In any case, as early as July 11, 1947, Molotov proposed to organize a rival recovery programme for Eastern Europe, which eventually led to the founding of the → Council for Mutual Economic Assistance (Comecon) on January 25, 1949.

Although → military aid was initially not conceived as part of the Marshall Plan, which stipulated that none of its funds were to be used by a European government for military purposes, after the Korean war broke out in 1950 there was a change in emphasis (→ Korea). Gradually the United States started giving military aid in the form of → war materials. A transition from mere economic cooperation to → collective security took place. Thus, when the Mutual Security Act was enacted in October 1951 (Public Law 165, 82nd Congress, 1st session; AJIL, Vol. 46, Supp. (1952) p. 14), the new legislation abolished the ECA and established in its place the Mutual Security Agency, which was to coordinate all foreign aid programmes – military, economic and technical. Moreover, restrictions upon East-West trade were imposed with respect to items of specific strategic value, especially through the enactment of the "Battle Act" in October 1951 (Mutual Defence Assistance Control Act of 1951, Public Law 213, 82nd Congress, 1st session), which provided for the termination of aid in the event of violations (→ Embargo; → Sanctions).

The Marshall Plan is deservedly seen as one of the milestones of post-World-War-II statesmanship. A cure rather than a mere palliative, it saved Western Europe from economic disaster, restored its dynamism and contributed to its economic and political integration. It has sometimes been contended that the Plan divided Europe, but this division was already the result of the war. Finally, from the American perspective, the Plan demonstrated that the United States had aban-

doned → isolationism in favour of a new global role in peacetime.

United States Senate, A Decade of American Foreign Policy, Basic Documents, 1941–49 (1950) 1268–1327.

J. JONES, The Fifteen Weeks (February 21–June 5, 1947) (1955).

H.B. PRICE, The Marshall Plan and its Meaning (1955).

W.L. CLAYTON, Gatt, the Marshall Plan and OECD, Political Science Quarterly, Vol. 78 (1963) 493–503.

E. VAN DER BEUGEL, From Marshall Aid to Atlantic Partnership (1966).

G. KENNAN, Memoirs, Vol. 1 (1967) 325–353.

H.C. MAYER, German Recovery and the Marshall Plan 1948–1952 (1969).

J. GIMBEL, The Origins of the Marshall Plan (1976).

M. KNAPP, Reconstruction and West-Integration: The Impact of the Marshall Plan on Germany, Zeitschrift für die gesamte Staatswissenschaft, Vol. 137 (1981) 415–433.

W. CROMWELL, The Marshall Plan, Britain and the Cold War, Review of International Studies, Vol. 8 (1982) 233–249.

ALFRED-MAURICE DE ZAYAS

EUROPEAN SOCIAL CHARTER

1. *Historical Background*

International standards of social legislation were first laid down in the international labour conventions dating back to 1905 (→ International Labour Organisation (ILO)). However, it was not until the adoption of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)) that the international promotion of social standards found expression in the proclamation of corresponding → human rights. In Arts. 22 to 27 the Universal Declaration lists a number of fundamental economic, social and cultural rights in addition to the more traditional civil and political rights, enumerated in Arts. 3 to 21. The division between these two categories of rights remained characteristic for the subsequent elaboration of international human rights instruments on both the regional and global levels (→ Human Rights Covenants; → Human Rights, Activities of Universal Organizations).

In 1950 the members of the → Council of Europe took the "first steps for the collective enforcement" of certain civil and political rights by the adoption of the → European Convention on Human Rights (ECHR). The European Social Charter, whose drafting started immediately after the entry into force of the European Convention in September 1953, is meant to be its counterpart in the area of the social and economic rights. The preparatory work was influenced by the Council of Europe's Parliamentary Assembly and the ILO, culminating in a tripartite conference convened in Strasbourg in 1958. The Charter was signed in Turin on October 18, 1961 and entered into force on February 26, 1965 upon five ratifications (the United Kingdom, Norway, Sweden, Ireland and the Federal Republic of Germany). It has since been ratified by Denmark, Italy, Cyprus, Austria, France, Iceland, the Netherlands and Spain.

2. *Substantive Provisions*

The substantive provisions of the Social Charter are essentially contained in Parts I and II, which each set out the same catalogue of 19 rights though in a different form. Part I is a declaration of policy aims binding on all contracting parties, who undertake to pursue by all appropriate means the attainment of conditions in which these rights may be effectively realized (see Art. 20(1)(a)). Part II contains detailed articles, corresponding each to one of the 19 rights, most of which are subdivided into several separate provisions. There is a total of 72 such provisions which become binding only on those States which accept them according to Part III, subject to a minimum which is both qualitative (Art. 20(1)(b): ratification of five out of the seven most important articles) and quantitative (Art. 20(1)(c): ratification of not less than 10 articles or 45 provisions). Only Italy and Spain have accepted all provisions. Provisions for subsequent ratification of further provisions (Art. 20(3)) were used by Denmark and Sweden in 1979. The minimum ratification requirements need not be observed in relation to dependent territories (Art. 34). Art. 20(5), which provides for an adequate system of labour inspection, is automatically binding on all contracting parties.

The Charter contains rights of diverse nature:

(a) Rights concerning work and labour relations in general (→ Labour Law, International Aspects): the right to work to be realized, *inter alia*, by a policy of full employment and free choice of occupation (Art. 1); just conditions of work including reasonable working hours, minimum holidays, etc. (Art. 2); safe and healthy working conditions (Art. 3); fair remuneration including equal pay for men and women (Art. 4; → Sex Discrimination); vocational guidance and training (Arts. 9 and 10).

(b) Protection of special groups of persons: children and young persons, with a minimum employment age of 15 (Art. 7; → Children, International Protection); women (Art. 8); disabled persons (Art. 15); and → migrant workers (Arts. 18 and 19).

(c) Trade union rights: the right to organize (Art. 5) and the right to bargain collectively (Art. 6), encompassing "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike . . ." (Art. 6(4)).

(d) Social security rights (Arts. 11 to 14; see also → Social Security, International Aspects).

(e) Protection of social institutions: the family (Art. 16); mother and child (Art. 17).

All these provisions are formulated in terms of subjective rights, but since they cannot be enforced by individual claims (see below), they are in fact no more than principles which have to be observed in legislation and practices dealing with the persons concerned. Their scope (employees, self-employed persons, civil servants, etc.) varies and is in part a source of controversy. Guidance for interpretation can be obtained from the → preamble (inclusion of the rural population, the general principle of non-discrimination) and the Annex to the Charter (limitation to nationals of the contracting parties, interpretative declarations concerning several articles). Many provisions nevertheless remain rather vague.

Part V of the Charter contains two restrictive clauses of general application to all substantive provisions: (a) an exception clause corresponding essentially to that contained in Arts. 8 to 11 of the ECHR (no restrictions unless they are prescribed by law and necessary in a democratic society for certain specified purposes (Art. 31)); and (b) a clause corresponding to Art. 15 of the ECHR authorizing temporary derogations in time of → war or other public emergency (Art. 30). No special reservations clause is contained in the Charter (→ Treaties, Reservations). The system of partial ratification seems to be incompatible with a possibility of making reservations. In practice, reservations have been permitted where the minimum requirements as to the acceptance of provisions are already otherwise fulfilled. The German declaration concerning Art. 6(4), which excludes the right to strike of civil servants, must be construed as a reservation (see Miehsler).

3. Domestic Implementation

The Charter contains express provisions regarding its implementation on the domestic level. From Art. 33 it may be concluded that the normal form of implementation is by legislation, while certain specified provisions may also be implemented by collective agreements, which must cover the great majority of workers. Art. 32 further provides that more favourable provisions of domestic law or of treaties remain unaffected. However, the contracting parties clearly did not intend the Charter itself to be directly applied by domestic authorities or courts (→ Self-Executing Treaty Provisions). On the contrary, it has been argued (e.g. by Wengler) that they expressly wished to prevent a self-executing effect by including a clause in the Annex to Part III according to which "the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided in Part IV thereof". An exception might be made for the rights under Arts. 6(4) and 18(4) which the States expressly undertake to "recognize" (Zuleeg). Other authors (e.g. Bleckmann, Kahn-Freund, Wiebringhaus) would not discount that the Charter may in principle be given direct effect on the domestic level by virtue of a State's constitutional law. However, even if this were the case, many provisions would not lend themselves to direct application because of their vagueness or dynamic character. All this is theoretical, as no party has formally recognized the Charter as part of its domestic legal system. The Austrian Parliament has expressly excluded any self-executing effect, reserving legislation by the application of the procedure under Art. 50(2) of the Constitu-

tion. However, the courts of several States (including the Federal Republic of Germany and the Netherlands) have relied on provisions of the Charter for the purpose of interpreting domestic law, e.g. on the question of lock-out (→ International Law in Municipal Law: Treaties).

4. Supervision

The international supervisory mechanism of Part IV of the Charter is essentially based on the model of the ILO system, the member States being required to submit reports, in relation to both ratified and non-ratified texts, which are examined first by a group of experts and then by a committee and the plenary meeting of a body representing the members of the organization. The characteristic ILO tripartite structure (with representatives of workers and employers in addition to governments) is, however, lacking in the case of the Charter. On the other hand, the Charter shows an additional parliamentary element, with an increased publicity effect. But unlike the supervisory system of the ECHR, with its → European Commission of Human Rights and → European Court of Human Rights, the Charter does not provide for binding decisions by a judicial or quasi-judicial body in individual cases nor are private individuals granted a right of petition.

There are two kinds of reports: regular biennial reports on the application of the provisions accepted upon ratification (Art. 21) and reports on provisions which were not accepted, to be submitted at appropriate intervals as requested by the Council of Europe's Committee of Ministers (Art. 22). Both kinds of reports are to be drawn up by the governments concerned according to detailed questionnaires. They must be communicated to certain national employers' organizations and trade unions, whose comments the governments must likewise transmit (Art. 23). Thus the social partners are given some, though limited, influence.

The reports are examined in turn by four organs:

(a) A committee of seven independent experts on social questions (Art. 25), whose "conclusions" form the basis of the work of the other three organs. An ILO representative takes part in a consultative capacity on this level (Art. 26).

(b) A committee of government experts from each contracting party, with certain international employers' and trade union organizations and → non-governmental organizations participating in a consultative capacity (Art. 27). This body reports directly to the Committee of Ministers, to which it also transmits the independent experts' conclusions.

(c) The Parliamentary Assembly of the Council of Europe, which communicates its views on the independent experts' conclusions to the Committee of Ministers (Art. 28). In practice it also has before it the government experts' report.

(d) The supervisory cycle is concluded by a resolution of the Committee of Ministers, which may be a two-thirds majority address recommendations to a particular contracting party (Art. 29).

5. Evaluation

The supervisory organs have developed a rich "case law" on the interpretation of the Charter provisions. Divergencies of opinion have inevitably arisen on many points; the independent experts and the Parliamentary Assembly have often criticized legislation or practices which the government experts did not find objectionable. The Committee of Ministers has never addressed a formal recommendation to a particular contracting State. In recent resolutions it has, however, drawn the attention of the governments concerned to certain specified "cases . . . in regard to which steps may have to be taken with a view to bringing legislation, regulations and practice more fully into line with the obligations arising from the Charter". Despite this soft approach, a number of results have been brought about by the independent experts' conclusions. Legislation has in many cases been enacted under this influence. In view of considerable overlapping with other international instruments (e.g. ILO conventions, social provisions of the law of the → European Communities) it cannot always be determined exactly to what degree the Charter has contributed to such developments. The overall assessment is certainly positive. This is also shown by the adherence of further States and by the extension of existing members' obligations, which is promoted by the reports on non-accepted provisions (Art.

22). The Charter has already been supplemented by a number of further important Council of Europe Conventions in the social field (e.g. the European Code of Social Security (1964)). Since 1978 there has been discussion of plans to strengthen the Charter system by supplementing the substantive and revising the procedural provisions. The protection of social rights could be further strengthened by incorporating at least some of them into the ECHR system as is proposed in a draft protocol to that Convention now under elaboration.

European Social Charter, UNTS, Vol. 529 (1965) 89–139; ETS, No. 35.

Council of Europe, Bibliography of the European Social Charter (2nd ed. 1982).

Council of Europe, Case Law on the European Social Charter (1982).

G. BARILE, La Carta Soziale Europea e il diritto internazionale, RivDirInt, Vol. 44 (1961) 624–644.

A. BLECKMANN, Interprétation et application en droit interne de la Charte sociale européenne, notamment du droit de grève, Cahiers de droit européen (1967) 388–412.

H.G. ISELE, Die Europäische Sozialcharta, Auf dem Wege von den allgemeinen Menschenrechten zu den sozialen Menschenrechten (1967).

W. WENGLER, Die Unanwendbarkeit der Europäischen Sozialcharta im Staat (1969).

F. HORNER, Die sozialen Grundrechte (1974).

M. ZULEEG, Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der Europäischen Sozialcharta, ZaöRV, Vol. 35 (1975) 341–363.

D. KAHN-FREUND, The European Social Charter, in: F.G. Jacobs (ed.), European Law and the Individual (1976) 181–211.

G. AGNELLI et al., Die Europäische Sozialcharta. Weg zu einer europäischen Sozialordnung? (1978).

La Charte sociale européenne, Dix années d'application, Colloque organisé les 14 et 15 octobre 1976, Bruxelles (1978).

H. WIEBRINGHAUS, Die Sozialcharta des Europarats, Eine Bilanz, in: Liber Amicorum B.C.H. Aubin (1979) 265–303.

H. MIEHSLER, The European Social Charter and the Civil Servants' Right to Strike, The German Case, in: Ius humanitatis, Festschrift für Alfred Verdross (1980) 474–574.

L. WASESCHA, Le système de contrôle de l'application de la Charte sociale européenne (1980).

H. WIEBRINGHAUS, La Charte sociale européenne vingt ans après la conclusion du traité, AFDI, Vol. 28 (1982) 934–947.

D.J. HARRIS, The European Social Charter (1984).

WOLFGANG STRASSER

EXILE *see* Denationalization and Forced Exile

EXPROPRIATION AND NATIONALIZATION

1. Historical Developments

This article is concerned with the protection of alien property in times of peace (see also → Aliens, Property); the rules applicable during war are described in the articles on → enemy property, → requisition and → sequestration.

The norms of international law governing expropriation and nationalization during peace have evolved historically in correspondence with general developments regarding the status of → aliens. For a long time, aliens enjoyed no or very few rights and their treatment was thus subject to changing views on the desirability of the admission of aliens (see articles on the → History of the Law of Nations). In modern times, the first rights granted to aliens with respect to their property are those found in → concessions and certain treaties between trading partners. The domestic laws of some nations accorded considerable protection to the alien; Art. 41 of the English Magna Carta (1215) stands as an early example. Gradually, it became generally recognized that property held by aliens was not subject to the unhampered discretion of the host State. In the middle of the 18th century, text writers assumed that a State which had admitted a foreigner to its territory had the duty to protect him and his property against any injury and to provide for his security. However, it was not entirely clear at that time whether foreigners were entitled to the same protection as the State's own subjects, in the absence of a treaty. Vattel and others assumed that, within the law of nations, the property of a citizen had to be regarded as property of his nation and from this perspective they argued for full protection of alien property. This point of view largely influenced subsequent State practice. In general, the protection of property was also strengthened by declarations of → human rights in the second half of the 18th century (American Declaration of Independence, 1776; French Déclaration des droits de l'homme et du citoyen, 1793).

As early as 1818, it was stated by the Secretary of State of the United States that no principle of

international law was more firmly established than the requirement to protect alien property (J.B. Moore, Digest of International Law, Vol. 4 (1906) p. 5). This development was strengthened in the 19th century by a number of treaties which incorporated general rules according aliens the same rights over their property as were recognized for nationals. Under the legal conditions then existing in the domestic legal orders, this standard of national treatment provided for a high level of protection for alien property. The strength of the views held at the beginning of the 20th century in this context is illustrated by the rules upon which the States participating in the → Hague Peace Conferences of 1899 and 1907 agreed. Art. 46, para. 2 of the Regulations annexed to the 1899 Hague Convention II and the 1907 Hague Convention IV on Land Warfare states categorically: "Private property cannot be confiscated." Thus, before 1917 it was generally accepted that alien property was protected by international law, and that the standard of protection was furnished by the prevailing rules of domestic law.

After the Revolution in Russia in 1917, the Soviet Union expropriated nationals and foreigners alike, and invoked the principle of national treatment in justification for her refusal to compensate aliens. Nevertheless, the Soviet Union later on concluded treaties with some States which allowed for certain compensation for expropriated property; the term "nationalization" was introduced, placing emphasis on the benefits of the State's action for the community instead of focusing on the effects for the owner whose property was taken. In the Lena Goldfields Arbitration (1930; see Cornell Law Quarterly, Vol. 36 (1950) p. 42), a Soviet expropriation was adjudicated and the Soviet view of international law was rejected; the Award was instead based upon the notion of → unjust enrichment as an expression of general principles of law.

Between 1918 and 1939, several judicial pronouncements declared that foreign property was protected by rules of customary law; the standard of national treatment had thus developed into the concept of a → minimum standard on the level of international law. The decision on the → Norwegian Shipowners' Claims, the Goldenberg Case (RIAA, Vol. 2, p. 901), and the judgment of the → Permanent Court of International Justice in the cases concerning → German Interests in Polish Upper Silesia are particularly noteworthy. In the → Hungarian-Romanian Land Reform Dispute Romania took a position inconsistent with these developments, but she was later willing to pay compensation based upon a settlement out of court. When Mexico expropriated United States oil interests in 1938, the then United States Secretary of State Hull was prompted to set forth the position of the United States, declaring that "prompt, adequate and effective compensation" was required in case of expropriation of alien property. Mexico disagreed, and the claims were settled out of court, both parties insisting upon their different legal positions.

Since 1945, State practice has overwhelmingly confirmed the rule that alien property is protected by rules of international law. In particular, the modalities of expropriations carried out by a large number of → developing States reflect the continuing relevance of international norms in this area. Various → lump sum agreements were concluded in settlements of issues related to the consequences of World War II, but they have also been concluded outside this particular context. In more than 200 treaties on → foreign investment, special protection has been granted in the light of the prominent role of private foreign capital in developing States; so far, most of these treaties have been concluded between European States and States of Africa and Asia.

The existence of rules of international law regarding expropriation of aliens was also reflected in resolutions passed in fora of the → United Nations before 1973. The "Right to Exploit Freely Natural Wealth and Resources" (GA Res. 626(VII) of December 21, 1952) was initially not understood as being in opposition to existing rules of international law. This became most clearly apparent in UN General Assembly Resolution 1803(XVII) of December 14, 1962 on Permanent Sovereignty over natural Resources, which still reflected a consensus on these rules (→ Natural Resources, Sovereignty over). It was stated there, *inter alia*, that an alien owner "shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law" (Section 4, sentence 2).

So far, Resolution 1803 stands as the last successful effort to reach a broad consensus on issues

regarding expropriation within universal organizations. Amidst the efforts of the developing countries to bring about a new → international economic order, organized mainly after 1970 in fora of the United Nations, attacks upon the traditional rules of international law regarding expropriation of alien property have been prominent. In 1973, a resolution on Permanent Sovereignty over Natural Resources for the first time omitted every reference to international law (UN GA Res. 3171(XXVIII). When the → Charter of Economic Rights and Duties of States was under preparation, the issue of expropriation became one of the main themes dividing the political groups; in spite of intense → negotiations, no → consensus was reached in this area. Finally, Art. 2(2) of the Charter was adopted by a vote of 120 votes in favour, 6 votes against and 10 abstentions. According to this article, "appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent". No reference to rules of international law was made.

Since the passing of the Charter, little progress has been achieved so far in global negotiations pertaining to matters concerning the protection of alien property. In particular, the discussions which took place when attempts were made to draft a Code of Conduct for Transnational Corporations (→ Transnational Enterprises; → Codes of Conduct) largely reflected the divergence of opinions which existed when the Charter of Economic Rights and Duties was adopted.

Capital-exporting countries have recently reiterated their position that international law requires "prompt, adequate, and effective compensation" (see the Statement of the President of the United States on International Investment Policy, DeptStateBull, Vol. 83, No. 2080 (1983) p. 38, at p. 40; and the statements made by the Federal Republic of Germany, France, and the United Kingdom in response to a reservation made by Portugal with respect to Art. 1 of the First Protocol to the → European Convention on Human Rights (Bundesgesetzblatt 1979 II, p. 1044 and Bundesgesetzblatt 1981 II, p. 1021)).

2. *Current Legal Situation*

Clearly, the opinions expressed by industrialized States and developing States with respect to the rules of international law are widely divergent, and the conduct of States in actual practice coincides with none of these expressed views. The complexity of the current legal situation is increased by the fact that since 1974 developing States have concluded a large number of bilateral treaties in which foreign investment is protected in a comprehensive manner, and by the fact that a considerable number of → investment codes provide a similarly high degree of protection on the level of domestic law. Moreover, a conspicuous development has occurred inasmuch as all three existing regional instruments on the protection of → human rights include provisions on the protection of private property.

In consequence of this situation, it is today necessary to consider separately the rules of treaty law as reflected in bilateral treaties on foreign investment, the norms of customary law, and the protection of property under human rights instruments. The main issue on all these different levels has been the amount of compensation due to the owner of expropriated property. However, the admissibility of expropriation, the definition of property for purposes of its protection by international law, and the definition of those measures which are to be treated as expropriations also require attention; in fact, those issues may turn out to be of increasing importance alongside the more fundamental problems raised in past years.

(*a*) *Investment treaties*

Modern investment treaties follow no uniform pattern, but a remarkable degree of homogeneity exists among them with respect to regulation of expropriation. As to the rights protected under these treaties, the relevant clauses typically define the term "investment" as "every kind of asset". Often, this definition is in turn illustrated by five specific categories of rights protected by the treaty: movable and immovable property, shares of stock and other interest of a company or interests in the property thereof, claims to money or to any performance under a contract having a financial value, intellectual and industrial property rights, and, finally, business concessions conferred by law or under contract.

Concerning the measures to be treated as ex-

propriations, aside from the formal taking of property, the wording in typical treaties may not differ substantially in their practical operation, but no single phrase can be characterized as generally accepted. English treaties often speak of "measures having effect equivalent to nationalization and expropriation . . ." whereas French agreements refer to ". . . toutes autres mesures dont l'effet est de déposséder, directement ou indirectement, les nationaux et sociétés de l'autre partie"; Swiss treaty practice uses a similar phrase. Treaties concluded by Germany typically speak of "other measures the effects of which would be tantamount to expropriation or nationalization . . ."; by way of a protocol, this is mostly interpreted as including situations in which the "economic substance is severely impaired" as a result of State intervention. On the whole, it remains to be seen whether these formulae are clear enough to serve their purpose to guide both host State and foreign investor. Remarkably, insurance contracts concluded by the investors, mostly with agencies of their home countries, include more specific language.

All investment treaties stipulate in some form that expropriations may only be carried out for a public purpose. As to the obligation of the host State to compensate the alien owner in case of an expropriation, all treaties contain regulations. Typical of recent treaty practice is the clause contained in agreements of the United Kingdom:

> "Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable."

Swiss agreements have recently included language stating that compensation must be "adéquate, conformément au droit international".

(*b*) *Customary law*

As to the admissibility of an expropriation, it has never been questioned that a State has in principle the right to expropriate alien property for the public good. Expropriatory measures must be designed to transfer the property to the State, or for the public good to an owner capable of using the property in a more beneficial manner. It would not be appropriate to use the power of expropriation for the sole purpose of increasing the State's resources. Also, the principle of non-discrimination must be observed (→ Discrimination against Individuals and Groups).

Beyond these rules, the current state of customary law regarding the expropriation of property held by aliens has been the subject of numerous arguments and debates, but no single statement of the law has been universally recognized as valid and acceptable. The uncertainty resulting from this situation stems both from the lack of a consensus on the → sources of international law and the precise rules by which customary law has to be determined in the situation which currently exists with respect to the *opinio juris* and State practice in matters of expropriation of alien property.

(*i*) *The definition of an expropriation*

Concerning the definition of an expropriation it is beyond doubt that, in addition to formal takings of property, certain categories of far-reaching interventions of the State into alien property will also be qualified as expropriations and thus lead to the duty to compensate. Clear and precise definitions of these categories have not been developed within national legal orders, and the applicable norms of international law have also remained vague. A starting point for the description of these categories may be found in the formulae used in investment treaties (see *supra*). In principle, the right of ownership embraces the right to control, use and manage the property and to dispose of it. Developments in the national legal orders illustrate, however, that no property right exists in an absolute manner and that it has been found necessary to subject ownership rights to certain restrictions in favour of the public benefit. As long as a State takes such measures to restrict alien property rights as are compatible with the developments in property law in the major legal orders permitting private property, it will not be held liable to pay compensation. However, arbitrary deviations from the standard of protection reflected in national rules will have to be qualified as expropriations. It is remarkable that little guidance can be found in State practice to clarify these principles in more detail. The major relevant

decisions of international tribunals are those reached in the → Norwegian Shipowners' Claim Arbitration, the → Chinn Case, the → German Interests in Polish Upper Silesia Case; and the de Sabla Case (Annual Digest, Vol. 7 (1933–1934) p. 241). The → Revere Copper Case was decided by a national tribunal within the framework of an investment insurance programme. No broad principles beyond those indicated above emerge from these judicial and arbitral pronouncements. In the light of certain recent tendencies of States to intervene increasingly in the area of property rights, the elaboration of more precise principles may well be needed; in this respect, the comparison of domestic legal orders may indicate acceptable solutions.

(*ii*) *Amount of compensation due*

In attempting to specify considerations which would be relevant for a court determining the present state of the law, it would appear that certain rules of a general nature can be identified which bear upon the present state of the law. Thus, the rule of customary law is relevant here according to which a norm of customary law changes only if those States which are particularly affected by the rule in question agree to the change; the → International Court of Justice (ICJ) based its decision in the → North Sea Continental Shelf Cases upon this rule. In the light of the consensus which was reflected, for instance, in UN GA Resolution 1803(XVII) on the one hand and the insistence of the major capital-exporting States upon the continued validity of the requirement of prompt, adequate and effective compensation on the other hand, it would be inconsistent with accepted rules of customary law to assert that the developments in the past decade, including the adoption of the Charter of Economic Rights and Duties of States, have led to the disappearance of rules of customary law in the area under consideration. Under Art. 11 of the → United Nations Charter, resolutions passed by the General Assembly have no binding effect. Although this consideration leads to the conclusion that "appropriate compensation" is still the general yardstick of current international law in matters of compensation, it remains necessary to examine in more detail the substantive meaning of this term.

In particular, it should be questioned whether "appropriate compensation" will under all circumstances have to be viewed as coinciding with the requirement of "prompt, adequate and effective payment" as traditionally interpreted by capital-exporting countries. The fact that major industrial States keep insisting that the traditional law has not been modified must be viewed in this context together with the fact that the same States have in a number of cases in recent practice accepted a variety of compensation arrangements which fall below the standard pronounced; lump sum settlements, but also financial *ad hoc* arrangements and agreements including cooperation on future services and sales can be pointed out in this respect. Under these circumstances, it is hardly convincing to argue that the capital-exporting States have always voluntarily waived their rights granted by traditional international law; it is more realistic to assume that the arrangements reached in practice reflect the parameters of an existing consensus. Against this background, the repeated assertion of the legal conviction that the traditional law stands unmodified in principle appears as artificial and illusory as the point of view that international law no longer protects alien property. Reference to the standards of protection incorporated in modern investment treaties cannot, under these circumstances, demonstrate the continuing validity of the traditional law. Treaty arrangements may be considered as reflecting customary law only inasmuch as it can be assumed that the parties intended to express that state of the law which would also be valid in the absence of the treaty.

Still, in the light of the heterogeneity of State practice, further attempts to reach a more systematic view of the current law are needed. To this end, it may be pointed out that the rules on expropriation of alien property developed historically as an expression of the minimum standard and that the domestic norms on the treatment of property have not remained static in most industrialized States as well; the connection between the minimum standard with rules of domestic law thus also points to a certain modification of the traditional rules. It is not surprising to ascertain that recent international State practice on matters of expropriation to a remarkable degree coincides with modern rules of national law in liberal States.

Another possible approach for determining the existing rules of customary law is to rely on the application of → general principles of law. In this context, the operation of the fundamental principle of requiring and protecting → good faith in this area may lead to more specific results in certain cases. It becomes apparent in this perspective, for instance, that an investment requiring high initial capital will have to be treated differently in its early phase from an enterprise with low initial capital which has operated with high profits for a long period; the notion of "legitimate reliance" on the part of the investor thus comes into play.

Finally, a court might be inclined in the context of North-South relations to take into account the implication of the rules on expropriation of alien property for the process of development in general. The Tribunal deciding the Aminoil case in fact did so by pointing out that the continuous flow of required private capital called for an attitude of States towards compensation which "should not be such as to render foreign investment useless, economically" (ILM, Vol. 21 (1982) p. 1033). It remains to be seen whether and to what extent specific requirements of development also operate by way of limiting the amount of compensation; in individual cases this may require an upper limit of compensation consistent with the financial resources of the host country, or in extreme cases the demonstrably negative impact of an investment upon the developmental process of the host country may be taken into account.

In summary, the above considerations indicate that no simple formula exists which encompasses the complex current state of customary law. The concept of net book value of an enterprise has served as a starting point for negotiations, but it cannot be said that State practice has crystallized on the basis of this measure; moreover, it must be recognized that standards of accounting in this area have varied and no precise approach has been universally accepted. Depending upon the facts of each case, competent courts engaged in stating the law are likely to look to a variety of factors when determining whether an amount of compensation is due which falls below the standard of full compensation.

(*iii*) *"Prompt and effective" compensation*

In order to be "effective", compensation must be paid in convertible currency, without limitations on repatriation; in recent practice, this standard has also not always been upheld. As to the meaning of "prompt" payment, the traditional view was that payment should be made before or at the time of the expropriation; again, modern practice does not fully coincide with this view. Today, it may be assumed that a State fulfils its obligations as long as the proper administrative and judicial processes for the fixing of compensation start soon after the taking and thereafter are not unduly delayed; alternatively, negotiation about compensation in good faith or the submission of the case to an arbitral or judicial body will satisfy the current requirements for a legal expropriation. It is worth noting in this context that payment by way of negotiable interest-bearing bonds to be paid in a period of five or even ten years has not been unusual in domestic expropriation proceedings.

(*iv*) *Unlawful expropriations*

As to the remedy for an unlawful expropriation, the Permanent Court of International Justice in the German Interests in Polish Upper Silesia Cases apparently assumed that restitution in kind was appropriate. Recent State practice cannot be said to confirm this point of view; the tendency has rather been that governments paid, or arbitrators awarded, monetary compensation. It is not clear to what extent the amount of compensation will have to reflect a recognized illegality; the question of damages will necessarily have to be considered in such a context.

3. *Protection of Property in Human Rights Instruments*

Rules governing expropriations have been included in human rights instruments. Art. 17(2) of the → Universal Declaration of Human Rights states that no one shall be deprived arbitrarily of his property. When it was attempted to give a more specific meaning to this general concept in the United Nations → Human Rights Covenants, intense attempts to reach a consensus failed due to the attitude of the Socialist States. Thus, the positions of the Western States and of developing countries could only find adequate expression in regional pacts on human rights. Art. 1 of the First Protocol to the → European Convention on Human Rights, Art. 21 of the → American Conven-

tion on Human Rights and Art. 14 of the → African Charter on Human and Peoples' Rights contain provisions protecting private property. In detail, the wording of the respective clauses is not identical. Moreover, the organs entrusted with the interpretation and application of these clauses have not yet had occasion to spell out the precise meaning of the respective provisions, even though in 1982 for the first time the → European Court of Human Rights addressed fundamental issues regarding Art. 1 of the First Protocol in the Case of Sporrong and Lönnroth (Judgment of September 23, 1982, Series A 52). In particular, the competent organs will have to decide to what extent certain forms of property are excluded from the State's power to expropriate, to what extent the member States enjoy a margin of discretion in determining whether an expropriation promotes the public good, and what specific consequences flow from the provisions relevant to the issue of compensation in case of expropriation. Moreover, it remains to be seen whether certain consequences will be drawn in the future in the treatment of expropriated property in the relations of States which recognize that property rights are protected on the level of regional law; thus, it might be questioned whether the strict application of the → act of State doctrine is consistent once the protection of property by human rights norms is recognized.

J. FISCHER WILLIAMS, International Law and the Property of Aliens, BYIL, Vol. 9 (1928) 1–30.

A. FACHIRI, International Law and the Property of Aliens, BYIL, Vol. 10 (1929) 32–55.

G. KAECKENBEECK, La protection internationale des droits acquis, RdC, Vol. 59 (1937 I) 322–419.

J. HERZ, Expropriation of Foreign Property, AJIL, Vol. 35 (1941) 243 et seq.

H. MOSLER, Wirtschaftskonzessionen bei Änderungen der Staatshoheit (1948).

A. ROTH, The Minimum Standard of International Law Applied to Aliens (1949).

R. BINDSCHEDLER, Verstaatlichungsmaßnahmen und Entschädigungspflicht nach Völkerrecht unter besonderer Berücksichtigung der schweizerischen Praxis über den Schutz schweizerischer Vermögenswerte im Ausland (1950).

A. ALBRECHT, The Taxation of Aliens under International Law, BYIL, Vol. 29 (1952) 145–185.

I. SEIDL-HOHENVELDERN, Internationales Konfiskations- und Enteignungsrecht (1952).

B. CHENG, The Rationale of Compensation for Expropriation, Transactions of the Grotius Society, Vol. 44 (1958/59) 267 et seq.

F. MANN, Outlines of a History of Expropriation, Law Quarterly Review, Vol. 75 (1959) 188–219.

B. WORTLEY, Expropriation in Public International Law (1959).

W. BIRKE, Die Konfiskation ausländischen Privatvermögens im Hoheitsbereich des konfiszierenden Staates nach Friedensvölkerrecht (1960).

K. KATZAROV, Théorie de la nationalisation (1960).

F. MANN, State Contracts and State Responsibility, AJIL, Vol. 54 (1960) 572–591.

A. DRUCKER, Compensation Treaties between Communist States, ICLQ, Vol. 10 (1961) 238–254.

S.N.G. ROY, Is the Law of Responsibility of States For Injuries to Aliens a Part of Universal International Law?, AJIL, Vol. 55 (1961) 863–891.

G. WHITE, Nationalisation of Foreign Property (1961).

G. CHRISTIE, What Constitutes a Taking of Property under International Law?, BYIL, Vol. 38 (1962) 307–338.

A. FATOUROS, Government Guarantees to Foreign Investors (1962).

G. FOUILLOUX, La nationalisation et le droit international public (1962).

K. BÖCKSTIEGEL, Die allgemeinen Grundsätze des Völkerrechts über Eigentumsentziehung (1963).

K. DOEHRING, Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht (1963).

I. SEIDL-HOHENVELDERN, Investitionen in Entwicklungsländern und das Völkerrecht, mit einer Bibliographie über Staatseingriffe in ausländisches Privateigentum (1963).

I. FOIGHEL, Nationalization and Compensation (1964).

M. MUGHRABY, Permanent Sovereignty over Oil Resources, A Study of Middle East Oil Concessions and Legal Change (1966).

J. STAATS, Ausländisches Privatvermögen in der internationalen Rechtsprechung, Probleme hoheitlicher Eingriffe (1966).

C. AMERASINGHE, State Responsibility for Injuries to Aliens (1967).

U. AMMANN, Der Schutz ausländischer Privatinvestitionen in Entwicklungsländern (1967).

R. LILLICH, International Claims: Postwar British Practice (1967).

G. SCHWARZENBERGER, Foreign Investments and International Law (1969).

P. WEIL, Problèmes relatifs aux contrats passés entre un Etat et un particulier, RdC, Vol. 128 (1969 III) 98–240.

J. ALENFELD, Die Investitionsförderungsverträge der Bundesrepublik Deutschland (1971).

H. NEUFELD, The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815) (1971).

B. WESTON, International Claims: Postwar French Practice (1971).

Z. KRONFOL, Protection of Foreign Investment, A Study in International Law (1972).

R. LILLICH (ed.), The Valuation of Nationalized Property in International Law, 3 vols. (1972–1975).

I. DELUPIS, Finance and Protection of Investments in Developing Countries (1973).

F. GARCÍA-AMADOR, L. SOHN and R. BAXTER, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974).

R. GEIGER, The Unilateral Change of Economic Development Agreements, ICLQ, Vol. 23 (1974) 73–104.

E. NOVOA MONREAL, Nacionalización y recuperación de recursos naturales ante la ley internacional (1974).

B. COSTANTINO, State Participation in Oil-Concessions: A New Kind of Taking of Foreign Property?, ItalYIL, Vol. 1 (1975) 150–165.

A. EL-KOSHERI, Le régime juridique créé par les accords de participation dans le domaine pétrolier, RdC, Vol. 147 (1975 IV) 219–394.

F. FRANCIONI, Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity, ICLQ, Vol. 24 (1975) 255–283.

R. LILLICH and B. WESTON, International Claims: Their Settlement by Lump Sum Agreements, 2 vols. (1975).

B. WESTON, "Constructive Takings" under International Law, Virginia Journal of International Law, Vol. 16 (1975) 103–174.

I. LITVAK and C. MAULE, Forced Divestment in the Caribbean, International Journal, Vol. 32 (1976–1977) 501–532.

E.-U. PETERSMANN, Die Dritte Welt und das Wirtschaftsvölkerrecht, "Entwicklungsland" als privilegierter Rechtsstatus, ZaöRV, Vol. 36 (1976) 492–550.

G. TESAURO, Nazionalizzazioni e diritto internazionale (1976).

D. GANTZ, The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property, AJIL, Vol. 71 (1977) 474–493.

D.A. LAPRES, Principles of Compensation for Nationalized Property, ICLQ, Vol. 26 (1977) 97–109.

L. ROOD, Compensation for Takeovers in Africa, Journal of International Law and Economics, Vol. 11 (1977) 521–538.

O. SCHACHTER, Sharing the World's Resources (1977).

I. SEIDL-HOHENVELDERN, Internationales Enteignungsrecht, in: Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts, Bewahrung oder Wende?, Festschrift für Gerhard Kegel (1977) 265–284.

K.S. SIK, The Concept of Acquired Rights in International Law, NILR, Vol. 24 (1977) 120–142.

B. WORTLEY, Some Early but Basic Theories of Expropriation, GYIL, Vol. 20 (1977) 236–245.

L. GOLDIE, State Responsibility and the Expropriation of Property, International Lawyer, Vol. 12 (1978) 63–82.

E. JIMÉNEZ DE ARÉCHAGA, State Responsibility for the Nationalization of Foreign Owned Property, New York University Journal of International Law and Politics, Vol. 11 (1978) 179–195.

R. LILLICH, Duties of States Regarding the Civil Rights of Aliens, RdC, Vol. 161 (1978 III) 329–442.

K.M. MEESSEN, Völkerrechtliches Enteignungsrecht im Nord-Süd-Konflikt, in: W. Kewenig (ed.), Völkerrecht und internationale wirtschaftliche Zusammenarbeit (1978) 11–34.

W.D. ROGERS, Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas, AJIL, Vol. 72 (1978) 1–16.

D. VAGTS, Coercion and Foreign Investment Rearrangements, AJIL, Vol. 72 (1978) 17–36.

T. WÄLDE, Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development, Lawyer of the Americas, Vol. 10 (1978) 265–298.

S. ASANTE, Restructuring Transnational Mineral Agreements, AJIL, Vol. 73 (1979) 335–371.

A. BOYE, L'acte de nationalisation (1979).

I. BROWNLIE, Legal Status of Natural Resources in International Law (Some Aspects), RdC, Vol. 162 (1979 I) 245–318.

G. ELIAN, The Principle of Sovereignty over Natural Resources (1979).

P. JUILLARD, Les conventions bilatérales d'investissement conclues par la France, Clunet, Vol. 106 (1979) 274–325.

M. SORNARAJAH, Compensation for Expropriation: The Emergence of New Standards, Journal of World Trade Law, Vol. 13 (1979) 108–131.

P. VELLAS, Droit de propriété, investissements étrangers et nouvel ordre économique international, Clunet, Vol. 106 (1979) 21–33.

O. BRING, The Impact of Developing States on International Customary Law Concerning Protection of Foreign Property (1980).

F. GARCÍA-AMADOR, The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation, Lawyer of the Americas, Vol. 12 (1980) 1–58.

R. DOLZER, New Foundations of the Law of Expropriation of Alien Property, AJIL, Vol. 75 (1981) 553–589.

J.A. FROWEIN, Eigentumsschutz im Europarecht, in: Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift zum 70. Geburtstag von Hans Kutscher (1981) 189–200.

H. GATTIKER, Behandlung und Rolle von Auslandsinvestitionen im modernen Völkerrecht, SchweizJIR, Vol. 37 (1981) 25–58.

F.A. MANN, British Treaties for the Promotion and Protection of Investments, BYIL, Vol. 52 (1981) 241–254.

M. MULLER, Compensation for Nationalization: A North-South Dialogue, ColJTransL, Vol. 19 (1981) 35–78.

R. HIGGINS, The Taking of Property by the State: Recent Developments in International Law, RdC, Vol. 176 (1982 III) 259–392.

O. SCHACHTER, Compensation for Expropriation, AJIL, Vol. 78 (1984) 119–130.

RUDOLF DOLZER

EXTRADITION

A. Notion and Purpose. – B. Historical Evolution. – C. Sources of Contemporary Extradition Law. – D. Duty to Extradite. – E. Substantive Law: 1. Principles. (a) Extraditable offences. (b) The double-criminality rule. (c) Evidence of guilt. (d) Reciprocity. (e) The speciality rule. 2. Circumstances Precluding Return. (a) Citizens. (b) Capital punishment. (c) Procedural defects. (d) Personal circumstances of the fugitive. (e) Military offences. (f) Fiscal offences. (g) Political offences. (h) The discrimination clause. (i) Others. – F. Extradition Procedure. – G. Related Procedures: 1. Conditional Surrender. 2. Re-Extradition to a Third State. 3. Transit. 4. Concurring Requests. – H. Evaluation.

A. Notion and Purpose

Extradition designates the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal prosecution or the execution of a sentence. Thus, extradition constitutes only one, albeit the most important, aspect of the broader spectrum of mutual → legal assistance between States in criminal matters.

Every single extradition is regarded as an agreement under → international law, notwithstanding the fact that the two States parties to such an agreement may have established general extradition relations by concluding a bilateral or acceding to a multilateral extradition treaty (→ Extradition Treaties). Under an individual agreement, the State of residence exercising jurisdiction (not necessarily criminal jurisdiction) over the fugitive offender renounces its jurisdiction for the benefit of the other State (→ Jurisdiction of States).

Unlike the case where an alien is expelled or deported (→ Aliens, Expulsion and Deportation), the motive for the return of a fugitive from justice is not the maintenance of domestic public order or security, but the furtherance of foreign criminal proceedings. In numerous instances, however, expulsion and deportation have been and continue to be used as alternatives to extradition, sometimes in order to accelerate the transfer of the fugitive, in other cases also to circumvent rules of extradition law which would preclude the return of the fugitive (see e.g. the Soblen Case (1962) 3 All ER 641). The legality of deportation in cases where extradition is prohibited depends upon the applicable domestic law and whether the relevant extradition treaty confers any rights upon individuals (→ Individuals in International Law). In any case, most courts have held that they may exercise criminal jurisdiction over a surrendered fugitive notwithstanding the fact that the return was illegal (*male captus bene detentus*).

B. Historical Evolution

The origins of international cooperation in the suppression of crime go back to the very beginnings of formal → diplomacy. Every period of history has examples of the rendition of fugitives and famous extradition cases date back to the pre-Christian ages. Rendition in ancient times did not, however, follow any legal rules but was considered as a highly political act left to the unfettered discretion of the sovereign. Sovereigns could choose to grant asylum (→ Asylum, Territorial) or oblige each other by surrendering those persons who were most likely to affect the political order within the requesting State. Until the middle of the 18th century, extradition primarily involved political → refugees rather than common criminals; the escape of the latter was not seen as a danger requiring sustained and concerted counter-measures on an international scale.

Though extradition treaties or extradition provisions in → peace treaties and treaties of → alliance were concluded in earlier times, it was not before the latter half of the 18th century that such treaties appeared in greater numbers. By that time the movement of people between States had increased and special problems began to arise in the shape of highway robbers, vagabonds and deserting troops (→ Deserters). While at first treaties were confined to rather limited and pragmatic provisions, during the decades that followed many of the more refined and still valid principles of extradition were developed upon a more general appreciation of the wider dimensions of the problem of escaping criminals. Hand in hand with the intensification of extradition relations and their extension to common criminals went restrictions on the surrender of political refugees to the point of a complete reversal of the situation existing at the outset of developments. Domestic public policy and individual liberties guaranteed in national constitutions, as reflected

in national extradition acts, added further limitations to arbitrary rendition, until by the end of the 19th century a coherent body of legal rules governing extradition had developed whose major principles still apply in contemporary extradition law.

C. Sources of Contemporary Extradition Law

Sources of contemporary extradition law are bilateral agreements and multilateral conventions on the one hand and national extradition acts on the other.

While bilateral or multilateral agreements are the most often used means for establishing extradition relations between States, another approach is uniform legislation on the basis of an agreed scheme (e.g. the Uniform Nordic Extradition Act and the 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders, as revised in February 1983).

Despite the fact that most of the basic principles and rules provided for in extradition treaties or schemes and in national extradition statutes are almost identical, and despite the fact that multilateral conventions served as a model for recent amendments of statutes and bilateral treaties, the prevailing opinion is that these principles and rules have nevertheless, with very few exceptions, not become rules of → customary international law.

D. Duty to Extradite

General international law neither imposes the duty on States to extradite common criminals nor does it oblige them to prosecute or punish fugitive offenders when extradition fails. The opposite view held by Grotius and others (*dedere aut judicare*) – already vigorously opposed at that time – was clearly rejected by the practice of States. Efforts to establish such a duty at least for war criminals after World War II remained without success, as have the recent attempts to base corresponding obligations on the → United Nations Charter and the → Friendly Relations Resolution. The duty to extradite or prosecute a fugitive offender does not exist save on the basis of a treaty fixing the prerequisites for and the exceptions to such an obligation.

Likewise, general international law contains no limitations on a State's freedom to extradite, except for those fundamental → human rights that can be considered as part of → *jus cogens*. Whether, beyond that bar, extradition is admissible in the absence of a treaty is decided solely under domestic law. While the common law countries and, for example, the Netherlands are prevented from extraditing in the absence of a treaty, most civil law countries do grant extradition without treaty on the basis of reciprocity and according to the rules of their national extradition acts.

E. Substantive Law

1. Principles

Every single extradition is subject to the rules of the applicable treaty or statute. In the absence of a universal convention or customary international law in this field there exist as many "extradition laws" as there are treaties and national statutes. A number of rules, however, recur in all these norms, differences being rather a matter of wording than of principle.

(a) Extraditable offences

Older treaties and statutes specify by name the offences for which extradition is available ("list"-treaties, "enumeration method"). This practice proved to be unfavourable in face of diverging terminologies in national penal codes and the evolution of new types of crimes such as narcotic drugs offences, whose inclusion required supplementary treaties. More recent treaties and statutes therefore define extraditable offences simply by reference to their punishability, the requirement being normally deprivation of liberty of at least one year disregarding extenuating or aggravating circumstances ("elimination method"). Some treaties combine both methods ("open-ended list"), some of the "no list" treaties and statutes provide that if one of several offences is an extraditable offence, extradition may be granted for all offences ("accessory extradition"). Mention has to be made of the fact that under a number of multilateral international conventions combatting specific → international crimes (→ Civil Aviation, Unlawful Interference with; → Terrorism) the offences established under these conventions are deemed to be included in existing extradition treaties.

(*b*) *The double-criminality rule*

The double-criminality rule requires that an act shall not be extraditable unless it constitutes a crime under the laws of both the requesting and the requested States. Expressly incorporated in "no list" treaties and statutes as one constituent element of extraditable offences along with the minimum penalty, the rule also often appears in treaties employing the enumerative method and is sometimes considered as part of customary international law. The rule ensures that no State is obliged to extradite a person for an act not recognized as criminal by its own standards, and also serves the principle of reciprocity in that a State is not required to extradite categories of offenders which it, in turn, would never have occasion to demand.

Rightly interpreted, the rule does not require identity as to the denomination of the offence but asks only whether the act in question is perceived as punishable under both legal systems, if necessary after an "analogical readjustment of the facts" (e.g. the phrase used in Art. 3(1) of the Gesetz über die internationale Rechtshilfe in Strafsachen (German Bundesgesetzblatt, 1982 I, 2071) of the Federal Republic of Germany). The rule as such requires that the act is *in abstracto* chargeable as an offence but does not usually require that the act is *in concreto* prosecutable and could also result in a conviction.

(*c*) *Evidence of guilt*

Courts in common law countries require, broadly speaking, that a requesting State make out a prima facie case of guilt against an alleged fugitive offender justifying his committal for trial under their own legal system, before they will grant extradition for the purpose of prosecution. No such evidence is required in respect of convicted fugitives; persons convicted *in absentia*, however, count as accused persons for the purposes of extradition. In contrast, most civil law countries reject this requirement. The verification of the extradition request is a more or less formal one. Supporting documents must enclose a copy of the warrant of arrest or judgment, the legal characterization of the offence, information regarding the identity of the offender and at most, a summary of the relevant facts. Prima facie evidence is here considered as an unnecessary requirement that will often jeopardize the performance of justice. Civil law countries do, however, request additional evidence (including evidence of guilt) if, from the circumstances of the case, there is reasonable doubt as to whether the requested person has in fact committed the offence, or where there is reasonable suspicion that the returnable offence charged to the fugitive is not genuine.

(*d*) *Reciprocity*

Traditionally, the principle of → reciprocity underlies the whole structure of extradition. Where general extradition relations are established by virtue of a treaty, reciprocity to a large extent is guaranteed, although even here optional grounds for denying extradition may result in the inequality of reciprocal obligations. Extradition in the absence of a treaty is the field where the principle of reciprocity is mainly applied; here, surrender takes place usually only after assurances of reciprocity have been expressly given by the requesting State. The precondition of strict reciprocity, however, is increasingly considered as being detrimental to the interests of justice. Some recent extradition treaties and statutes, therefore, either do not mention reciprocity at all, allow considerable exceptions or express the principle in optional terms, thus conceiving reciprocity as a political maxim rather than as a legal precondition.

(*e*) *The speciality rule*

Under the speciality rule, incorporated in almost every treaty and statute and considered as a rule of general international law, a fugitive may not be detained, tried or in any way punished in the requesting State for any offence committed prior to his surrender other than the one for which extradition was granted, unless he does not leave the territory of the requesting State within a certain time limit (usually 30 to 45 days) after being free to do so, or voluntarily returns or is lawfully re-extradited to it by a third State, or unless the State which surrendered him consents. Prior consent is not required if the description of the offence for which extradition was granted is altered in the course of the proceedings, provided that the offence in its new description is based on

the same facts and itself constitutes a returnable offence (under some treaties a lesser returnable offence, under others a returnable offence for which no higher maximum penalty is fixed).

The speciality rule, though generally not conceived of as a rule conferring individual rights, nevertheless protects the fugitive from having to face charges of which he had no notice prior to his transfer; it also reinforces the double-criminality rule and rules prohibiting extradition for certain categories of offences (e.g. political, fiscal or military offences), and it protects from abuse the legal processes of the requested State, which is called upon in extradition to renounce its jurisdiction over, and protection of, the fugitive.

Particularly in cases where it appears that the fugitive after return may be prosecuted or prejudiced on political grounds, it has become the constant practice of States to require express assurances from the requesting State that it will respect the speciality rule.

2. *Circumstances Precluding Return*

Like the aforementioned principles, a number of exceptions to the obligation to extradite are to be found in most extradition treaties and are reflected in national extradition acts. Such exceptions primarily relate to the personal circumstances of the fugitive, to the peculiarities of criminal proceedings in the requesting State and to certain categories of offences.

(*a*) *Citizens*

While common law countries, basing their criminal jurisdiction strictly on the territoriality principle (→ Territorial Sovereignty) and being thus unable to prosecute their own nationals for offences committed abroad (→ Nationality), are usually prepared to extradite their citizens, civil law countries, as a rule, are prevented from doing so by constitutional or statutory law. Extradition treaties, therefore, if not excluding the extradition of citizens altogether, usually concede to requested States the right to deny extradition of nationals if their domestic law so provides. Some extradition treaties restrict the requested State's freedom to naturalize fugitive offenders after demand has been made for them, others oblige requested States to institute criminal proceedings for their part if surrender has been refused on grounds of nationality.

(*b*) *Capital punishment*

Under most extradition treaties and statutes surrender may be denied if the offence for which extradition is requested is punishable by death under the law of the requesting State, unless the authorities of that State previously give assurances which the requested State considers sufficient that the death penalty will not be imposed or carried out. Difficulties in obtaining such assurances may, however, arise in cases where capital punishment is the only punishment prescribed by law and where under the law of the requesting State the power of pardon lies with the parliament or the Head of State, or where the independence of the judiciary excludes any interference in the forthcoming proceedings. Some norms extend the possibility of denying extradition to cases involving punishment impairing the physical integrity of the offender, inhuman or degrading punishment or even life imprisonment.

(*c*) *Procedural defects*

Recent statutory law and agreements preclude extradition if there is reason to believe that the criminal proceedings in the requesting State have not been or will not be in conformity with the internationally recognized → minimum standard for procedural guarantees. Under this concept, extradition may be denied if the fugitive has been or will be tried by an *ad hoc* or extraordinary tribunal or if he has been convicted *in absentia* without having, upon return, the right to a complete retrial safeguarding the rights of defence. Whether such procedural defects may be invoked in order to refuse surrender in the absence of explicit reference to corresponding exceptions in an extradition treaty remains doubtful.

(*d*) *Personal circumstances of the fugitive*

A number of States refuse extradition on "humanitarian grounds" if surrender is likely to have consequences of an exceptional and disproportionate gravity for the fugitive, particularly on grounds of age, state of health or other personal circumstances.

(e) *Military offences*

While earlier extradition treaties expressly provided for the surrender of → deserters (as do modern defence agreements and treaties of military → alliance), later extradition treaties and national statutes usually exclude military offences from extradition. Far from universally accepted, the exception, if applied, is mostly restricted to "purely military" offences not involving any common crime.

(f) *Fiscal offences*

Traditionally, fiscal offences (e.g. tax evasion, violation of currency or customs regulations) were also excluded from extradition. Under some treaties exceptions were subject to subsequent additional agreements being agreed between the contracting parties dealing with specific categories of fiscal offences. A more modern view, however, takes into account the danger to national economies and the extensive damage to public budgets caused by white collar crimes, and rejects the view that fiscal offences are not really crimes calling for counter-measures on an international scale. Recent extradition treaties and statutes, therefore, no longer exclude fiscal offences from extradition and older conventions have been amended correspondingly (see e.g. the Second Additional Protocol to the European Convention on Extradition, adopted March 17, 1978).

(g) *Political offences*

The political offence exception, based on humanitarian concern for the offender on the one hand and on the reluctance of States to become involved in the political problems of other States on the other hand, has constituted one of the most intractable problems of extradition law ever since it was first introduced into treaties and national statutes in 1833. Today, the political offence exception forms part of every extradition treaty and statute between and in democratic countries, but its character as a binding rule of customary law is at least debatable. Difficulties, errors and disputes in connection with the exception are primarily due to the lack of any agreed definition of the term "political offence". Treaties and statutes confine themselves to excluding "political offences" (or "offences of a political character") and "connected offences" from extradition, leaving the classification of an offence as "political" to the requested State. Lesser problems are posed by "absolute" or "purely" political offences (e.g. treason, → espionage, sabotage), defined as offences aimed directly and exclusively against the State, its organs or political organization. The scope of the so-called "relative or related" political offences entails much greater uncertainty. Relative political offences are *in se* common crimes assimilated to political offences because the perpetrator pursued a political purpose or was politically motivated (the subjective definition) or because the common crime fell into a political context in that it was committed incidentally to or in the course of and in furtherance of → civil war, insurrection or political commotion. A more rigid definition confines relative political offences to those common crimes having a "predominantly" political character or being directly connected to a purely political offence by preparing, facilitating or ensuring the impunity of the latter. The "predominance" or "proportionality" test, requiring consideration of such factors as the seriousness of the offence or its consequences, the indiscriminate use of violence against innocent victims and the futility of the attempt to further the political object claimed for the offence, appears to be the most reasonable approach, but none of the others is excluded by law, and even the strict subjective definition, though mostly rejected in theory, has been frequently applied in practice. A requested State's decision affirming the political character of an offence may be challenged, if at all, only in clear cases of abuse.

The lack of unanimity that is found with regard to the definition of political offences also exists *vis-à-vis* possible "exceptions to the exception". Only the debatable "*attentat* clause", restricted to heads of State and their families, has gained wide acceptance. Very few treaties and statutes expressly exclude → genocide, murder, manslaughter or related crimes in general from the concept of political offences. Out of the special international conventions, only the Genocide Convention and the European Convention on the Suppression of Terrorism (→ Terrorism) unambiguously declare the limited number of offences established by them as "non-political" for the purposes of extradition; all others confine them-

selves to the maxim *dedere aut judicare*. In sum, neither the kind nor the number of particular restrictions to the political offence exception reflect a general consensus as to what is worthy of the protection offered by the exception, and what cannot be tolerated by the community of nations and therefore ought not be privileged in extradition law. There are increasing doubts as to whether the political offence exception in its traditional wording is still a timely concept, if indeed it ever was.

(h) The discrimination clause

Recently, a so-called discrimination clause has been added to the political offence exception, underlining the humanitarian background of the traditional exception and overlapping with its scope of application to a considerable extent. Older extradition acts had already complemented the political offence exception by including those cases where it seemed likely that request for surrender based on a common crime had in fact been made with a view to trying the fugitive for a political offence. The European Convention on Extradition of 1957, forthwith serving as a model for subsequent treaties and statutes, for the first time expanded this rule by providing that extradition will not be granted "if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons" (Art. 3(2); → Racial and Religious Discrimination). This clause, focusing not on the political character of a potential offence but on the political character of an eventual persecution, expressly incorporates the principles of humanitarian asylum into the law of extradition, in the understanding that prosecution of a political offence may, but does not automatically amount to political persecution. In protecting fugitive offenders the discrimination clause is clearly preferable to the political offence exception, which is often misapplied.

(i) Others

Other grounds for denying extradition commonly provided for are pending proceedings or final decisions passed in respect of the same offence in the requested State (*ne bis in idem*), immunity by reason of lapse of time, or the fact that the offence has been committed in whole or in part in the territory of the requested State.

F. Extradition Procedure

Extradition proceedings are initiated only upon formal request, usually communicated through diplomatic channels and supported by those documents specified by the applicable extradition treaty or, in the absence thereof, by the extradition act of the requested State. Insufficient documents may be supplemented within a fixed time limit. Most extradition treaties and statutes provide for the possibility of requesting – for a limited period pending receipt of a formal request – the provisional arrest of an alleged fugitive offender, either by means of rapid communication or on the basis of an international warrant of arrest ("red individual notice") issued by → Interpol. The extradition procedure itself is not usually the subject-matter of extradition treaties but is left entirely to the requested State, including the questions if, to what extent and at which stage of the proceedings judicial protection is available to the fugitive. While in common law countries the lawfulness of rendition may be reviewed in *habeas corpus* proceedings, civil law countries make surrender dependent upon a prior criminal court's ruling on its admissibility; if extradition is declared inadmissible, this decision is usually final, otherwise surrender is left to the executive's discretion. As a rule, the requesting State has no standing in any of these judicial proceedings.

Most extradition acts governing extradition procedure provide for return by consent (simplified extradition, informal surrender) in cases where the fugitive, duly instructed, waives formal proceedings either in writing or before a court or commissioned judge. If so doing, the fugitive in some countries also loses the protection under the speciality rule, in others the speciality rule may be waived separately. A validly declared waiver is usually irrevocable.

Expenses resulting from return proceedings in the requested State are met by that State; some treaties provide that exceptional expenses (e.g. for air transport) are to be borne by the requesting State.

G. Related Procedures

1. *Conditional Surrender*

A fugitive serving a sentence or facing criminal proceedings in the requested State may be surrendered temporarily if the requesting State undertakes to return him after the termination of the proceedings. States may commit themselves to return their own nationals if they have been surrendered temporarily.

2. *Re-Extradition to a Third State*

A fugitive surrendered to the requesting State may not, without the consent of the requested State, be surrendered to a third State, unless he has not left the requesting State after being free to do so for a fixed period of time.

3. *Transit*

Transit of a fugitive from the requested to the requesting State through the territory of a third State depends upon the consent of the latter. Consent will usually be given upon the presentation of a copy of the order granting the extradition. However, some States subject transit to the same rules as extradition itself. If air transport is used and no landing is scheduled, a notification of the State whose territory will be flown over is sufficient, if required at all. In the case of an unscheduled landing, such notification may have the effect of a request for provisional arrest. Whether, in such a case, a citizen of that State would have to continue his journey to the requesting State, is doubtful.

4. *Concurring Requests*

A variety of rules is provided for in extradition treaties for cases where extradition is requested by more than one State. If requests are made for the same offence, the requested State has to give precedence to the request of the State in which the offence was committed. If requests are made for different offences, the requested State should make its decision with regard to the seriousness of the offences, the nationality of the fugitive, the respective dates of the requests and the possibility of subsequent extradition to another State.

H. Evaluation

Undoubtedly, extradition is at present the most effective means of cooperation between States in criminal matters, whereas criminal prosecution (on the basis of *dedere aut judicare*) for cases where extradition has failed remains of little practical importance, if only on grounds of technical difficulty. Recent efforts to conclude specific agreements on the transfer of criminal proceedings and the execution of foreign criminal judgments might, however, shift the relative weights of the different components of mutual assistance in criminal matters. Until then, extradition relations of whatever kind should, as the most recent resolution of the → Institut de Droit International (Cambridge, 1983) emphasizes, be expanded as indispensable in times where fugitives from justice take ample advantage of rapid means of transport and diminished border controls. The elaboration of extradition relations in detail highly depends on the relations between the respective States in general and on the mutual confidence in their legal and judicial systems in particular. Extradition relations between States having comparable legal orders and sharing the same values will and should be closer and more flexible, and less exceptions should be needed. Where greater differences exist between States, more safeguards are necessary; in some instances States would be best advised to refrain from entering into general extradition agreements and instead to grant extradition, when appropriate, on an *ad hoc* basis subject to the rules of the domestic extradition law of the requested State.

R.C. HINGORANI, The Indian Extradition Law (1970).
P.E. TROUSSE and J. VANHALEWIJN, Uitlevering en Internationale Rechtshulp in Strafzaken (1970).
T. VOGLER, Auslieferungsrecht und Grundgesetz (1970).
I.A. SHEARER, Extradition in International Law (1971).
M.C. BASSIOUNI, International Extradition and World Public Order (1974).
M. DEFENSOR-SANTIAGO, Political Offences in International Law (1977).
G.V. LA FOREST, Extradition to and from Canada (2nd ed. 1977).
J. REMMELINK, Uitlevering (1978).
P. FELCHLIN, Das Politische Delikt (1979).
D. FRANKE, Politisches Delikt und Asylrecht (1979).
V.E.H. BOOTH, British Extradition Law and Procedure. Vol. 1 (1980), Vol. 2 (1981).
H. GRÜTZNER and P.G. PÖTZ, Internationaler Rechtshilfeverkehr in Strafsachen (2nd ed. 1980) [looseleaf; with commentary by T.H. Vogler, W. Walter and P. Wilkitzki].

I. STANBROOK and C. STANBROOK, The Law and Practice of Extradition (1980).
C. VAN DEN WIJNGAERT, The Political Offence Exception to Extradition (1980).
K. DOEHRING, New Problems of the International Legal System of Extradition with Special Reference to Multilateral Treaties, AnnIDI, Vol. 59, No. 1 (1981) 73–105, 142–159, 163–180.
R. LINKE et al., Internationales Strafrecht. Auslieferung, Rechtshilfe, Vollstreckung, Fahndung (1981).
G. CATELANI and D. STRIAMI, L'Estradizione (1983).
M. CHERIF BASSIOUNI, International Extradition, United States Law and Practice (1983) [looseleaf].
T. STEIN, Die Auslieferungsausnahme bei politischen Delikten (1983).
S. UHLIG and W. SCHOMBURG, Gesetz über die Internationale Rechtshilfe in Strafsachen (1983).
J. GAUTHIER, La nouvelle législation suisse sur l'entr'aide internationale en matière pénale, Schweizerische Zeitschrift für Strafrecht, Vol. 101 (1984) 51–88.
P.L. ROBINSON, The Commonwealth Scheme relating to the Rendition of Fugitive Offenders: A Critical Appraisal of Some Essential Elements, ICLQ, Vol. 33 (1984) 614–633.

TORSTEN STEIN

EXTRADITION TREATIES

1. Notion

Extradition treaties govern the surrender of fugitives from justice by the fugitive's State of residence to another State claiming criminal jurisdiction (→ Extradition). Such treaties, being either bilateral agreements or multilateral conventions, are usually confined to rules fixing the preconditions for surrender and the exceptions to them. Sometimes provisions regarding extradition are embodied in a more comprehensive treaty on → legal assistance between States in criminal matters in general or even legal assistance in the broadest sense, including assistance in civil, family and criminal matters (see the Code of Private International Law 1928 – Bustamente Code, or the virtually identical treaties on legal assistance between various Socialist States).

International conventions aiming at the suppression of certain → international crimes and obliging the States parties to either extradite or prosecute the alleged offenders (→ Civil Aviation, Unlawful Interference with; → Terrorism; → Genocide) refer to existing extradition treaties and may widen their application by providing that the crimes established by the international convention shall be regarded as extraditable crimes under existing extradition treaties; but these international conventions are not extradition treaties themselves.

Agreed schemes (e.g. the 1966 Commonwealth Scheme relating to the Rendition of Fugitive Offenders, as revised 1983, and the Uniform Nordic Extradition Act, e.g. Sweden 1959), though serving the functions of an extradition convention, are subject to the adoption of corresponding national legislation and/or the designation of specific countries and are therefore not extradition treaties *strictu senso*.

2. Historical Evolution

Very few extradition treaties or relevant provisions in → peace treaties or treaties of → alliance can be found in earlier times. It was not until the second half of the 18th century that extradition treaties were concluded to a larger extent, being at first confined to limited categories of offenders such as political offenders or → deserters. In the course of the 19th century, extradition treaties were extended to cover all common criminals while political and military offenders were exempted from surrender. During the latter period most of the still valid principles of extradition law were developed in extradition treaties.

3. Significance

In the absence of any rule of → customary international law in this connection, extradition treaties are the only source of a State's duty to extradite. On the other hand the existence of an extradition treaty is not necessarily a precondition for the surrender of a fugitive offender. Whether extradition is admissible in the absence of a treaty is decided solely under the domestic law of the requested State.

Domestic law also decides whether the provisions of an extradition treaty take precedence over those laid down by the national extradition act of the requested State (→ International Law and Municipal Law). Under the law of most European States, extradition treaties take precedence over domestic statutes, either on the basis of an express provision in that statute (cf. the recently revised extradition acts of Austria (Aus-

trian Bundesgesetzblatt, 1979, No. 529), Germany (German Bundesgesetzblatt, 1982 I, 2071) and Switzerland (Sammlung der eidgenössischen Gesetze, 1982, 846; ILM, Vol. 20 (1981) p. 1339)) or according to the *lex specialis* rule. In the United Kingdom, however, the Extradition Act prevails and extradition is admissible only after an Order in Council has directed the application of the Act to a specific country after the conclusion of a corresponding extradition treaty.

According to the prevailing opinion extradition treaties create rights and obligations only for the States parties to the treaty; the fugitive claimed may not, as a consequence, invoke against his surrender the violation of the extradition treaty by the requesting State or treaty provisions precluding his return (→ Individuals in International Law). Recent statements, like the 1983 Cambridge Resolution by the → Institut de Droit International (AnnIDI, Vol. 60 II (1983) pp. 304–310), advocate that States, when concluding an extradition treaty, should provide that a person whose extradition is requested is entitled to invoke the treaty before national courts for his protection. In practice, however, such protection is mostly guaranteed by analogous provisions in national extradition acts.

4. *Content*

The substantive rules provided for in contemporary bilateral as well as multilateral extradition treaties are basically identical and reflect the "extradition law on hand" that also appears in national extradition acts. This uniformity or at least similarity is not at all coincidental but due to mutual influence. Older treaties and in particular multilateral conventions served as a model for later agreements, and treaties have had to be drafted taking account of existing domestic rules in order to gain acceptance at least as compromises. Differences, if not only a mere matter of wording, depend upon the relations between the contracting States in general (States with comparable legal and political systems provide for less exceptions and safeguards) and on the type of the agreement (bilateral treaties are more flexible, whereas multilateral conventions between heterogenous States often confine themselves to → minimum standards).

5. *Existing Treaties*

(*a*) *Bilateral*

There is no reliable figure for existing bilateral extradition treaties, due to the unknown number of unregistered treaties (→ Treaties, Registration and Publication) and treaties that have become inoperative or obsolete. It has been estimated that there are around 1500 effective bilateral extradition treaties.

(*b*) *Multilateral*

There is no world-wide extradition convention and such a convention is not likely to be drafted or even proposed. Existing multilateral extradition treaties are confined to regions and subregions as follows:

(*i*) *Europe*

The European Convention on Extradition of December 13, 1957, entered into force on April 18, 1960 (ETS, No. 24; UNTS, Vol. 359, p. 273), binding 15 out of 21 member States of the → Council of Europe, Finland and → Israel having acceded; two Additional Protocols of 1975 and 1978 (ETS, Nos. 86 and 98) entered into force on August 20, 1979 and June 5, 1983 respectively for a limited number of States.

The Benelux Convention on Extradition and Judicial Assistance in Penal Matters of June 27, 1962, entered into force on December 11, 1967 (UNTS, Vol. 616, p. 80), following closely the European Convention.

(*ii*) *Africa*

The Agreement between the Arab League States Concerning the Extradition of Fugitive Offenders, opened for signature on November 3, 1952, entered into force on August 28, 1954 for Egypt, Jordan and Saudi Arabia (British and Foreign State Papers, Vol. 159, p. 606; → Arab States, League of).

The General Convention on the Cooperation in Judicial Matters of the Organisation Commune Africaine et Malgache (OCAM) of September 12, 1961, signed by 12 of the 14 former French territories in Equatorial and West Africa, entered into force, as far as can be seen, for Dahomey, Gabon and the Malagasy Republic (text in L.B. Sohn (ed.), Basic Documents of African Regional

Organisations, Vol. 2 (1972) p. 616; → Regional Cooperation and Organization: African States).

(iii) The Americas

Quite a number of multilateral extradition treaties have been concluded within the Inter-American system, sometimes overlapping and some probably being inoperative: The Treaty for the Extradition of Criminals and for Protection against Anarchism of January 28, 1902 (CTS, Vol. 190, p. 411), signed by nearly all American States, was ratified only by Costa Rica, El Salvador, Guatemala and Mexico.

The Caracas Agreement on Extradition of July 18, 1911 (CTS, Vol. 214, p. 129) was ratified by Bolivia, Columbia, Ecuador, Peru and Venezuela.

The Central American Extradition Convention of February 7, 1923 (M.O. Hudson, International Legislation, Vol. 2, 1922–24 (1931) p. 954) was ratified by Costa Rica, El Salvador, Guatemala, Honduras (withdrew 1953) and Nicaragua. A follow-up convention adopted April 12, 1934 has never entered into force.

The Code of Private International Law of February 20, 1928 (Bustamente Code), Arts. 344 to 381 (LNTS, Vol. 86, p. 111), was ratified by 15 Latin American States.

The Montevideo Convention on Extradition of December 26, 1933 (LNTS, Vol. 165, p. 45) was ratified by 12 American States including the United States of America.

The Inter-American Convention on Extradition of February 25, 1981 (ILM, Vol. 20, p. 723), was signed by 11 Latin American States. Although it is not likely to enter into force for political reasons, the rules contained may, however, be applied in practice among the American States.

6. Evaluation

Notwithstanding the fact that resolutions of international conferences and associations encourage States to grant extradition also in the absence of an extradition treaty and that new forms of legal assistance in criminal matters like the transfer of criminal proceedings and the execution of foreign judgments may diminish the importance of extradition, extradition treaties will remain of primary importance as the only source of a State's duty to extradite. The fact that States continue to conclude new extradition treaties and to replace older treaties by new ones clearly underlines their necessity. Uniform extradition systems in a given geographical area do have their advantages, but one may doubt whether multilateral conventions, reflecting only the minimum standard of joint convictions, abstaining often from providing the necessary details and being subject to reservations, are the best solution to the problem. Bilateral extradition treaties have proved more flexible in this respect and should be given preference. Art. 33 of the Inter-American Convention of 1981, leaving it to the States parties to decide whether the conventions shall supersede bilateral treaties in force (→ Treaties, Conflicts between), strongly supports this view, while Art. 28 of the European Convention appears to be too narrow in allowing only for supplementary agreements.

I.I. KAVASS and A. SPRUDZS, Extradition Laws and Treaties – United States, 2 vols. (1979) [looseleaf].

Ministère de la Justice (France), Entr'aide répressive internationale, Recueil pratique des conventions d'extradition et de coopération en matière pénale, 2 vols. (1979).

M. PISANI and F. MOSCONI, Codice delle Convenzioni di estradizione e di assistenza giudiziaria in materia penale (1979).

Ministerio de Justicia (Spain), Convencios de Extradición (1980).

I. ZANOTTI, La Nueva Convención Interamericana sobre extradición, Revista Peruana de Derecho Internacional, Vol. 34 (1982) No. 83, 16–51, No. 85, 32–55.

TORSTEN STEIN

FORCED LABOUR

1. Notion

Whereas → slavery is the exaction of involuntary labour based on a claim of property over a person, forced labour is another form of compulsion by which a government deprives the individual of his freedom of action.

Although forced labour as a form of institutionalized servitude may seem a notion of the distant past there is clear evidence that this phenomenon still persists in a number of countries in the 20th century despite early initiatives under the aegis of the → League of Nations and the → International Labour Organisation (ILO) to counter forced labour.

2. *Forced Labour in Modern States*

Persons either suspected of opposition to a régime or considered racially or nationally unfit have been summarily arrested in some countries and placed under long or indefinite terms of confinement in → internment camps, remote labour camps or industrial camps. Forced labour régimes have been established in various forms both under totalitarian and colonial governments, but the practices by Nazi Germany, Japan and the Soviet Union, where millions of persons have been exploited in forced labour camps, are the most obvious examples of negation of the basic human right to freedom (→ Human Rights).

During World War I, Imperial Germany introduced by decree a forced labour programme in the occupied territories (→ War; → War, Laws of; → Occupation, Belligerent). The practice of transferring Belgian workers to German war industries became the forerunner of foreign forced labour groups, which were employed by Nazi Germany on a large scale during World War II. These "labour-programmes" were in clear violation of Art. LII of the Regulations annexed to Hague Convention IV of 1907 respecting the Laws and Customs of War on Land (→ Land Warfare; → Hague Peace Conferences of 1899 and 1907) and of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (→ Geneva Red Cross Conventions and Protocols; → Prisoners of War). The ruthless methods employed in the allocation and procurement of this kind of labour constituted → war crimes in accordance with Art. 6(b) of the Nuremberg Charter (→ Nuremberg Trials).

Compulsory labour practices also occurred on a large scale in South-East Asia under the Japanese occupation. At the → Tokyo trial, the indictment referred *inter alia* to breaches of treaties, *in casu* Art. 3 of the → mandate granted by the Principal Allied and Associated Powers to Japan in 1920 prohibiting slave trade and forced labour in the former German Islands in the Pacific Ocean. In order to complete the Burma-Siam railway and other works contributing to the prosecution of the war, native labourers were also recruited by force to work in the Japanese occupied territories.

In the light of the Nuremberg and Tokyo trials it is an anomaly and a grave setback in the evolution towards the abolition of forced labour, that Allied leaders signed a Protocol at Yalta on February 11, 1945 on German "reparations in kind" stipulating *inter alia* the use of German labour, thus reintroducing forced labour in the post-war era (→ Yalta Conference (1945)). Not only millions of German prisoners of war but also nearly a million German civilians were taken to the Soviet Union to work in the mines and forests of the Urals and Siberia. The death toll among the civilians exceeded 40 per cent and the survivors returned only gradually as late as 1955, ten years after the end of hostilities.

Forced labour in the Soviet Union had, however, a long history. Already in 1923, six years after the Russian revolution, the first concentration camp was established where prisoners were extensively used for forced labour. Gradually, the Soviet concentration camps became an institutionalized system for economic development. Many "corrective labour camps" were established during the first five-year plan (1928 to 1932) when policy of collectivation led to urbanization and unemployment. The Stalinist purges of 1937–1938 brought additional thousands of "unreliables" into the camps.

During and after World War II, predominantly non-Russian ethnic → minorities were deported to Siberia (→ Forced Resettlement). After a worldwide survey of forced labour in 1953 by the joint ILO-United Nations *Ad Hoc* Committee on Forced Labour, a number of correction camps were, according to Soviet sources, converted into labour colonies. It was, however, indicated that only ordinary criminals are eligible for corrective labour colonies.

3. *Historical Evolution of Legal Rules*

(*a*) *League of Nations*

The first concerted efforts to reduce the use of forced labour resulted from the 1919 Paris Peace Conference (→ Peace Treaties after World War I) and the B and C Mandate Treaties under which the use of forced labour was legal only if it served a public purpose. A similar provision can be found in the Slavery Convention of 1926.

(*b*) *International Labour Organisation*

The first Convention devoted entirely to forced

labour was the Forced Labour Convention of June 28, 1930 (No. 29; UNTS, Vol. 39, p. 55), which came into force on May 1, 1932 (→ Treaties, Conclusion and Entry into Force). This Convention requires the suppression of forced or compulsory labour in all its forms within the shortest possible period subject to exceptions relating to compulsory military service, normal civic obligations, convict labour, work in emergencies and minor communal services.

In order to fall within the definition of "forced or compulsory labour" in the 1930 Convention, work or service must be exacted "under the menace of any penalty". The Forced Labour Convention is supplemented by a number of other conventions and recommendations designed to regulate practices which could degenerate into forced labour.

On June 25, 1957, the ILO adopted the Abolition of Forced Labour Convention (No. 105, UNTS, Vol. 320, p. 291), which came into force on January 17, 1959. Unlike the 1930 Convention, this Convention does not contain a definition of forced labour, but instead stipulates five distinct forms of proscribed labour: forced labour as a means of political coercion; for purposes of economic development; as a means of labour discipline; as punishment for participation in strikes; as a means of racial, social, national or religious discrimination (→ Racial and Religious Discrimination).

Since the adoption of the Abolition of Forced Labour Convention, three general surveys by the ILO Committee of Experts on the Application of Conventions and Recommendations related to the implementation of the Forced Labour Conventions of 1930 and 1957 have taken place: in 1962, 1968 and 1979.

(c) *Joint UN-ILO activities*

At the request of the American Federation of Labour in 1947, the → United Nations Economic and Social Council urged action to undertake a comprehensive survey on the extent of forced labour in all member States of the → United Nations. In March 1951, the Council established in cooperation with the ILO, the *Ad Hoc* Committee on Forced Labour. In its substantive report (1953) the Committee stated that its enquiry had revealed the existence of facts relating to systems of forced labour of so grave a nature that they seriously threatened fundamental human rights and jeopardized the freedom and status of workers in contravention of the obligations and provisions of the → United Nations Charter and the Universal Declaration (→ Human Rights, Universal Declaration (1948)).

(d) *United Nations action*

The Universal Declaration of Human Rights does not specifically prohibit forced labour. However, it is clear from the records of discussions which preceded the adoption of Art. 4 dealing with "slavery and servitude" that systems of forced labour were considered by the drafters of the Declaration to be new forms of slavery or servitude emerging in modern society and henceforth equally prohibited by this article.

The Fourth Geneva Red Cross Convention (1949) in its Arts. 40 and 51 reformulated the norms laid down in the Hague Regulations 1907, which have now become part of → customary international law.

Art. 8(3) of the International Covenant on Civil and Political Rights (→ Human Rights Covenants) prohibits the performance of forced or compulsory labour, subject to exceptions similar to those enumerated in the ILO Forced Labour Convention, 1930. The International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) proscribes in Art. 2(e) the exploitation of labour of the members of a racial group or groups, in particular by submitting them to forced labour (→ Apartheid).

(e) *Regional action*

The → European Convention on Human Rights (1950), without defining forced labour, provides in Art. 4(2) that "no one shall be required to perform forced or compulsory labour". Art. 4(3) adds:

"3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:
(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries

where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations."

The → European Commission of Human Rights and the → European Court of Human Rights have occasionally interpreted these provisions, and have compared them with the ILO Convention of 1930 (cf. Iversen v. Norway, Yearbook of the European Convention on Human Rights, Vol. 6 (1963) p. 278; Van der Meersch Case, Publications of the European Court of Human Rights, Vol. 70 (1983)).

The → American Convention on Human Rights (1969) in Art. 6(3) stipulates exceptions similar to those under the European Convention.

4. *Current Legal Situation*

By January 1985, some 128 States were parties to the ILO Forced Labour Convention No. 29, 1930, and 108 States to the ILO Abolition of Forced Labour Convention No. 105, 1957. Despite this impressive record new labour regulations adopted on economic and social grounds in certain countries may lead to the exaction of work under the menace of a penalty. Moreover, problems in the application of the Conventions appear to arise from wide discretionary powers of preventive control granted to administrative authorities and not subject to any review, yet enforceable by penalties involving compulsory labour. Due to the lack of an adequate international machinery to sanction forced labour practices, they are likely to continue in the foreseeable future.

ECOSOC/ILO, Report of the *Ad Hoc* Committee on Forced Labour (1953) UN Doc. E/2431.

International Labour Conference, Forced Labour, General Survey on the Reports Concerning the Forced Labour Convention 1930 (No. 29) and the Abolition of Forced Labour Convention 1957 (No. 105) (1968).

International Labour Conference, Abolition of Forced Labour, General Survey by the Committee of Experts on the Applications of Conventions and Recommendations (1979).

J. BASTET, Le travail forcé et l'organisation internationale (1932).

J.H.E. FRIED, Transfer of Civilian Manpower From Occupied Territory, AJIL, Vol. 40 (1946) 303–331.

N. JASNY, Labor and Output in Soviet Concentration Camps, Journal of Political Economy, Vol. 59 (1951) 405–419.

H. BÜLCK, Die Zwangsarbeit im Friedensvölkerrecht (1953).

C.W. JENKS, Human Rights and International Labour Standards (1960) 25–46.

W. KLOOSTERBOER, Involuntary Labour since the Abolition of Slavery (1960).

J.G.C. VAN AGGELEN

FORCED RESETTLEMENT

1. *Notion*

This article focuses on involuntary transfers of individuals or groups within the → jurisdiction of a State whether inside its own territory (→ Territorial Sovereignty) or into or out of occupied territory (→ Occupation, Belligerent). (For individual deportations outside a State's effective jurisdiction see → Aliens, Expulsion and Deportation and → Denationalization and Forced Exile; and for mass expulsions across national → boundaries see → Population, Expulsion and Transfer.)

Historically, forced resettlement has served four main purposes: settlement of sparsely populated and economically underdeveloped areas; displacement of ethnic, religious or political → minorities; punishment of convicted criminals by banishment; and drafting of manpower for → forced labour. More recently, forced resettlement, particularly of indigenous populations, has aimed at their displacement so as to enable the unrestricted economic exploitation of their ancestral lands by the State or by → transnational enterprises under special concession agreements (→ Concessions; → Indigenous Populations, Protection).

Prior to the expansion of international law into the field of → human rights, most instances of forced resettlement were deemed to fall within the domain of municipal law and to be subject to the exclusive → domestic jurisdiction of the State concerned, in so far as such transfers did not cross national frontiers. International legal issues would only arise if the persons affected were → aliens

and their State of → nationality decided to exercise → diplomatic protection on their behalf, or when the persons to be resettled were minorities protected under a bilateral or multilateral treaty. Since the advent of the → United Nations and particularly in the light of the jurisprudence of the → Nuremberg Trials, numerous international instruments have been adopted which not only make forced resettlement incompatible with international law but render this practice an → international crime.

2. *Historical Survey*

History furnishes many instances of forced resettlement as a means to develop hitherto unpopulated areas. Prominent examples are the settlement of the vast expanses of Russia under the Romanov Tsars, who ordered hundreds of thousands of their subjects to areas of Northern Russia and Siberia, frequently as punishment.

European Colonial Powers (→ Colonies and Colonial Régime) used forced resettlement as a means of banishing criminals to places such as Australia and French Guyana. Political minorities were also deported: In 1755 the British Governor of Nova Scotia ordered the removal of the French-Acadian minority numbering about 15 000 and had them scattered throughout the other English colonies so that they would ultimately lose their French habits and become loyal subjects of the King of England.

The Western expansion of the United States in the 19th century was achieved pursuant to the policy of "manifest destiny" at the expense of the native Indian population, which was gradually decimated and ultimately resettled on government reservations (→ Indigenous Populations, Treaties with). A particularly tragic chapter was the forced resettlement of the Cherokee Nation from Georgia to Oklahoma from 1835 to 1838.

During World War I Russia deported 50 000 of her German-speaking subjects to the east – under such conditions that the majority died as a result. After the 1917 Revolution the new government proceeded to forcibly resettle some three million Ukrainians in Siberia. After the Soviet Union's invasion of Poland in September 1939 and the → annexation of the → Baltic States and Bessarabia, some two million persons were similarly deported. The German attack on the Soviet Union in June 1941 was followed by the prophylactic removal of over 800 000 Soviet citizens of German ethnic origin from the European parts of the Soviet Union. Other ethnic minorities in the Soviet Union were uprooted, including some 250 000 Crimean Tatars, who were transported several thousand miles to the Urals, Siberia, Kazakshstan and Central Asia in the summer of 1944. It is estimated that 46 per cent of them died during deportation and over the following 18 months. The Chechens, Ingushi, Karachai, Balkars, Kalmyks, numbering together some 750 000, were also deported for a variety of reasons.

After the Japanese attack at Pearl Harbour in December 1941 and the entry of the United States in World War II, some 110 000 American citizens of Japanese ancestry, most of them residing in California, were removed to points east of the Rocky Mountains. Canadian authorities soon followed the American example by similarly removing some 24 000 Japanese-Canadians from the West Coast. Several Japanese-Americans unsuccessfully challenged the constitutionality of the evacuations before the United States Supreme Court (Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944)).

Of all forced resettlements of World War II the most extensive and brutal were carried out by national-socialist Germany and claimed millions of victims. By way of response to these crimes the Allied Powers agreed at the → Yalta Conference (1945) to exact → reparations "in kind" from Germany, which were defined, in the Protocol on German Reparations, dated February 11, 1945, as including the "use of German labour". This agreement was the basis of Control Council Proclamation No. 2 of September 20, 1945, authorizing the use of German labour in and outside Germany. Whereas the Western Occupying Powers declined to use German labour outside of Germany (→ Germany, Occupation after World War II), the Soviet Union deported several hundred thousand Germans for forced labour.

3. *Current Legal Situation*

(*a*) *During armed conflict*

Art. 6(b) of the Charter of the International

Military Tribunal at Nuremberg defined → war crimes to include "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory . . . ." Art. 6(c) defined → crimes against humanity to include "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war . . . ." Count 3, section B of the Nuremberg indictment dealt with "deportation for Slave Labour and for other purposes of civilian populations of and in occupied territories". Count 3, section J of the indictment charged that the defendants had forcibly deported the inhabitants of occupied territories who were predominantly non-German and replaced them by thousands of German colonists. The defendants were found guilty of these charges, as it was proved that some 100 000 Frenchmen and over a million Poles had been forcibly resettled during the war, and that some five million persons had been deported from the occupied territories into Germany to help run the war industry.

The only forced resettlements of civilians considered to be legal were those based on → military necessity. Thus General Lothar Rendulic in his trial before the United States Military Tribunal at Nuremberg (U.S. v. Wilhelm List, et al. (Hostages Trial) 1948) was acquitted on this charge. Field Marshal Erich von Manstein, on the other hand, was convicted before a British military tribunal in 1949 because his reasons for a massive evacuation of the civilian population in the Ukraine in the summer of 1944 were held to be insufficient (→ Proportionality).

The clear prohibition of forced resettlement in time of war has been codified in Art. 49 of Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War (→ Civilian Population, Protection; → Geneva Red Cross Conventions and Protocols), which provides in paras. 1 and 2:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand . . . . Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."

Further, in order to discourage the type of colonizing carried out by Germany during World War II, Art. 49 concludes: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

For → civil wars, the 1977 Protocol II to the Geneva Conventions provides: "The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand" (Art. 17(1)).

Recent international conflicts and civil wars have witnessed large-scale evacuations and forced resettlements, but in the absence of an → international criminal court no prosecutions have followed.

(*b*) *During peace-time*

Art. 13(1) of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)) provides: "Everyone has the right to freedom of movement and residence within the borders of each state." Similarly, Art. 12(1) of the International Covenant on Civil and Political Rights (→ Human Rights Covenants), in force for 80 States, reads: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Forced resettlement is incompatible with these provisions.

Applicable in time of peace as in that of war, Art. 2 of the Genocide Convention, in force for 92 States, defines → genocide to include "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" such as by, *inter alia*, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . . [and] forcibly transferring children of the group to another group". It has been argued that forced resettlement may in some cases involve the crime of genocide.

4. *Special Issues*

Forced resettlement has continued to be prac-

tised in the 1970s and 1980s in various parts of the world, e.g. in the Israeli-occupied territories, Australia (Queensland), Bangladesh, the Philippines, Brazil, Guatemala (El Quiche), Guyana (Akawaio Indians of the Upper Mazaruni Basin) and Nicaragua (Misquito Indians). Involuntary relocations of indigenous peoples to "model villages" are being carried out in connection with the building of hydroelectric power plants, the expansion of the timber industry, and the search for and exploitation of mineral resources. These practices have been brought to the attention of the United Nations Commission on Human Rights and also of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities (→ Human Rights, Activities of Universal Organizations).

An issue of particular international concern has been the implementation by South Africa of the policy of territorial → apartheid or "homelands" policy, pursuant to which at least three million persons have been forcibly relocated over the past twenty years; it is estimated that a further million will soon follow. The purpose of the relocation programme is to banish the black South African population into newly created "States" scattered throughout South African territory which are given "political independence", so that the blacks have the citizenship of these so-called States and are allowed to enter South African territory only as → migrant workers. In 1976 the Transkei was granted independence, but it failed to achieve international → recognition, as the → United Nations General Assembly in Resolution 31/6A of October 26, 1976 and the → United Nations Security Council in Resolution 402 (1976) of December 22, 1976 called upon States not to recognize it or any other "homeland". Subsequently, South Africa has gone on to declare Bophuthatswana (1977), Venda (1979) and Ciskei (1982) "sovereign and independent" States which have ceased "to be part of the Republic of South Africa". As the United Nations *Ad Hoc* Working Group of Experts reported to the Commission on Human Rights in 1983, removals to the so-called bantustans take place under inhumane conditions and the resettlement camps lack adequate health, sanitary and social services (→ South African Bantustan Policy).

There is an international consensus that forced resettlement as discussed above entails a grave violation of the right of peoples to → self-determination, as defined and developed by the United Nations.

ECOSOC Doc. E/CN.4/1983/10. Violations of Human Rights in Southern Africa, Report of the Ad Hoc Working Group of Experts Prepared in Accordance with Commission on Human Rights Resolution 5 (XXXVII) and Economic and Social Council Resolution 1982/40.

J.H.E. FRIED, Transfer of Civilian Manpower from Occupied Territory, AJIL, Vol. 40 (1946) 303–331.

D.S. THOMAS and R.S. NISHIMOTO, The Spoilage, Japanese American Evacuation and Resettlement (1946).

F.E. LA VIOLETTE, The Canadian Japanese and World War II (1948).

R. CONQUEST, The Soviet Deportation of Nationalities (1960).

A. BOSWORTH, America's Concentration Camps (1967).

A. SHEEHY, The Crimean Tatars, Volga Germans and Meskhetians, Minority Rights Group, Report No. 6 (1973).

A.-M. DE ZAYAS, International Law and Mass Population Transfers, Harvard ILJ, Vol. 16 (1975) 207–258, esp. 255–257.

J. DUGARD, South Africa's "Independent" Homelands: An Exercise in Denationalization, Denver Journal of International Law and Policy, Vol. 10 (1980) 11–36.

ALFRED-MAURICE DE ZAYAS

FOREIGN AID AGREEMENTS

1. Notion

The notion of foreign aid agreements may be understood in a very broad sense. Considering only the economic field and defining aid as all forms of economic cooperation, it would be necessary to include not only all agreements on → economic and technical aid, but also all → commercial treaties, → foreign investments and the activities of → transnational enterprises. Also included could be those agreements between States and international organizations which concern the granting of economic and technical aid, e.g. the treaties between States on the one side and the → International Bank for Reconstruction and Development, the → International Monetary Fund, the → International Development Association or the → International Finance Corporation

on the other. But it is also possible to extend the notion of foreign aid to comprise the military field; thus "foreign aid agreements" would also cover all treaties providing for any form of → military aid.

Here the notion is understood in a narrow sense. It includes treaties concluded on a bilateral level between States, usually between industrial and → developing States, on which basis economic and/or technical aid is supplied.

2. *Form and Contents*

Aid agreements vary considerably as to form and contents; there is no uniform State practice, and even the practice of one State may show variations at different periods of time because of the sensitive nature of foreign aid and its dependence on political and economic factors. Thus the form and contents of aid agreements will depend on the actual political relations between the States concerned and also on the specific form of assistance States are able and willing to offer to others. With relation to form, aid agreements ordinarily are → executive agreements which enter into force upon signature, but there are also examples in State practice of aid agreements being concluded by an exchange of → notes. As a rule, aid agreements are outline or framework → treaties under which a financial amount – be it non-refundable or in the form of a credit – or other contributions or services are promised by the supplying States; the modalities of granting aid are usually reserved for specific agreements to be concluded under the umbrella of the aid agreement.

Despite differences between the various aid agreements it is possible to identify typical contents. Agreements on financial cooperation, as a rule, provide for the payment of credits or non-refundable amounts by the granting State either for a specific project or for a number of projects. The purpose of the financial aid is specified in the agreements: the projects to be carried out are expressly defined; whilst changes in the projects are possible they are subject to the consent of both parties to the agreements. Aid agreements may provide that goods and services to be obtained through financial aid must be bought and imported from the granting State, but this practice is not followed by all States. Aid agreements concluded, for example, by the Federal Republic of Germany provide only that goods and services are to be offered for tender on an international level and in so far as goods and services are imported from the Federal Republic of Germany, the receiving State shall not take any measures that may impair the free choice of transport facilities and, in particular, discriminate against German transport enterprises. Finally, an aid agreement typically provides that the granting State and its institutions connected with the implementation of the agreement are exempted from taxes and other duties in the receiving State.

Agreements on technical cooperation contain the basic conditions for the granting of technical aid and define the fields in which the technical cooperation between the States concerned may take place. Additional agreements – "project agreements" – fix, at a later stage, project conditions in detail, i.e. their purpose, scope, organization, specific services and time-table. However, the basic aid agreement, in addition to the definition of the field of cooperation, provides for the fundamental obligations of both the granting and the receiving State. The granting State is usually obliged to bear the costs of the experts it sends to the receiving country, as well as the cost of the material it supplies; furthermore, the granting State undertakes to guarantee that its experts will duly observe the laws of the receiving State, cooperate with its agencies and refrain from interfering in its internal affairs. The receiving State for its part undertakes to provide the necessary space, material and experts for the implementation of the envisaged projects; it is obliged to exempt material and experts from the granting State from taxes and other duties and to guarantee the physical safety of the foreign experts. The foreign experts are usually exempt from any civil or criminal liability in the receiving State; they are accorded the right to come and go freely from the country and they are also guaranteed a certain minimum standard of living in the receiving State (→ Aliens, Admission).

3. *Legal Issues*

The main legal issues raised by foreign aid agreements concern the applicable law, the discretion of the receiving States to freely dispose of the aid given, the protection of the interests of the

granting States, the privileges and exemptions for deliveries and experts from the granting States, and, finally, the political conditions which may be linked with the conclusion of aid agreements.

In modern practice aid agreements usually make no express reference to the law applicable to them, and in particular do not provide for any applicable municipal law. State practice thus no longer supports the idea that aid agreements are governed by the municipal law of one of the participating States. The modern practice rather suggests that aid agreements are ordinary agreements between States and that international law is therefore the proper law to be applied to them.

However, this does not mean, that the granting of aid under an aid agreement is entirely governed by international law: aid agreements are only framework treaties which leave the actual granting of aid to specific agreements concluded at a later stage. These specific agreements are often subject to the municipal law of the granting State. This is so, for instance, of the practice of the Federal Republic of Germany whose aid agreements expressly provide that agreements implementing financial and technical aid are governed by German law. For an answer to the question as to whether this practice is consistent with general international law, it must be accepted that no rule prohibiting such practice exists today. However, it must also be said that such practice is only harmless as long as the basic questions of granting aid are regulated in the aid agreements governed by international law and the implementation agreements are limited to mere subordinate technical questions. This must be so if the principles of → sovereignty and equality of States are to be taken seriously (→ States, Sovereign Equality). Despite any existing differences in economic wealth and power both the granting and the receiving States are legally equal partners, and this remains the case even if the idea that under international law States are obliged to give assistance to other States has not yet won acceptance (→ International Law of Development).

As to the modern practice of aid agreements which expressly regulate the purpose and use of financial and technical aid and thus restrict the discretion of the receiving States to freely dispose of the aid, it must also be conceded that no rule of general international law is opposed to such agreements. This is true of all agreements defining the projects to be financed or supported by technical aid, and also of those agreements under which the receiving States, when implementing the projects, are obliged to take into account the particular interest of the granting State, e.g. to import goods and services from the granting State. There is a considerable practice of States which link financial and technical aid to the condition that the receiving State buys goods and/or services from the granting State. Therefore, it cannot be said that aid given under such conditions is inconsistent with international law. Nevertheless, it is impossible to overlook the possibility of a conflict arising between the legitimate interest of a granting State in furthering the export of its goods and services and the receiving State's interest in freely deciding on its economic, technical and social development. The latter is a requirement which derives from the principle of sovereignty; the receiving State must remain independent in determining its own development. What is needed is an equitable balance between the interests of the granting and the receiving State; granting States, in striking this balance and when negotiating and implementing aid agreements, may have to exercise some self-restraint and refrain from any measures which may interfere with the receiving State's free determination of its economic development.

The provisions contained in aid agreements which concern the exemption of deliveries and experts from taxes and other duties in the receiving State reflect the legitimate needs of the granting State without unduly harming the independence of the receiving State. Provisions of this kind have a necessary place in aid agreements, in particular where no other treaty relations on economic and technical cooperation exist between the States concerned. Problems may arise in connection with the safeguards and exemptions accorded to foreign experts. No dispute ought to arise over the requirement that the receiving State safeguards the life and the well-being of the foreign experts and takes all measures to guarantee them a standard of living comparable to the standards in their home countries. More difficult is the extent to which foreign experts should be exempt from civil and criminal prosecution in the receiv-

ing State. Clearly, a general exemption from all kinds of liability cannot be required; a limit may be expected which confines freedom from liability to acts committed by experts in the fulfilment of their duties. It is, however, often difficult to decide whether an act was committed in the fulfilment of a duty; the room for interpretation may remain wide and, accordingly, the exemption of foreign experts from liability may be very broad. Should foreign experts commit intentional or grossly negligent acts of wrongdoing it ought to be possible to hold them responsible in the receiving State even when the acts are connected with the fulfilment of their duties.

In negotiating and concluding foreign aid agreements, States often try to link the conclusion of an agreement to certain requirements or expectations of the receiving State's internal or external policies. Of some importance in recent years was the requirement imposed on receiving States to respect fundamental → human rights and basic principles of democracy. Requirements of this kind are rarely expressly contained in foreign aid agreements or directly linked with them. Mostly they are an issue during the → negotiations and are expressed in political → declarations during or after the signing of the agreement. Whether these requirements or interferences with the policies of the receiving States are consistent with international law is hard to answer in a clear-cut way; here too, a balancing of different considertions has to take place. Even if it is assumed that States today are obliged by international law to exercise solidarity and grant aid to poor and less developed countries, States cannot be ordered to give aid to specific countries in specific amounts; a broad discretion remains in the hands of the granting States. In the same way, granting States cannot be hindered in pursuing certain political goals when giving aid. As far as the demand for respecting fundamental human rights and basic principles of democracy is concerned, both these represent basic interests of the world community (→ Jus cogens) which all States at least advocate in their → international relations. Nevertheless, significant differences in the perception of human rights and democratic principles exist in the world today, and any expectations the giving States may have will inevitably confront the right of the receiving States to freely determine their internal and external affairs. Differences in the perception of human rights and democracy developed in the receiving States in their specific historical, economic and social situations should be respected, and inequalities in bargaining power should not be misused by granting States to coerce receiving States into political decisions and attitudes which constitute an abandonment of parts of their sovereignty and → self-determination.

J.J. KAPLAN, The Challenge of Foreign Aid (1967).
M. FLORY, Droit international du développement (1977).
J.J. KAPLAN, International Aid Co-ordination. Needs and Machinery (1978).
A. PELLET, Le droit international du développement (1978).
A.O. ADEDE, Approaches to Bilateral Loans Agreements between Developed and Developing States, Dalhousie Law Journal, Vol. 5 (1979) 121–153.
Human Rights and U.S. Foreign Policy under Carter: A Preliminary Appraisal, Denver Journal of International Law and Policy, Vol. 8 (1979) 517–658.
P. MACALISTER-SMITH, International Humanitarian Assistance (1985) 114, 124–126.

LOTHAR GÜNDLING

FOREIGN DEBTS

Foreign debts are liabilities of → States, intergovernmental organizations, persons or corporate entities *vis-à-vis* other States, intergovernmental organizations, persons or corporate entities in another State. The specific nature of such payment obligations in terms of private or public international law has to be considered in the light of each of these legal relationships.

1. Public Debts

Public debts conceived as liabilities between States ensue from → treaties or from international torts (→ Internationally Wrongful Acts; → Reparation for Internationally Wrongful Acts). They are to be considered under the rules of public international law. Notwithstanding the doctrinal and practical significance of interstate obligations arising from torts, their economic importance falls short by far of the financial impact of liabilities established by treaties. States are free to determine the substance of intergovernmental contractual payments obligations. Where their

agreement only specifies the amount of the debt, the date of payment and the interest to be paid, recourse must be had to general precepts of → monetary law to determine the currency in which the accounts are to be kept, the currency to be used for payment, and the place and other prerequisites for payment, such as the enforceability and scope of value clauses. This may lead, to solutions evolved in municipal law, so that the consequential interplay of international and national law can create special difficulties.

A change of government does not affect the existence of monetary liabilities. Obligations of a defunct State devolve in accordance with the pertinent rules of → State succession, which also apply to → State debts following the assumption of territory by another sovereign power (→ Territory, Acquisition; → Territorial Sovereignty). Nor does → war extinguish State debts, as discussed below. In a declaration of March 6, 1951, Chancellor Konrad Adenauer confirmed that the Federal Republic of Germany was liable for the pre-war external debt of the German Reich, a matter which finally gave rise to the → London Agreement on German External Debts of February 27, 1953.

Various consequences also flow from the separation of newly independent territorial sovereign entities from the former metropolitan State (→ Decolonization). The Articles of Agreement of the → International Bank for Reconstruction and Development (IBRD) provide that a loan to a dependent territory (→ Non-Self-Governing Territories) must be guaranteed by the member State involved (Art. III, Section 4(i)). Accordingly, the guarantee remains in effect after the independence of the territory. In line with British practice, it stands to reason that apportionment of existing liabilities may be attained through the assumption by the new State of debts which the predecessor had entered into for the financing of projects in the former colony (→ Decolonization: British Territories). Related solutions have been applied in cases of → secession by part or parts of a territorial entity. Thus in the 1974 rescheduling of Pakistan's debts, it was agreed that the country need not service those debts incurred prior to secession for projects clearly situated in what is today Bangladesh.

The → Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, opened for signature on April 8, 1983 (UN Doc. A/CONF.117/14, April 7, 1983), deals only with financial obligations of a debtor "State towards . . . another State, an international organization or any other subject of international law" (Art. 33), thus excluding State liabilities *vis-à-vis* private creditors from its scope. State succession does not "as such affect the rights and obligations of creditors" (Art. 36). Failing agreement by the States concerned, the debts of the predecessor pass to the successor in "equitable proportion" following transfer or separation of part or parts of territory, or the dissolution of a State (Arts. 37, Section 2; 40, Section 1; and 41). However, when the "successor is a newly independent State, no State debt shall pass to [such a State] unless an agreement provides otherwise . . .", which must not, however, endanger "fundamental economic equilibria" of the successor or infringe the principle of each people's permanent sovereignty over its wealth and national resources (Art. 38; → Natural Resources, Sovereignty over).

2. War-related Public Debts

Frequently, agreements between States to discharge debts have been concluded in the context of → armed conflict. While jointly at war, allied nations have often granted each other mutual credits, as evidenced by 19th century treaty practice on subsidies and support payments (→ Alliance). Other examples are the Franco-British Agreement of April 30, 1915, and the Lend-Lease Agreements between the United States and its Allies in World War II. Up to the 20th century nations were frequently held liable to compensate the financial war efforts and → war damages of the victors by means of → reparations. Precepts of public international law limiting impositions on defeated States, e.g. in terms of their ability to perform, have not yet emerged; nor is an obligation to apply reparation payments to reconstruction discernable. However, the experience of Germany under the → Versailles Peace Treaty (1919) suggests that the economic capacity of the obligee remains the decisive factor if such an agreement is to be carried out as contemplated. This insight was ultimately taken into account by the commercialization of Germany's reparation liabilities in

the → Dawes and → Young Plans (1924 and 1930 respectively), while the pertinent obligations of the vanquished State had been initially conceived as a moral debt.

Assessment of German reparations after World War II was deferred both by the Paris Reparations Agreement of January 14, 1946 and by the London Agreement on German External Debts of February 27, 1953. Cancellation by the United States of the British Lend-Lease debt in the amount of 25 000 million dollars in conjunction with the granting of a reconstruction credit in the amount of 3750 million dollars in 1945 shows that after World War II foreign debts due to the war effort were considered primarily in terms of ability to repay them.

3. *Private Debts*

Liabilities between States and foreign private creditors are subject to municipal law, including the latter's rules of → private international law (→ Contracts between States and Foreign Private Law Persons). As in the domain of public debts, the economic importance of contractual obligations is preponderant. Among the multiple forms of international borrowing under a particular municipal law, the raising of loans against promissory notes of public authorities is of particular weight. The advantage of fund-raising against promissory notes as compared with the traditional floating of bonds results from their reduced risk and cost of placement, generally lower interest rates, and superior adaptability to the changing requirements of public treasuries. States' preference for fund-raising against promissory notes is, however, probably best explained by the noise-dampening quality of that method compared with the public issue of a loan on foreign markets, a feature in line with the obvious effort by governments to veil the structure of their indebtedness *vis-à-vis* foreign creditors.

4. *Effect of War*

In peacetime, the servicing of foreign debts is normally unlikely to encounter difficulties under the aegis of free trade and convertible currencies. Radical changes, however, are brought about by acts of State interfering with private border-crossing transactions. It has become almost commonplace that international contracts providing for the supply of goods or the rendition of services under private law can no longer be carried out upon the outbreak of belligerent hostilities of the States in which the parties reside; whether the commencement of warfare operates as a discharge of the contractual obligations depends on the applicability of the general doctrine of frustration in the law of the State or States concerned (→ War, Effect on Contracts). The relationship between debtor and creditor arising out of a loan contract is not abrogated by the outbreak of war, while the obligation of the borrower to transmit funds to the lender, and the lender's corresponding right of action are suspended. This is confirmed by treaty practice, notably Art. 229 of the Treaty of Versailles, Art. 81 of the Peace Treaty with Italy of February 10, 1947 (→ Peace Treaties of 1947), and Art. 18(a) of the → Peace Treaty with Japan of September 8, 1951. Chapter X, Art. 4 of the Convention on the Settlement of Matters arising out of the War and the Occupation between the Federal Republic of Germany and the three Western Allied Powers, of May 26, 1952 (→ Bonn and Paris Agreements on Germany (1952 and 1954)) acknowledges this by reaffirming that "... the state of war shall not in itself be regarded as affecting obligations to pay pecuniary debts arising out of obligations and contracts which existed, and rights which were acquired, before the commencement of the state of war". However, post-war agreements between former belligerents may definitively settle private as well as public claims, possibly acting as a → waiver with effect against a State's own nationals.

If only the debtor State or the State from which the private debtor operates has become a belligerent, the borrowing relationship remains unaffected as a matter of principle. However, the debtor State, in particular a → government-in-exile may be incapable of servicing or may prevent the servicing of private debts by invoking → trading with the enemy restrictions until the *bona fide* quality of the claim is established. It is unclear whether the same applies to a credit granted by a belligerent or one of its residents to a neutral State or granted to a resident of that State on a credit not yet drawn by the borrower. The granting of a credit to a belligerent power by a neutral government does, or at any rate may, run counter to the obligation of neutrality

(→ Neutrality, Concept and General Rules). Yet a neutral government is under no obligation to prevent its nationals from extending loans and credits to a foreign State which is at war, though it is free to treat such loans as contrary to the spirit of neutrality and discourage or forbid them altogether.

5. Interference by Sovereign Acts under Municipal Law

Political conflicts short of war may entail the blocking or the seizure of aliens' accounts in the national banking system by governmental order. Thus, effective November 14, 1979, the United States blocked all assets of the Government of Iran and its instrumentalities as well as controlled entities, including the Central Bank of Iran, which were subject to the jurisdiction of the United States or in the possession or control of persons subject to their jurisdiction, including foreign affiliates of American firms (→ Jurisdiction of States; → Retorsion; → Reprisals). Transfers by Iranian entities for payment of obligations to United States residents in respect of obligations to these persons were, however, permitted later that month. It remains to be settled under the → United States-Iran Agreement of January 19, 1981, terminating the controversy over → hostages, whether the extension of these measures to dollar deposits outside the United States may be justified internationally, e.g. as flowing from that nations monetary sovereignty, which might amount to the primacy of the *lex monetae*.

6. Exchange Controls; International Arrangements

Apart from such interference by sovereign acts consequent upon political confrontations, private payments liabilities may be restricted by exchange control legislation due to the scarcity of reserves available to the debtor State, and the corresponding necessity to prevent the outflow of foreign currencies. Among the measures that may be taken are the rationing of border-crossing payments, the requirement of authorization for remittances in foreign currencies, the allocation of foreign exchange depending on the quantity or the quality of the debt to be settled, the postponement of discharges in external currencies, and the prohibition of such outgoing disbursements. Where exchange control affects the servicing of foreign debts by restricting the necessary movement of funds, pertinent regulations as a whole may be maintained consistently with the Articles of Agreement of the → International Monetary Fund (IMF). Its Art. VIII, Section (2)(a) implements the basic target of Art. I(4) – freedom of payments – by disallowing as a matter of principle restrictions on the making of payments and transfers for current international transactions. Payments of interest and modest amounts for the amortisation of loans are thus permitted, while the lump-sum repatriation of borrowed capital does not seem to be so privileged (Art. XXX(d)(3)). Exchange restrictions may, however, be introduced when the IMF declares that a currency is scarce (Art. VII, Sections 2 and 3). The same recourse is available to members benefitting from Art. XIV under transitional arrangements with the IMF. Exchange restrictions affecting capital movements are authorized by Art. VI, Section 3, members being free to exercise such controls as they consider necessary to regulate pertinent transactions and transfers, though that endorsement does not apply to all operations. Art. VIII, Section 2(b) excludes the judicial enforceability of claims arising from credits the fulfilment of which claims would run counter to exchange control measures consistent with that provision.

Domestic exchange control legislation cannot, as a rule, have effect upon inter-State monetary obligations governed by public international law, as a State may not rely on its municipal law to avoid its international obligations. Many treaties, particularly those relating to financing institutions provide expressly for freedom from exchange restrictions. Such clauses do not cast doubt on the general rule just set forth (Mann, p. 559).

The example of Germany in the inter-war period suggests that national exchange control, of necessity, entails supplementary mechanisms of border-crossing effect if international liabilities are to be respected and discharged to the utmost extent feasible. Capital outflows at the beginning of the world economic crisis of the 1920s and 1930s, as well as the reimbursement of considerable short-term and medium-term public and private borrowing, led the German Government to

reintroduce the rationing of foreign exchange in 1931. This entailed the conclusion of bilateral → clearing agreements destined to secure compliance with border-crossing payments obligations without the corresponding disbursements of foreign exchange forbidden by pertinent legislative and regulatory restrictions. This solution became a general feature of intra-European financial relations in the period prior to World War II.

7. Development Loans

Since 1945 the financial support granted by public creditors to → developing States has become increasingly important. Frequently, such loans have been granted on particularly favourable terms. Creditor nations and their agencies may thus take into account the resolutions of the → United Nations Conference on Trade and Development (UNCTAD) and recommendations of the → Organisation for Economic Co-operation and Development (OECD) Development Aid Committee that financial development loans should be non-reimbursable or made available on "soft" terms, i.e. providing for low interest rates, repayment in non-convertible currencies and maturities beyond the usual due dates (→ Economic and Technical Aid). Inter-State obligations regarding financial development aid are usually specified in bilateral agreements offering the recipient governments access to loan facilities of the creditor governments or their agencies. However, in contrast to indebtedness to private creditors, Third World indebtedness *vis-à-vis* public creditors is receding, its share in the overall liabilities of creditor nations having gone down from 57 per cent in 1970 to 37 per cent in 1980. Correspondingly, the share of credits on "soft" terms decreased from 41 per cent to 25 per cent over the same period, though the liabilities of low income developing countries continue to grow.

Having regard to the high degree of Third World indebtedness by the mid-1970s, increasing from 179 500 million dollars in 1975 to 446 000 million dollars in 1980, the 4th UNCTAD meeting in 1976 pleaded for the global rescheduling of credits granted by public donors, though with limited, rather than comprehensive tangible results only. Following this initiative and in the wake of a recommendation by the UNCTAD Council of March 1978, 13 member States of the OECD Development Aid Committee have adapted retroactively the terms of loans in favour of the neediest debtor nations by waiving claims equivalent to 1,100 million dollars.

8. Debt Rescheduling

Difficulties in the servicing of foreign credits by public or private debtors after World War II, partly ensuing from the scarcity of convertible foreign exchange, have given rise to debt rescheduling. Existing monetary obligations are modified by the → negotiation of new maturities in conjunction with the deferment of reimbursements for several years and a change of interest rates. At present, the necessity of such rescheduling is experienced in particular by a number of African and Latin American States as well as by several members of the Soviet bloc which have had to seek renegotiation of their foreign liabilities. Rescheduling arrangements and their implementation rely on certain legal devices which have become current since the mid-1960s, in response to the following developments: the explosive increase in foreign borrowing by developing nations (aggregate indebtedness in 1971, 86,600 million United States dollars compared with 446,000 million dollars in 1980); the mounting share of loans from private banks on market conditions used in the financing of balance of payments deficits (60 per cent of the aggregate deficit in 1981); the doubling of the amounts required in the servicing of debts between 1978 and 1980; and the diminishing exchange reserves in conjunction with the rise of short-term liabilities whose aggregate approaches half of the open claims. Public and, to the extent compatible with constitutional and statutory requirements, private debts are consolidated in line with uniform criteria. Increasingly, governments and intergovernmental organizations have a decisive role in negotiations. Finally, there is a definitive trend to gear the rescheduling to the overall economic situation of the debtor State, and not only to short-term desiderata concerned with balance of payments adjustment. The growing participation of governments on the creditors' side is, of course, a concomitant of the important role of public credits and of the governmental guarantees given to export.

In 1956, the "Club of Paris" was set up for the purpose of organizing multinational rescheduling

negotiations. This informal grouping of Western creditor governments meets as the need arises, with the French Ministry of Finance exercising a permanent coordinating function. In the absence of a formal understanding in the nature of a legal instrument, certain substantive usages and procedural arrangements have been always adhered to in the work of this "Club". The participating governments cooperate in the renegotiation of public and government-guaranteed private debts arising from commercial transactions. Creditor States are committed to apply the same or substantially identical terms of repayment in bilateral relief arrangements. As a rule, within this framework the IMF and the IBRD furnish technical advice and financial support upon request of the governments concerned. The IBRD has also initiated several rescheduling negotiations and managed the supporting consortia. The participation of the IMF in rescheduling efforts may also entail additional financial support from the IMF, e.g. in the form of stand-by arrangements, which is usually made contingent on the accomplishment of IMF inspired economic policy targets by the debtor State. IMF participation is also frequently a prerequisite for the willingness of banks to enter renegotiations. Liabilities of minor amount may also be settled bilaterally.

Other consortia are also on record. Thus since 1959, under the aegis of the OECD (formerly the Organisation for European Economic Co-operation (OEEC)) a group of 14 member States has organized measures aiming at the economic recovery of Turkey by the granting of new credits and the rescheduling of existing ones. The activity of the consortium is beyond the jurisdiction of the OECD which, however, furnishes the secretariat as well as technical assistance. The financial operations are carried out on the basis of separate bilateral agreements between Turkey and each member of the consortium. By the end of 1978, aid to Turkey in its entirety reached the equivalent of 6,900 million dollars.

Rescheduling between the banks concerned and the debtor State, without the creditor governments being involved, has been successful in specific, if isolated, cases. Significantly, however, the terms obtained by banks in those instances were not unfavourable to them at all. They even succeeded in the debtor governments adopting economic stabilization and recovery programmes as a prerequisite of rescheduling (e.g. Peru and Zaire in 1976). This confirms the tendency towards an equal treatment of public and private debts. Generally, rescheduling would be facilitated by increased efficiency of surveillance over creditors and debtors of international financial obligations. Existing controls, notably by the IMF, the Club of Paris, the → Bank for International Settlements and other intergovernmental and non-governmental institutions, already render valuable service in this regard, although improvement of → fact-finding and adjustment procedures would be desirable.

9. Debts Owed to Intergovernmental Organizations

In order to cope with balance of payments difficulties, IMF members may acquire the currencies of other members from the Fund for an equivalent amount of their own money. Legally, this amounts to the purchase of a foreign currency, and economically to a foreign exchange credit. As of April 30, 1981, only developing nations had made use of Fund facilities by drawing the equivalent of 9200 million Special Drawing Rights (SDRs). The World Bank Group (IBRD and the → International Development Association) grants development credits to Third World countries for the financing of technically feasible and economically persuasive development projects. In 1980, the principal debtors were Brazil, Mexico, India and Bangladesh, whose liabilities *vis-à-vis* the World Bank Group amounted to 19100 million dollars. To improve private projects in developing nations, the → International Finance Corporation, a wholly-owned subsidiary of the IBRD, offers longterm credits to enterprises and assumes participation in their capital. The → European Economic Community offers loans in particular through the → European Investment Bank to member States or their nationals to reduce the energy dependence of Europe, to promote regional economic projects and to facilitate changes in the structure of industry. Since 1954, credits in excess of 24,500 million European Currency Units (→ European Monetary Cooperation) have been granted within the Community.

IBRD, Annual Reports.
IMF, Annual Reports.

IMF, Annual Reports on Exchange Arrangements and Exchange Restrictions.
OECD, Annual Reports (Activities of OECD).
OECD, Financial Accounts of OECD Countries (annually).
OECD, Financial Statistics Monthly.

G. VAN HECKE, Problèmes juridiques des emprunts internationaux (2nd ed. 1964).
J. GOLD, The International Monetary Fund and Private Business Transactions (1965).
G.R. DELAUME, Legal Aspects of International Lending and Economic Development Financing (1967).
A.C. CIZAUSKAS, International Debt Renegotiation, Lessons from the Past, World Development, Vol. 7 (1979) 199–210.
D. CARREAU, I. FLORY and P. JUILLARD, Droit international économique (2nd ed. 1980).
W.J. GASSER and D.L. ROBERTS, Bank Lending to Developing Countries, Federal Reserve Bank of New York Quarterly Review, Vol. 7, No. 3 (1982) 18–29.
F.A. MANN, The Legal Aspect of Money (4th ed. 1982).
K. SCHRÖDER, Die Umschuldungen mit den Ländern des RGW, Außenpolitik, Vol. 34 (1983) 134–153.
I. SEIDL-HOHENVELDERN, Das Wiener Übereinkommen über Staatennachfolge in Vermögen, Archive und Schulden von Staaten, Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht, Vol. 34 (1983) 173–199.

HUGO J. HAHN

FOREIGN INVESTMENTS

1. Notion

Foreign investment may be characterized as the transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) to be used in the conduct of an enterprise in that country in return for a direct or indirect participation in the earnings of the enterprise. The use of the funds in the conduct of an enterprise distinguishes foreign "investment" from foreign "trade". Foreign investment may consist of "direct investment" or "portfolio investment". The distinguishing factor is the degree of managerial control acquired by the investor. Portfolio investment accordingly includes debt instruments, such as bonds, as well as equity instruments, such as stocks or shares, so long as the investor does not acquire substantial voting power (usually less than 25 per cent). Direct investment may take the form of new ventures or of the acquisition of existing enterprises. Foreign investment may be governmental investment or private investment, according to the sources of the funds.

2. Historical Evolution

Although foreign investment can be traced to the early days of colonization, its strategic role in economic development emerged during the 18th and 19th centuries. During the period ending with World War I European foreign investment was primarily portfolio investment rather than direct investment, while investment abroad of the United States appears to have consisted primarily of direct investments. During that time, however, statistics did not differentiate direct investments from other non-controlling equity investments. During the last part of the 19th century French and German long-term capital exports went mainly to European countries, in particular Russia, while British capital flowed primarily overseas. United States foreign investment before 1900 went chiefly to Mexico and Cuba, while the remaining Latin American countries were host countries for substantial British overseas investment. After World War I the United States took over from Europe the role of principal supplier of external capital for Latin America. For three decades after World War II it was the dominant supplier world-wide.

Foreign investment was frequently stimulated by the local sovereign by means of special charters or → concessions granted to the investor for the conduct of the enterprise. Famous examples from the 19th century are the concession for the construction and operation of the → Suez Canal of November 30, 1854 and the concession agreement between the Congo Free State and the promoters of the Compagnie de Katanga of March 1, 1891 for the economic development of the province.

While private investment is often placed in and facilitated by → developing States, in fact the greater part of foreign investment moves between developed countries. For example, according to the most recent bench-mark survey of the United States (relating to 1977), direct foreign investment of the United States in developing countries amounted to $31 800 million, as compared with direct investment in developed countries in the sum of $110 120 million. Investment in mining

and petroleum industries accounted for slightly more than one quarter of the total United States direct investment abroad but the percentage of petroleum investment in the developing countries was significantly less than that of mining investment as a result of the expropriations in the OPEC countries (→ Organization of Petroleum Exporting Countries; → Expropriation and Nationalization).

In general, during the so-called classical period of foreign investment two approaches governing its status coexisted. One system sought to facilitate and promote foreign direct investment through grants by the host country to foreign investors of special privileges and preferential treatment stipulated in special concession agreements. The other provided an open door to foreign investment, by according it national treatment and refraining both from grants of special advantages and imposition of discriminatory conditions (→ Economic Law, International; → Most-Favoured-Nation Clause; → World Trade, Principles).

After World War II the picture changed radically as the developing countries commenced to curb or eliminate foreign ownership in natural resources (→ Natural Resources, Sovereignty over). The prelude to this shift in policy was the resort to confiscatory measures by the Carranza Government in Mexico, culminating in the constitutional abrogation of private ownership rights in mineral and petroleum deposits promulgated in 1917 and the nationalization of the petroleum industry in 1938. To be sure, the confiscations of 1917 were nullified by the Mexican Supreme Court and the concessions reconfirmed by the Petroleum Law of 1926 (following an "extra-official" agreement with the United States to that effect) and the United States oil companies were ultimately compensated for the loss of the properties nationalized in 1938 on the basis of an appraisal by joint experts. These and other instances of expropriation, however, led to repeated though unsuccessful efforts to codify the protection of foreign investors in a general international convention. Thus as early as 1929 the → League of Nations sponsored an international conference on the treatment of foreigners which failed to arrive at a final draft of a convention, and during the League's closing days a special joint committee on private investment working at Princeton issued a noteworthy report entitled the Conditions of Private Foreign Investment.

The → United Nations held a Conference on Trade and Employment at Havana in 1948, adopting a Charter for a proposed International Trade Organization (the → Havana Charter) which included a special article (Art. 12) on the stimulation, permissible limitations and security of foreign investments, applicable in part to both existing and future investments. *Inter alia*, Art. 12 encouraged the conclusion of special bilateral and multilateral investment treaties between member States. The Charter, however, failed to become operative, because the United States President decided in 1950 not to resubmit the Charter to Congress, in view of the strong objections to it by the United States business community, in particular to Art. 12 whose provisions on investment protection were considered to be too vague and too weak.

Regional attempts, such as the Economic Agreement of Bogotá (1948) and the draft of a General Inter-American Economic Agreement, likewise were conspicuous failures.

Yet, since private investment was considered to be an important vehicle of international development assistance, the United States and, subsequently, other capital exporting countries established national measures to protect the foreign investments of their nationals against political risks, such as restraints on the repatriation of proceeds from investment and on expropriations. These measures, called "investment guarantee programmes", originated in the United States Economic Cooperation Act of 1948 and were at first restricted to Europe. They were extended to other geographical areas by the Mutual Security Act of 1951, the scope of the guarantee having meanwhile been more closely defined by the Foreign Economic Assistance Act of 1950. The Mutual Security Act of 1953 added the requirement of a prior agreement between the United States and the prospective host country. The Mutual Security Act of 1959 finally restricted the programme to developing countries. Since 1961 the agency in charge of the programme has been the Overseas Private Investment Corporation (OPIC). Agreements have been concluded with 75 nations.

The Federal Republic of Germany established a comparable investment guarantee programme in 1959, on the basis of an appropriation included in the *Haushaltsgesetz* of 1959. Similar appropriations have been made in all succeeding budget laws. The guarantee requires either the existence of a treaty with the host country specifying the treatment of the investment or the assurance of adequate protection under applicable local law. Developing countries enjoy a preferred position. Similar investment guarantee programmes operate now in 15 other States which are members of the → Organisation for Economic Co-operation and Development (Australia, Austria, Belgium, Canada, Denmark, Finland, France, Italy, Japan, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom). Attempts to create multilateral investment insurance for foreign private direct investment have so far not been successful, except that in 1972 the Arab countries concluded a convention establishing the Inter-Arab Investment Guarantee Corporation.

3. *Current Legal Status*

In recent years foreign investment has become a heterogeneous phenomenon in both economic and legal terms. While developed countries are still the predominant host countries, the share of the developing countries in total foreign investment has increased, with the so-called newly industrialized countries having turned into particularly attractive host countries. Moreover the role of the United States has undergone a drastic change. Foreign investment in the United States has increased dramatically, while the United States' proportion of total foreign investment by all capital-exporting countries has markedly declined.

From the legal perspective a number of concurrent trends deserve attention: the growing importance of → investment codes, reflecting the divergent policies of host countries with respect to foreign investment; the "internationalization" of concession agreements; the rapid rise in bilateral investment treaties; the emergence of facilities for the settlement of investment disputes, and the repercussion of these developments on the traditional rules governing expropriations.

(*a*) *Growth of investment codes*

Today the developing countries no longer pursue an unqualified open-door policy with respect to foreign investment, but rather supervise and direct the entry of foreign investment. National investment codes vary greatly according to the economic policies and perceived needs of the respective governments. While a number of developing countries provide special tax benefits and other advantages to promote the establishment of new enterprises, others impose heavy tax burdens and other limitations on foreign enterprises, particularly if operating in certain sectors such as mining and petroleum extraction, or bar foreign enterprises entirely from specified industries. Some nations have made "indigenization" of foreign enterprises a national objective which is pursued in a variety of ways.

One of the most discussed investment codes of that type is the code established in 1970 by Decision No. 24 of the Commission of the Cartagena Agreement (organizing the → Andean Common Market). The code is based on the notion that foreign direct investment may be beneficial to the host country, provided that it constitutes new investment, is subject to progressive indigenization and facilitates access to foreign technology untrammeled by restrictive clauses in licences. Therefore, "new" investment requires prior governmental approval, is conditioned on agreements on the transformation of foreign enterprises into mixed enterprises, defined as enterprises whose capital belongs to national investors in a proportion ranging from 51 to 80 per cent, and may not limit the acquisition of technology by restrictive clauses (→ Technology Transfer). Certain sectors may be reserved to national enterprises. Recent liberalizations designed to permit encouragement of foreign investment have resulted in an increase of foreign investment in Andean Common Market countries, particularly in manufacturing.

Legislative restrictions on inward foreign investment exist also in the developed countries, especially in France, Canada and Japan. The French system is based on Law No. 66-1008, as implemented by Decrees Nos. 67–78 and 67–82. Canada introduced restrictions with the enactment of the Foreign Investment Review Act,

1973, while Japan's Law Concerning Foreign Investment dates back to 1950. The United States instituted surveillance of foreign investment in the United States with the passage of the International Investment Survey Act of 1976; but as yet no actual control measures have been enacted.

(*b*) *Internationalization of concession agreements*

Parallel with the increased adoption of national investment codes evolved an internationalization of concession agreements. In order to protect foreign investment covered by concession agreements against subsequent law changes in the host country or expropriations without compensation, after World War II the practice developed of inserting so-called "stabilization clauses" and "internationalization clauses" into the agreements. An early example of the first type of clause was Art. 13 of the concession agreement between Kuwait and AMINOIL (1948), while the prototype of the latter type of clause may be seen in Art. 46 of the agreement between Iran and the International Oil Consortium. The internationalization of concession agreements and its effect on the liability for breach has been recognized by important recent international arbitral awards, such as in the three → Libya-Oil Companies Arbitrations, the Kuwait-AMINOIL arbitration (ILM, Vol. 21 (1982) 976) and the Congo-AGIP arbitration (Yearbook Commercial Arbitration, Vol. 8 (1983) 133). The validity of such clauses was also endorsed by the → Institut de Droit International at its 1979 session.

(*c*) *Spread of bilateral investment treaties*

The newest vehicle for promotion and protection of foreign investment is the conclusion of bilateral investment treaties between capital-exporting countries and host countries. Although originating with the bilateral agreements negotiated in the early 1960s between the Federal Republic of Germany and other nations in conjunction with its investment guarantee programme, since 1974 they have come into common use by other European investor nations and investment-seeking countries, in all some 170 countries in 1981. The United States, which until recently relied on investment guarantee clauses in its general → treaties of friendship, commerce and navigation with other nations, has recently developed a Model Bilateral Investment Treaty and negotiated treaties of that type with several developing countries. Treaties of that type broaden the access of foreign investment, bar the imposition of onerous requirements, assure adequate compensation in the case of expropriation and provide for dispute settlement through the International Centre for the Settlement of Investment Disputes (→ Investment Disputes, Convention and International Centre for the Settlement of).

(*d*) *Creation of facilities for third-party settlement of investment disputes*

The need for a permanent mechanism for neutral dispute settlement caused the World Bank (→ International Bank for Reconstruction and Development) to sponsor the International Convention on the Settlement of Investment Disputes, which came into force in 1966 and has been ratified by 82 developing and developed countries.

(*e*) *Effects*

The recent efforts aimed at restoring the security of foreign investment have reversed the trend of foreign expropriations without appropriate compensation, which reached its height with the expropriations of the foreign petroleum concessions by the OPEC countries in 1974, and have attenuated the impact of the two United Nations resolutions of the same year, i.e. the Declaration on the Establishment of a New International Economic Order (→ International Economic Order) and the → Charter of Economic Rights and Duties of States. The new developments serve to restore a better balance between the need of nations to control their economic destinies and the legitimate expectations of foreign investors.

4. Special Legal Problems

Investment by foreign multinational enterprises has accentuated some of the drawbacks of foreign investment in developing countries (→ Transnational Enterprises). The United Nations is engaged in elaborating a comprehensive → code of conduct for the activities of such powerful transnational groupings (United Nations Code of Conduct for Transnational Corporations).

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, UNTS, Vol. 575 (1966) 159.

Declaration on the Establishment of a New International Economic Order, UN GA Res. 3201 (S-VI), May 1, 1974.

Declaration of Economic Rights and Duties of States, UN GA Res. 3281(XXIX), December 12, 1974.

Decision No. 24, Commission of the Cartagena Agreement, December 31, 1970 (as amended), ILM, Vol. 16 (1977) 138.

OECD, Declaration on International Investment and Multinational Enterprises, June 21, 1976. (In Activities of OECD in 1976, Annex 4 (1977)).

League of Nations, Special Joint Committee on Private Foreign Investment of the Economic and Financial Organization, Conditions of Private Foreign Investment (1946).

R.F. MIKESELL, Foreign Investments in Latin America (1955).

R. KOVAR, La "Congolisation" de l'Union Minière du Haut-Katanga, AFDI, Vol. 13 (1967) 742–781.

A.I. BLOOMFIELD, Patterns of Fluctuation in International Investment Before 1914 (1968).

R.B. DICKIE, Foreign Investment: France, A Case Study (1970).

P. FISCHER, Die internationale Konzession (1974).

Committee to Study Foreign Investment in the United States of the Section of Corporation, Banking and Business Law of the American Bar Association, A Guide to Foreign Investment under United States Law (1979).

Institut de Droit International, Les accords entre un Etat et une personne privée étrangère, AnnIDI, Vol. 58 (1979) 42–103.

OECD, International Investment and Multinational Enterprises, Recent International Investment Trends (1981).

U.S. Direct Investment Abroad, 1977, U.S. Department of Commerce (1981).

M.S. BERGMAN, Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty, New York University Journal of International Law and Politics, Vol. 16 (1983) 1–43.

Foreign Direct Investment in the United States, 1980, U.S. Department of Commerce (1983).

OECD, Investing in Developing Countries (5th rev. ed. 1983).

OECD, Investment Incentives and Disincentives and the International Investment Process (1983).

STEFAN A. RIESENFELD

FREE TRADE AREAS

1. Notion

The term free trade area originated in a proposal in 1947 made by Lebanon to the Preparatory Committee of the → Havana Charter, which was dealing with the exceptions to the → most-favoured-nation rule. Lebanon proposed that these exceptions should include free trade areas besides the traditional → customs union and a variety of preferences (among neighbouring countries, among countries within an economic region, etc.). Since that concept was not only of interest to the → developing States of the Near and Middle East and of Latin America but also appealed to industrialized countries, in particular to France, it was adopted in the final text of Art. 44 of the Havana Charter, which failed, however, to receive the necessary ratifications and never entered into force. The substance of Art. 44 reappears in Art. XXIV of the → General Agreement on Tariffs and Trade (1947), the permanent substitute for the international trade organization envisioned by the abortive Havana Charter. Through that GATT provision, the term free trade area was introduced into the field of international economic law (→ Economic Law, International).

Art. XXIV, para. 8(b) of GATT defines a free trade area as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories".

While the goal of establishing free trade through the abolition of internal barriers is a common feature of customs unions and free trade areas, the basic difference lies in the custom union's uniform external tariff as against imports from third countries. This presupposes common organs and a commitment to a common commercial policy, thus affecting the State's → sovereignty and, as held by the → Permanent Court of International Justice, a State's economic independence (→ Customs Régime between Germany and Austria (Advisory Opinion)). The free trade area, on the other hand, entails a much lower degree of integration: The member States' full autonomy to determine their external commercial policy *vis-à-vis* third countries remains unaffected, but the advantages of free trade between the member States are gained. This was, *inter alia*, the reason why the permanently neutral States opted for the free trade area form as the model for their participation in → European in-

tegration (→ Permanent Neutrality and Economic Integration; → European Free Trade Association (EFTA)).

2. History

The origin of free trade areas went hand in hand with the establishment of GATT. During the pre-GATT era such economic groupings of States were, nevertheless, not entirely unknown: To the extent that such groupings did not fulfil all the conditions of customs unions, they were known as "partial" or "incomplete" customs unions and often had features characteristic of the modern free trade area. Such were the "customs unions" between Sweden and Norway during the 19th century, Canada and the United States between 1854 and 1866, Poland and → Danzig after 1921, and Luxembourg and Belgium after 1935 (→ Belgium-Luxembourg Economic Union).

The first initiative to establish a free trade area as defined in Art. XXIV of GATT was made within the framework of the Organisation for European Economic Cooperation (OEEC), the predecessor of the → Organisation for Economic Co-operation and Development. This led to the Stockholm Convention Establishing the European Free Trade Association of November 20, 1959, which Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom joined. Following the Helsinki Agreement of March 27, 1961, Finland became an associate member of EFTA. After the first enlargement of the → European Communities, free trade agreements with Austria, Portugal, Sweden and Switzerland, signed on July 22, 1972, came into force on January 1, 1973. Similar agreements were concluded with Iceland, Norway and Finland with the result that, besides the still existing free trade area among the remaining EFTA countries, new free trade areas were established between the latter on the one hand and the European Communities on the other, thus comprising now some 18 European countries (→ European Communities: External Relations).

Simultaneously with the developments in Europe, the free trade area concept was also adopted in Latin America: by virtue of the "Multilateral Treaty of Free Trade and Central American Economic Integration" signed at Tegucigalpa, Honduras, on June 10, 1958, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua established a free trade régime; in contrast to the European models, however, this treaty is designed to ultimately create a customs union "as soon as conditions are favorable" (Art. I). Guatemala, Honduras and El Salvador entered into a further "Treaty of Economic Association" in Guatemala City on February 6, 1960, guaranteeing each other, *inter alia*, "free movement of persons, goods, and capital between their territories" (Art. I). The Managua Treaty of Central American Economic Integration of December 13, 1960 provides for the completion of the establishment of a Central American free trade area within a period of five years and, furthermore, the subsequent creation of a common market and the adoption of a uniform Central American tariff (Arts. I and II) (→ Latin American Economic Cooperation).

As a reaction to the free trade and further economic integration movements in Central America, Mexico and ten South American States concluded the Montevideo Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association (LAFTA) on February 18, 1960, which also envisaged at a later stage the establishment of a Latin American common market (Preamble, para. 7). The LAFTA Treaty (Art. 2) envisioned a transitional period of twelve years for the establishment of a free trade area. Even after extension of that period until December 31, 1980, a free trade area in the sense of Art. XXIV of GATT could not be brought about. For these reasons, LAFTA, by virtue of the (second) Montevideo Treaty of August 12, 1980, was replaced by a more flexible organization, the → Latin American Integration Association (LAIA).

As a parallel to the LAFTA/LAIA free trade movement, the Caribbean Free Trade Association (CARIFTA) was established by the Dickinson Bay Agreement of December 15, 1965, between Antigua, Barbados and British Guyana, and was later extended to the entire Caribbean Area by virtue of the Supplementary Agreement, dated March 18, 1968 (→ Caribbean Cooperation).

CARIFTA was subsequently replaced by the Chaguaramas Treaty, dated July 4, 1973, establishing the Caribbean Community (CARICOM) which basically follows the model of a customs union. CARIFTA thus became the first example

of a free trade area effectively evolving into a customs union.

The New Zealand-Australia Free Trade Agreement of August 31, 1965 (UNTS, Vol. 554, p. 169) established NAFTA, which is also meant to be converted into a customs union.

The European Communities have concluded a large number of trade, association and cooperation agreements with European and non-European countries, some of which, such as the 1975 Agreement with Israel, contain features typical for the creation of a free trade area.

For the future, plans are being made to establish a Canada-US free trade area to be called CUFTA, and also such an area in the Pacific to be called PAFTA, with Japan as the leading economic power.

3. *Common Issues of Free Trade Areas*

(*a*) *Abolition of trade restrictions*

According to Art. XXIV(8)(b) of GATT, the abolition of trade restrictions is the essential feature of a free trade area. Herein are included: tariffs, invisible tariffs and quantitative import restrictions on the one hand, and export duties and export restrictions on the other. Such trade barriers can never be removed *ipso facto* with the entry into force of the instrument establishing the area but require a transitional period ranging from five (e.g. Austria-EEC, 1972) to twelve (LAFTA) years in the course of which customs duties and other restrictions are gradually to be abolished.

This principle of liberalization may apply to all goods or to a specific type only, such as manufactured products. The former is typical for the Latin American, the latter for the European free trade areas, which basically exclude agricultural products and fish and other marine products from their scope of application.

As a corollary to the elimination of trade barriers, any member of a free trade area is obliged to implement rules to prevent distortion of competition. Restrictive business practices, such as trusts, cartels, monopolies, etc. (→ Antitrust Law, International), employed by both private enterprises and public corporations jeopardize the objectives of any free trade area and are likewise to be eliminated. The same applies to government aids as well as dumped and subsidized exports (EFTA Treaty, Arts. 13 to 17, CARIFTA Treaty).

(*b*) *Rules of origin and deflections of trade*

Both issues are peculiar to free trade areas. They have their origin in the fact that members of free trade areas are – contrary to those of customs unions – not obliged to join the others to establish a common external tariff wall against non-members, but are free in that respect. Consequently, third countries, in order to take advantages of the area, would enter the latter through the gates of that member which levies the lowest duties on a particular good. Such practices would then work to the detriment of members with higher external tariffs on certain products. For these reasons, Art. XXIV(8)(b) of GATT provides that only "products originating in such territories" should benefit from a free trade area. Since only such goods are entitled to the so-called "area tariff treatment", the decisive issue lies in defining what "originating in the area" actually means. While the European free trade systems contain an elaborate set of rules incorporated in annexes to the principal instruments, the Latin American systems confine themselves to general provisions as regards the relevant criteria for the qualification for area tariff treatment (LAFTA, Art. 49 and CARIFTA, Art. 5). The basic solutions are: the "wholly produced" criterion, including all products that have been wholly produced within the area; the "process" criterion, including products which have been produced in the area by a qualifying process (they must be classified under a different Brussels nomenclature tariff heading than any of the materials or components imported into the producing member country; cf. → Customs Law, International); and the "percentage" or "value-added" criterion, including products in which the value of area components exceeds that of materials imported from a non-area country. The evidence of the fact that a specific product has fulfilled any of these criteria is granted by a specific document, called the "certificate of origin" or "movement certificate", as in the case of the Austria-EEC Free Trade Area. Here authorization to issue the movement certificates lies with the customs authorities of

Austria and of the member States of the Community.

The issue of "deflections of trade" or "diversion of commercial traffic" is likewise the result of the establishment of independent tariff walls by the individual area member *vis-à-vis* non-member countries. It arises from the different external tariffs on raw material or semi-finished products from third countries; these would enter the area through the gates of a low tariff member, where they would subsequently be processed or assembled into new (now area) products. They would thus gain an advantage in competition with similar products originating in the territories of those area members levying higher tariffs on the necessary raw materials or intermediate products. In order to combat such practices, most constitutions of free trade areas contain provisions defining deflections of trade (e.g. EFTA Convention, Art. 5; LAFTA Agreement, Art. 6; Austria-EEC Agreement, Art. 24), but leave it primarily to the injured member to cope with that problem before submitting it to the competent organ of the organization. The criteria established by the Austria-EEC Agreement of 1972 include: (a) an increase in imports of a given product from the territory of one contracting party to that of another; (b) this increase is or would be detrimental to any production activity carried on in the latter; (c) this increase is the result of the partial or total reduction of customs duties levied by the importing party on that product, in accordance with the Agreement; and (d) this increase is due to significant disparities between the customs duties or charges having equivalent effect levied on the raw materials or intermediate products used in the manufacture of the product in question, in favour of the exporting contracting party.

(*c*) *Institutional structures*

The legal basis of a free trade area is a treaty (→ Treaties) which, by establishing at least one common organ, functions simultaneously as the constitution of an international organization. The institutional structure is relatively complex in EFTA, comprising the Council as the supreme organ, endowed with legislative, administrative and also judicial functions, the Secretariat and a number of Committees (Examining Committees, Customs Committee, Budget Committee, Committee of Trade Experts, etc.). A similar complex structure is to be found in LAIA. The structure of the agreements between the remaining EFTA members and the EEC, on the other hand, is relatively simple: they provide for the establishment of one single organ, the Joint Committee, responsible for the administration and the implementation of the respective agreement (e.g. Art. 29 of the Austria-EEC Agreement). For this purpose, it is endowed also with legislative functions and, furthermore, may act as the organ for the settlement of disputes (e.g. touching issues of deflections of trade, dumping etc.) among area members.

(*d*) *Free trade areas and GATT*

GATT takes a favourable position towards customs unions and free trade areas, as reflected in Art. XXIV(4). The underlying idea of that article is that the establishment of larger markets through these two forms of economic integration would result in economic growth in the member countries which, in turn, would increase the demands for products from third (i.e. GATT) countries. On the other hand, customs unions or free trade areas should not be misused to disguise preferential arrangements within the GATT system.

Problems arose in particular with EFTA in 1960, when a large number of GATT members felt that its basic confinement of free trade to industrial goods only meant that it did not fulfil the GATT condition of applying to "substantially all the trade" which qualified free trade areas as exceptions to the most-favoured-nation standard. LAFTA (1960) and NAFTA (1965), on the other hand, contained no detailed timetable in their constitutions as regards the abolition of trade barriers and thus did not fulfil the requirement of an "interim agreement necessary for the formation of a free trade area", as prescribed in Art. XXIV(5) of GATT. In spite of these discrepancies between the instruments submitted to GATT for examination and Art. XXIV of GATT, the parties to the latter at length approved these forms of regional integration. More recent agreements, such as the EFTA-EEC instruments of 1972, contain an express statement that, for example, the contracting parties are "resolved . . . to eliminate progressively the obstacles to substan-

tially all their trade, in accordance with the provisions of the General Agreement on Tariffs and Trade concerning the establishment of free trade areas" (preamble, para. 2).

4. *Evaluation*

The original concept of the free trade area as being a relatively loose union of sovereign States for the purposes of facilitating trade has gone two different ways since the late 1950s: In Europe it was seen as an alternative to intensively integrated groupings of States with political aspirations, as the customs union would imply, and was therefore confined to basic economic cooperation among its members; in the Latin American region (and also in the case of NAFTA), the free trade area concept was viewed as a starting point to higher degrees of regional integration, including not only the formation of a common commercial policy but also of a common policy in other spheres. Although virtually all constitutions for the establishment of free trade areas can be reconciled with the spirit and the letter of Art. XXIV of GATT only with difficulty and thus would constitute, as it is indeed widely held, only extensive preferential arrangements, they are nevertheless tolerated by GATT as facts in international economic life and expressions of a steadily growing regionalism. This may indeed have been to the good, as one recent writer has stated: ". . . it may be that the forces making for regionalism have been so powerful that if the GATT had not bent before the strong wind, like the wise bamboo, it would have been broken irreparably" (Haight, p. 399).

G. KEISER, Das System der Freihandelszone als ein Weg zu größeren Märkten, in: E. von Beckerath, F.W. Meyer and A. Müller-Armack, Wirtschaftsfragen der Freien Welt, Erhard-Festschrift (1957) 602–635.

H. BACHMANN, Das Prinzip der Freihandelszone und das Präferenzsystem des Britischen Commonwealth, Außenwirtschaft, Vol. 13 (1958) 49–72.

W. HESBERG, Die Freihandelszone als Mittel der Integrationspolitik (1960).

B. FISCHER, Die Problematik der Handelsumlenkungen und des Ursprungsbegriffes in einer Freihandelszone (1961).

C.H. ALEXANDROWICZ, World Economic Agencies (1962).

H. STEINBERGER, GATT und regionale Wirtschaftszusammenschlüsse (1963).

J.S. LAMBRINIDIS, The Structure, Function and Law of a Free Trade Area, The European Free Trade Association (1965).

R.I. STRAUS, Eine Weltfreihandelszone, Außenwirtschaft, Vol. 22 (1967) 241–269.

H.R. KRÄMER, Formen und Methoden der internationalen wirtschaftlichen Integration; Versuch einer Systematik (1969).

K.W. DAM, The GATT, Law and International Economic Organization (1970).

F. JAEGER, GATT, EWG und EFTA, Die Vereinbarkeit von EWG- und EFTA-Recht mit dem GATT-Statut (1970).

F.A. HAIGHT, Customs Unions and Free-Trade Areas under GATT, Journal of World Trade Law, Vol. 6 (1972) 391–404.

P. ROBSON, Japan and a Pacific Free Trade Area, Journal of Common Market Studies, Vol. 11 (1972) 75–79.

S.E. GORDON, True North, Strong and Free-Trading, Canadian Business Magazine, Vol. 46 (November 1973) 66–68.

V. CURZON, The Essentials of Economic Integration, Lessons of EFTA Experience (1974).

R. BURNETT, Inclusion of Papua New Guinea in New Zealand-Australia Free Trade Area, Journal of World Trade Law, Vol. 9 (1975) 226–229.

P. LORTIE, Economic Integration and the Law of GATT (1975).

G. ANDRON, A Free Trade Area and the Foreign World with an Application to EC Expansion, Southern Economic Journal, Vol. 43 (October 1976) 996–1008.

D.J. THOMAS, The GATT and the NAFTA Agreement, Journal of Common Market Studies, Vol. 15 (1976) 29–41.

Y. COHEN, Israel and the European Communities, Political and Economic Implications of the Free Trade Area Agreement (1977).

P. FISCHER, Österreich – EWG, Völkerrechtliche Fragen (1978).

A. GOLBERT, Latin American Economic Integration: An Overview of Trade and Investment Developments in ANCOM, CACM and LAFTA, Syracuse Journal of International Law and Commerce, Vol. 7 (1979–1980) 183–211.

Y. COHEN, Israel and the EEC, Israel's Integration in the Economic Structure of the European Community (1980).

J. HUBER, The Practice of GATT in Examining Regional Arrangements Under Article XXIV, Journal of Common Market Studies, Vol. 19 (1981) 281–298.

E. USTOR, The MFN Customs Union Exception, Journal of World Trade Law, Vol. 15 (1981) 377–387.

W. HUMMER, Rechtsfragen aus Anlaß der Sukzession der ALALC durch die ALADI, in: Rechtsvergleichung, Europarecht und Staatenintegration, Gedächtnisschrift für Léontin-Jean Constantinesco (1983) 282–297.

PETER FISCHER

GENOCIDE

1. History and Ambit of the Genocide Convention

The motivation behind the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 (UNTS, Vol. 78, p. 278) was to avoid repetition of the horrifying experience of World War II, in the course of which the National Socialist régime in Germany liquidated whole population groups including, above all, a large proportion of European Jewry. Furthermore, the expulsion of Germans and of persons of German descent living in the former eastern provinces of Germany and in eastern and south-eastern European countries frequently took place under conditions that are classifiable as genocide (→ Population, Expulsion and Transfer; → Forced Resettlement). In the wake of the judgment of the International Military Tribunal in Nuremberg on October 1, 1946 (→ Nuremberg Trials), the → United Nations General Assembly unanimously adopted Resolution 96(I) calling upon the → United Nations Economic and Social Council to prepare a Draft Convention on the Crime of Genocide. After several preparatory drafts the Convention was adopted unanimously by the General Assembly with no abstentions on December 9, 1948 and came into force on January 12, 1951. By December 31, 1983, the Convention had been ratified or acceded to by 92 States. Of the great powers only the United States has not yet ratified it.

2. Content of the Convention

The contracting parties begin by affirming in Art. I "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" (→ International Crimes). Acts constituting genocide are defined in Art. II as acts directed against national, ethnical, racial or religious groups, whether the persons affected are citizens of the State concerned or not. Such acts may comprise killing members of the group, causing them serious bodily or mental harm, deliberately inflicting conditions of life on the group that are calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group. Any such act must be committed with intent to destroy, in whole or in part, the group as such (→ Discrimination against Individuals and Groups; → Racial and Religious Discrimination; → Minorities). Apart from genocide itself, Art. III declares the following acts to be punishable: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. Art. IV excludes reference to → acts of State as justification for an offender's impunity or immunity. Art. V imposes an obligation on contracting parties to make provision for effective penalties for all acts punishable under the Convention. The actual duty to punish is to be found in Art. VI, but, in accordance with the territorial principle of jurisdiction, it is restricted to the State on whose territory the act concerned was committed (→ Jurisdiction of States). In addition, jurisdiction is also given to an → international criminal court, although no such forum has yet been established. According to Art. VII, acts punishable under the Convention shall not be considered as political crimes for the purpose of → extradition; moreover, contracting parties pledge themselves to grant extradition in such cases. Art. VIII goes beyond the criminal law content of the Convention and gives contracting parties the right to call upon organs of the → United Nations to take appropriate measures to prevent and suppress acts of genocide. Finally, Art. IX establishes the jurisdiction of the → International Court of Justice in disputes between contracting parties including those relating to the responsibility of a State for genocide (→ Responsibility of States: General Principles). However, a certain number of States, including all the socialist States, in particular the Soviet Union, have made reservations regarding this last provision (→ Treaties, Reservations).

3. Evaluation of the Convention

As compared with the law before 1948, the Convention embodies a number of notable improvements. Art. I declares genocide to be a crime "under international law" and not "against international law". In the light of this careful formulation, it cannot be assumed that individuals who commit acts punishable under the Conven-

tion may only be punished if provision is made for criminal liability under the national law of the State where the act was committed (→ International Law and Municipal Law). On the contrary, the provision in Art. VI for jurisdiction of an international criminal court, which would have to apply the Convention directly, shows that the Convention imposes actual legal duties on everyone and establishes liability for violations by guilty individuals without references to the national criminal law of States (→ Individuals in International Law; → Crimes against the Law of Nations). The extent of liability has also been expanded under the Convention: The inclusion of acts committed in peacetime correctly extends the Nuremberg Tribunal's interpretation of → crimes against humanity, which was restricted to acts committed in time of war. The duty incumbent on States to make the acts defined in the Convention punishable under national law promotes a sense of moral abhorrence towards genocide in the consciousness of the public at large and thus contributes indirectly to the prevention of crime. Since the coming into force of the Convention, spokesmen for threatened groups have in fact repeatedly pointed to the presence of criminal liability for genocide. The Nuremberg Tribunal's rejection of the act of State doctrine in its judgment is rightly affirmed in Art. IV. Furthermore, extradition for genocide is safeguarded in Art. VII in the face of objections that the violations are in the nature of political crimes. Finally, the provision of legal protection by organs of international law is also of importance. Art. VIII gives all contracting parties, even if they are not members of the United Nations, the right to request competent organs to take action under the → United Nations Charter for the prevention and suppression of genocide and, in particular, to submit complaints about violations of the Convention that have already occurred. The possibility of a State accused of genocide appealing to the prohibition of intervention in matters essentially within the → domestic jurisdiction under Art. 2(7) of the UN Charter is thereby excluded. Art. IX further creates a general duty to submit all disputes to the ICJ, including those relating to the application and implementation of the Convention. In spite of the reservations of a certain number of States, this duty is binding on the great majority of the contracting parties.

Notwithstanding these improvements the Convention may not serve as an effective guarantee of minimal → human rights under international criminal law. Although the Convention acknowledges genocide as a crime under international law, liability for which stems directly from international law, it is nevertheless a shortcoming of substantial significance that the territorial principle was taken as the basis for the exercise of criminal jurisdiction whereas the Geneva Red Cross Conventions of 1949 impose a duty on States to prosecute → war crimes in accordance with the principle of universal jurisdiction (→ Geneva Red Cross Conventions and Protocols). Since crimes of genocide can hardly be committed without at least indirect participation on the part of State agencies, the Convention has been unable – in view of this basic defect – to attain any practical significance as a penal provision. This is so because States will hardly prosecute crimes committed by themselves or their organs against protected groups unless the responsible government is overthrown by a political or military defeat as happened in Germany in 1945. Clearly, there is nothing in the Convention to stop the contracting parties making provision for universal jurisdiction in the punishment of genocide under their domestic law, thus closing the gap in the Convention on their own initiative; the Federal Republic of Germany, for example, took such a step in Section 6(1) of its Criminal Code. Another drawback of the Convention is that political and cultural groups – for instance, → guerilla forces in internal struggles and → civil wars or certain categories of inhabitants in opposition to the government – are not mentioned in Art. II, although they are no less endangered or less worthy of protection than other groups.

4. Further Action by the United Nations and the Council of Europe

The crime of genocide was adopted by the → International Law Commission in Art. II(10) of the Draft Code of Offences Against the Peace and Security of Mankind (YILC, Vol. 6 (1954 II) p. 149), which was laid before the UN General Assembly in 1954. However, the decision whether to adopt or reject this proposal has been post-

poned by the United Nations from year to year.

On the other hand, the non-applicability of statutory limitations to the crime of genocide has been established by treaties under international law. Thus, Art. I(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of November 26, 1968 (UN GA Res. 2391(XXIII)) states that no statutory limitation shall apply to crimes of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, irrespective of the date of their commission. Clearly the unrestricted retroactive effect of this exclusion of limitation conflicts with the fundamental principles of the rule of law as understood in Western democracies. In Art. II of the Convention the exclusion of the act of State doctrine and in Art. III the duty to make extradition possible are reaffirmed.

Limitation on the prosecution of genocide is also excluded by Art. I(1) of the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of January 25, 1974 (ETS, No. 82) which is not yet in force. Here retroactivity is correctly confined by Art. II(2) to those cases where statutory limitation had not yet taken effect at the time the Convention came into force.

International → declarations and treaties protecting human rights contain an express reference in relation to the principle of legality that criminal liability for an act may follow not only from the provisions of national law but also from international law. Thus, international law as basis of criminal liability has been recognized in Art. 11(2) of the Universal Declaration of Human Rights of December 10, 1948, in Art. 15(1) of the International Covenant on Civil and Political Rights of December 19, 1966 and in Art. 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (→ Human Rights, Universal Declaration (1948); → Human Rights Covenants; → European Convention on Human Rights (1950)).

5. *The Eichmann Case*

In December 1961, Adolf Eichmann, the SS leader who shared heavy responsibility for the extermination of the Jews during World War II, was sentenced to death under Israeli law by the District Court in Jerusalem for, *inter alia*, a crime against humanity. Following the rejection of his appeal by the Israeli Supreme Court, he was executed on May 31, 1962. The District Court based its authority to exercise jurisdiction in this case on, *inter alia*, the view that crimes against humanity constitute *delicta juris gentium*, to which the principle of universal jurisdiction has at all times been generally applicable, and also that the Israeli law under which Eichmann was prosecuted, was modelled on the genocide provision of the 1948 Convention. With regard to the introduction of Section 6(1) of the German Criminal Code the application of the universality principle was also justified by reference to the extremely serious nature of the crime. However, the 1962 Draft of the Criminal Code had still adhered cautiously to the territorial principle.

6. *The Draft International Criminal Code*

Art. IV of the Draft International Criminal Code compiled by M.C. Bassiouni together with two committees of experts between 1976 and 1979 under the auspices of the International Association of Penal Law is an almost verbatim version of the penal provision in Art. II of the Genocide Convention.

Genocide: A Commentary on the Convention, Yale Law Journal, Vol. 58 (1948–1949) 1142–1160.

H.-H. JESCHECK, Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 66 (1954) 193–217.

N. ROBINSON, The Genocide Convention, A Commentary (1960).

J. BAUMANN, Gedanken zum Eichmann-Urteil, Juristenzeitung (1963) 110–121.

F. BAUER, Kriminologie und Prophylaxe des Völkermords, Recht und Politik (1967) No. 3, 67–74.

M.C. BASSIOUNI and V.P. NANDA, A Treatise on International Criminal Law, Vol. 1 (1973) 522–532.

B. BRYANT and R. JONES, The United States and the 1948 Genocide Convention, Harvard ILJ, Vol. 16 (1975) 683–704.

G. GREBING, Zur Frage der Schaffung eines Internationalen Strafgerichtshofs, Goltdammer's Archiv für Strafrecht (1976) 97–113.

M.P. MURPHY, A Statement of Moral Purpose: The 1948 Genocide Convention, Fordham International Law Forum, Vol. 2 (1978–1979) 45–59.

W. MAIHOFER, Nichtverjährung des Völkermordes, Zeitschrift für Rechtspolitik, Vol. 12 (1979) 81–87.

M.C. BASSIOUNI, International Criminal Law, A Draft International Criminal Code (1980) 72–74.
B.B. FERENCZ, An International Criminal Court, Vol. 2 (1980) 115–176.
H.-H. JESCHECK, Entwicklung, gegenwärtiger Stand und Zukunftsaussichten des internationalen Strafrechts, Goltdammer's Archiv für Strafrecht (1981) 49–70.
B.B. FERENCZ, The Future of Human Rights in International Jurisprudence: An Optimistic Appraisal, Hofstra Law Review, Vol. 10 (1982) 379–400.
D. OEHLER, Internationales Strafrecht (2nd ed. 1983) 640–644.

HANS-HEINRICH JESCHECK

GERMAN NATIONALITY

1. The Problem

Every → State has its own special rules governing its nationality, primarily the acquisition as well as the loss of nationality. Some general principles found in the different national legal orders are described in the article on → nationality which also contains a survey of the international law problems and consequences of domestic nationality rules. Nationality laws of individual States are in general not discussed in this Encyclopedia, a separate treatment being indicated only in cases in which special problems of a public international law character are involved. This holds true for the British Commonwealth (see → British Commonwealth, Subjects and Nationality Rules). German nationality also poses unique problems in national as well as international law.

The defeat of the German Reich in World War II resulted at first in the occupation of its territory (→ Germany, Occupation after World War II). In 1949, separate constitutions were enacted, in the Federal Republic of Germany on the one side and in the German Democratic Republic (GDR) on the other. Before and after these events, a political and academic discussion took place about the legal status of Germany (→ Germany, Legal Status after World War II); this discussion has not yet led to a definitive conclusion accepted by all sides. It is still a matter of controversy whether the German Reich as a → subject of international law survived the defeat in 1945 and all later events, and also what the legal relationship between the German Reich and the two States now existing in "Germany" is (cf. also → Continuity; → State Succession). Neither the treaties concluded by the two German States with their allies nor the treaties concluded in the 1970s (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)) furnish a clear answer to the intricate problems concerning the legal status of Germany as a → divided State. The general problems can be considered here only in so far as they are of relevance for German nationality.

2. Relevant Texts

In 1913, a nationality law for the German Reich was enacted (Reichs- und Staatsangehörigkeitsgesetz). This law has undergone many fundamental changes, but in substance it has survived the replacement of the German monarchy by the republic in 1918/19, the Nazi régime (which deprived whole groups of their German nationality), the defeat in 1945 and a good number of following events. This law of 1913 is today still valid in the Federal Republic of Germany, and it was considered valid and was applied in the GDR until 1967 (although various amendments were enacted in both States).

The Basic Law of the Federal Republic of Germany of 1949 contains a few, but essential, provisions on German nationality and the notion of "Germans". Besides Art. 16, which is of importance for the loss of German nationality, Art. 116 contains the following fundamental rules:

"(1) Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (*Volkszugehörigkeit*) or as the spouse or descendant of such person.

(2) Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile (*Wohnsitz*) in Germany after 8 May 1945 and have not expressed a contrary intention."

The first section of Art. 116 is of greater importance in the present context.

When the constitution of the GDR was enacted in October 1949, stress was placed, also in that part of Germany, on the claim to represent the whole German people. This claim found expression, *inter alia*, in Art. 1 of the constitution which provided: "There exists only one German nationality"; however, a new constitution enacted in 1968 no longer contained such a provision. In 1967, a new nationality law (Staatsbürgerschaftsgesetz) was adopted in the GDR. The bases of this law and the legal doctrine relating to it in the GDR can be summarized as follows: The German Reich disappeared at the end of World War II as a subject of international law; the creation of two new States on German soil in 1949 necessarily had the consequence that the inhabitants of these States (at least in their great majority) automatically acquired the different nationalities of these different States; and even if the Reichs- und Staatsangehörigkeitsgesetz was applied in both German States between 1949 and 1967, this law was part of two different legal systems and it regulated two different nationalities.

Beside the constitutional provisions and the laws already mentioned, a number of subsidiary and supplementary provisions concerning nationality questions exist in the two German States; they can be found in the work of Makarov/v.Mangoldt.

It should be mentioned that German nationality law always followed the principle of *jus sanguinis* in the acquisition of nationality by birth.

3. *Legal Evaluation*

As already mentioned, opinions are divided on the problem whether the German Reich survived the defeat and occupation in 1945 and whether the German Reich still exists as a subject of international law. The different positions entail important consequences for nationality questions. Basically, there are three alternatives, each vigorously defended, founded on different legal and political assumptions.

It has already been stated that according to the nationality law of 1967 and legal doctrine in the GDR, two different German nationalities exist since 1949, each of the two German States having its own nationals. No common bond connects these nationalities across the frontier between the States concerned. This rigid view is accepted in the Federal Republic of Germany by only a few authors.

The prevailing view in the Federal Republic of Germany, strongly supported by the Federal Constitutional Court, considers the German Reich as still existing above or beside the two German States despite the fact that the Reich does not at present possess any organs of its own and does not exercise real governmental powers. In consequence, the Germans in the two present States possess one – the German – nationality. Apart from this undivided nationality, the citizens of the two States may also have a sort of special citizenship, but this is subordinated to the German nationality.

A third view (accepted also by the author of this article) considers the Federal Republic of Germany as identical with the German Reich, and the GDR as a second and separate State. According to this opinion, both States have their own nationals, but with a very important proviso: In conformity with the historical development and the constitutional order of the Federal Republic of Germany, nationals of the GDR must be accepted and protected as German nationals by the organs of the Federal Republic, at least so far as they ask for protection. According to this view, third States are entitled or even obliged to respect the protection of (former) citizens of the GDR by the organs of the Federal Republic.

These different views could not be reconciled when, in 1972/1973, a treaty on the relations between the two German States was concluded. The treaty and notes appended to the treaty state that some basic questions, among them the problem of nationality, cannot be regarded as solved.

The continued divergence of opinions on the nationality question has led to difficulties in intercourse with third States, for example in recent years when consular treaties were concluded or envisaged between the GDR and Western States. Sometimes, ingenious formulae have been found in order to bridge the irreconcilable substantive positions; in this context a difference is sometimes made between (German) nationality and two – subordinate – citizenships in the two existing States.

An extremely important question, connected

with the divergence of opinions described above, concerns the nationality of the inhabitants of → Berlin. At least on one point an agreement has been reached. According to the Quadripartite Agreement on Berlin of 1971 (Annex IV), the "performance by the Federal Republic of Germany of consular services for permanent residents of the Western Sectors of Berlin" has been accepted by the Four Powers.

M. RUBY, L'évolution de la nationalité allemande d'après les Textes 1842–1953 (1954).

E.-W. BÖCKENFÖRDE, Die Teilung Deutschlands und die deutsche Staatsangehörigkeit, in: Epirrhosis, Festgabe für Carl Schmitt (ed. by H. Baron, et al.), Vol. 2 (1968) 423–463.

G. ZIEGER, Staatsangehörigkeit im geteilten Deutschland, Versuch einer dualistischen Begründung, Deutschland Archiv, Vol. 5 (1972) 249–280.

K.M. MEESSEN, Das Problem der deutschen Staatsangehörigkeit nach dem Grundvertrag, Europa Archiv, Vol. 28 (1973) 515–524.

J.A. FROWEIN, Das Individuum als Rechtssubjekt im Konsularrecht, Zu den Konsularverträgen mit der DDR, in: Internationales Recht und Wirtschaftsordnung, Festschrift für F.A. Mann zum 70. Geburtstag (1977) 367–380.

H. VON MORR, Der Bestand der deutschen Staatsangehörigkeit nach dem Grundvertrag (1977).

B. GUÉRIN, L'évolution du statut juridique de l'Allemagne de 1945 au traité fondamental (1978).

G. RESS, Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972 (1978).

G. ZIEGER, Das Problem der deutschen Staatsangehörigkeit, in: G. Zieger (ed.), Fünf Jahre Grundvertragsurteil des Bundesverfassungsgerichts (1979) 189–221.

R. BERNHARDT, Deutschland nach 30 Jahren Grundgesetz, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Vol. 38 (1980) 7–54.

J.J.A. SALMON, L'impact de la détermination de la nationalité allemande en R.F.A. sur les conventions consulaires passées avec les Etats tiers, RevBelge, Vol. 3 (1980) 187–201.

K. HAILBRONNER, Deutsche Staatsangehörigkeit und DDR-Staatsbürgerschaft, Juristische Schulung, Vol. 21 (1981) 712–718.

G. HOFFMANN, Zur Frage der Staatsangehörigkeit in Deutschland, AVR, Vol. 19 (1981) 257–286.

A.N. MAKAROV and H. VON MANGOLDT, Deutsches Staatsangehörigkeitsrecht (3rd ed. 1981) [loose-leaf].

W. SEIFFERT, Wechselseitige Respektierung der Staatsangehörigkeitsregelungen der beiden deutschen Staaten, Recht in Ost und West, Vol. 24 (1981) 193–196.

G. RIEGE, Die Staatsbürgerschaft der DDR (1982).

K. STERN, Die deutsche Staatsangehörigkeit, Deutsches Verwaltungsblatt, Vol. 97 (1982) 165–173.

E. KLEIN, DDR-Staatsbürgerschaftserwerb und deutsche Staatsangehörigkeit, Neue Juristische Wochenschrift, Vol. 36 (1983) 2289 et seq.

S. MAMPEL, Das Staatsangehörigkeitsrecht der DDR und die deutsche Staatsangehörigkeit, Recht in Ost und West, Vol. 27 (1983) 233–244.

D. SCHRÖDER, Besatzungsgewalt und Personalhoheit, Zur Staatsangehörigkeit der Berliner im Völkerrechtsverkehr, AVR, Vol. 21 (1983) 409–432.

D. WYDUCKEL, Erwerb der deutschen Staatsangehörigkeit durch Einbürgerung in der DDR?, in: Recht und Staat im sozialen Wandel, Festschrift für Hans Ulrich Scupin zum 80. Geburtstag (1983) 663–686.

K. DOEHRING, Das Staatsrecht der Bundesrepublik Deutschland (3rd ed. 1984) 87 et seq.

H. VON MANGOLDT, Zur Einheit der deutschen Staatsangehörigkeit im Spiegel jüngerer Konsularverträge, AVR, Vol. 22 (1984) 138–171.

RUDOLF BERNHARDT

HAVANA CHARTER

"Havana Charter" is the official short title for the "Charter for an International Trade Organization" (ITO) which was signed by 54 States at the close of a conference held in Havana between November 21, 1947 and March 24, 1948. It was never ratified.

1. Historical Background

The aim of the United States to restore multilateral world trade on a basis of equal treatment found its first programmatic expression in the → Atlantic Charter of August 14, 1941. Therein, the British and United States Governments declared their intention "to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity". The United States used the various lend-lease agreements concluded during wartime as instruments to persuade the Allied Powers to participate after World War II in a common programme of action for the development of international trade and the removal of discriminatory measures such as excessive tariffs and other trade barriers (see, for example, Art. VII of the American-British Agreement of February 23, 1942). Similar recommendations were made at the Conferences of Hot Springs (May 1943; → Food and Agriculture Organization of

the United Nations) and → Bretton Woods (July 1944). After the war, the United States was able, within the framework of negotiations concerning the → European Recovery Program, to obtain European support for its Proposals for Expansion of World Trade (Department of State Publication 2311), published on December 6, 1945 and distributed to all States.

On the instance of the United States, the → United Nations Economic and Social Council (ECOSOC) decided on February 18, 1946 (Res. 1/13) to convene the United Nations Conference on Trade and Employment and to set up a Preparatory Committee consisting of representatives of 18 States to prepare a draft convention to be presented to the Conference. In the absence of the Soviet Union – one of the appointed members – the Preparatory Committee took as the basis for its discussions the Suggested Charter for an International Trade Organization presented by the United States Government (Department of State Publication 2598) which was governed by the following principles: (1) obligation of member States to negotiate tariff reductions (→ Customs Law, International); (2) → most-favoured-nation treatment in the traffic of goods between member States; (3) prohibition of new preferential tariff systems, with the exception of → customs unions; (4) elimination of quantitative restrictions (import and export quotas, payments restrictions); and (5) prohibition of discrimination when applying permissible quantitative and other restrictions.

Negotiations in the Preparatory Committee concentrated mainly on the admissibility of quantitative import restrictions. Whereas the United States sought, in order to avoid discrimination against the dollar, to keep such restrictions to a minimum, the other States were, for various reasons (to safeguard their balance of payments, protect new industries, control the domestic economy and promote full employment) in favour of the introduction of a wide variety of exceptions; in the event, industrially less developed countries were allowed to apply quantitative restrictions to protect new industries and soft currency countries were permitted the discriminatory use of quantitative restrictions in order to safeguard their balance of payments (provided the → International Monetary Fund had confirmed the existence of balance-of-payments difficulties). The negotiations of the Preparatory Committee were divided into the following phases: First Session in London (October 15 to November 11, 1946) terminating with the London Draft (UN Doc. E/PC/T/33); meeting of the Drafting Committee in New York (January 20 to February 25, 1947) terminating with the New York Draft (UN Doc. E/PC/T/34/Rev.1); Second Session in Geneva (April 20 to August 22, 1947) terminating with the Geneva Draft (UN Doc. E/PC/T/186). During the Second Session, the members of the Committee (together with five other States) began negotiating the multilateral reduction of tariffs. These negotiations led to the signing on October 30, 1947 of the → General Agreement on Tariffs and Trade (GATT). This Agreement not only obliged member States to maintain the agreed tariff concessions for a certain period but also incorporated the trade policy provisions of the Geneva Draft of the Charter; it became effective on January 1, 1948.

The Conference which opened in Havana on November 21, 1947 with the participation of 56 States (but again without the Soviet Union) to discuss the Geneva Draft, was characterized by renewed attempts by less developed, soft-currency and planned economy countries to add further exceptions and escape clauses to allow protectionist and dirigistic national measures. The compromise formulations accepted at the Conference made, however, only minor changes to the basic provisions of the Geneva Draft; less developed States were only under narrowly defined circumstances granted the right to introduce protective measures. Other notable changes to the Geneva Draft concerned the following: → free trade areas and agreements for the progressive formation of such integration areas, in addition to customs unions, were declared admissible; incidentally, for the first time in an international treaty the term "free trade area" was used and defined, as the elimination of customs tariffs among member countries with the retention by member countries of other customs autonomy, i.e. no common customs administration and no common external tariffs. The provisions of the Geneva Draft on the protection of → foreign investments, providing, *inter alia*, for "just" compensation in cases of → expropriation, were de-

leted because of their lack of precision, and replaced by a generally worded obligation to refrain from discriminatory measures against foreign investments, with the further recommendation that special agreements for their protection should be concluded.

The Conference ended on March 24, 1948 with the signing of the Charter; at the same time an Interim Commission for the International Trade Organization – consisting of representatives of the signatory States – was established to supervise the setting-up of the Organization, having its seat and a permanent secretariat in Geneva. When it became clear that the Charter would not be ratified after the United States Government had announced on December 6, 1950 that it would not seek Congress approval for the Charter, the Interim Commission wound up its activities; its secretariat remained at the disposal of GATT.

2. Contents of the Charter

The Charter was divided into nine chapters with 106 articles and 16 annexes (A–P) which formed an integral part of the Charter and included important interpretative notes on many of the articles (Annex P).

(a) Substantive provisions

Chapter IV, which contained the principles and rules on commercial policy, was of prime significance. The central provisions were those on most-favoured-nation treatment (Art. 16), national treatment of imported foreign goods (Art. 18), elimination of quantitative restrictions on imports and exports (Arts. 20 to 24), subsidies (Arts. 25 to 28), State trading and State monopolies (Arts. 29 to 32), anti-dumping and countervailing duties (Art. 34), customs unions and free trade areas (Art. 44) and the escape clause for the protection of domestic products in case of an excessive increase in imports (Art. 40). All these provisions had already been included in the GATT (see above); the changes in the final text of the Havana Charter since the Geneva Draft were to a large extent also subsequently incorporated into the GATT by means of protocols of amendment.

From Chapter III (Economic Development and Reconstruction), which contained a variety of measures and recommendations for the assistance of developing countries, only their exemption from some stringent rules of Chapter IV, e.g. by allowing new or increased tariffs or import quotas for the protection of new industries (Art. 13), has been carried over into the GATT; this specific exemption has been substantially enlarged meanwhile by the introduction of the concept of preferential treatment of developing countries in later revisions of the GATT (→ Developing States). The positive promotion of development as recommended in the Havana Charter (foreign investment, financial and technical assistance) has been taken up by various agencies of the United Nations (UNDP, UNIDO) and other international organizations (IBRD, IFC, IDA, FAO, International Fund for Agricultural Development).

Chapter V on the control of restrictive business practices in international trade would have empowered the ITO to investigate such practices by private or public enterprises upon application by an affected member State, to report on its findings and to request the territorially responsible member State to take appropriate remedial action (Arts. 48 and 50). Later efforts of the United Nations in this field remained confined to the establishment of a → code of conduct and have culminated so far in the adoption by the UN General Assembly of a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (Res. 35/93 of December 5, 1980).

In Chapter VI on commodity agreements it was recognized that special commodity control agreements were necessary for "primary commodities" (defined in Art. 56 as farm, forest or fishery products, and minerals in natural or processed form; → Commodities, International Regulation of Production and Trade). Limits were, however, set to the admissibility and contents of such agreements (Arts. 60 to 66); for example, exporting and importing countries should hold an equal number of votes, and availability of the commodities at fair prices should remain assured. On April 27, 1953, ECOSOC recommended adherence to the principles of Chapter VI (Res. 462 A (XV)) and they have in fact largely been followed in later commodity agreements (e.g. in the Wheat, Sugar and Tin Agreements; see also → United Nations Conference on Trade and Development).

In the GATT (Art. 29) member States had

undertaken to observe the general principles of Chapters I to VI "to the fullest extent of their executive authority" even before ratification of the Charter. At the occasion of the 1955 revision of the GATT it had been decided to delete this provision; the respective protocol of amendment, however, was abandoned in 1967 because it did not receive the necessary unanimous acceptance by all State parties.

(*b*) *The International Trade Organization (ITO)*

In Chapter VII the Charter provided for the establishment of ITO as a → United Nations Specialized Agency with the following organs: a Conference of member States as the supreme decision-making organ of the Organization (Arts. 74 to 77), an Executive Board consisting of 18 members, its composition and functions to be determined by the Conference (Arts. 78 to 81), special Commissions consisting of independent experts (Arts. 82 and 83), and a Director-General supported by a secretariat (Arts. 84 and 85). Not only sovereign States but also dependent territories with autonomy over their external commercial relations would have been entitled to become members of the Organization. An attempt by the larger States to obtain superior voting power in the Conference (→ Weighted Voting) was unsuccessful; it was, however, provided that the eight countries of "chief economic importance" should be represented on the Executive Board. The decisions of the Conference and of the Executive Board would have required a simple majority. The Organization was to have international legal personality (Art. 89) and to enjoy in the member States such legal capacity, privileges and immunities as are necessary for the exercise of its functions (Art. 90).

(*c*) *Procedure for the settlement of disputes*

The provisions on the settlement of disputes in Chapter VIII, notable for their novelty, were intended to prevent member States from taking unilateral action in support of their individual economic policies. The proposed procedure was to be applied whenever a member State claimed that the rights and benefits accruing to it under the Charter were being impaired by another member State. The States in question were in the first place under an obligation to negotiate; if the → negotiations proved unsuccessful, the parties could either agree on → arbitration or the complaining State could submit the matter to the Organization – to the Executive Board in the first instance, and if the matter remained unsettled, to the Conference. The Organization was able not merely to make recommendations to the parties, but also to release the complaining State from certain obligations under the Charter towards the other State to the extent it considered appropriate in view of the damage suffered (Arts. 92 to 95). In addition, recourse could be had to the → International Court of Justice: Any State whose interests were prejudiced by a decision of the Conference could ask the Organization to request an → advisory opinion from the ICJ as to the legality of the decision in question; such an opinion would be binding on the Organization and the Conference would be under an obligation to modify its decision accordingly (Art. 96). The above-described procedure has been incorporated in the GATT, but without the provisions concerning recourse to the ICJ.

3. Significance of the Charter

The main reason for the failure of the Charter may be found in the fact that it tried to solve too many problems in a single instrument and that conflicting interests made compromises necessary which satisfied no one. Once the main issue – the gradual removal of trade barriers – had found its place in the GATT, the signatories lacked the necessary incentive to bind themselves to the other rules of the Charter and thus restrict their freedom of action; the provisional GATT solution, in the form of an agreement between governments, appeared sufficient for the time being.

Nevertheless, the influence of the Charter on subsequent measures undertaken in the field of international trade should not be underestimated. The exhaustive discussions on the Charter, in which almost all States participated led to a clarification of the various issues of world trade and pointed the way to their solution (→ World Trade, Principles); they provided at least a starting point for the subsequent treatment of such problems in the United Nations, within the GATT, and in individual agreements. When the provision of the GATT have to be interpreted, reference must be made to the preparatory work

on the corresponding provisions of the Charter.

The prospects for the establishment of a universal and comprehensive world trade organization – the usefulness of which can hardly be doubted – would have been better if the Havana Charter had been limited to questions of organization and procedure, substantive rules being reserved for later decisions of the organization or supplementary agreements.

United Nations Conference on Trade and Employment, held at Havana, Cuba from November 21, 1947, to March 24, 1948, Final Act and Related Documents, UN Publ. Sales No. 1948.II.D.4.

Havana Charter for an International Trade Organization, United States Department of State Publ. 3206; British Command Paper Cmd. 7375.

J. VINER, Conflicts of Principle in Drafting an International Trade Charter, Foreign Affairs, Vol. 25 (1946–1947) 612–628.

H. BACHMANN, Die Welthandels-Charta und die Schweiz (1948).

G. BRONZ, The International Trade Organization Charter, Harvard Law Review, Vol. 62 (1948–1949) 1089–1125.

H. FEIS, The Geneva Proposals for an International Trade Charter, International Organization, Vol. 2 (1948) 39–52.

E. VON MICKWITZ, Die Welthandels-Charta, Europa-Archiv, Vol. 3 (1948) 1329–1334, 1485–1492, 1547–1554.

J. ROYER, La genesi e i principi fondamentali della Carta dell'Avana, La comunità internazionale, Vol. 3 (1948) 541–551.

P.W. BIDWELL and W. DIEBOLD, The United States and the International Trade Organization, International Conciliation, No. 449 (1949) 185–239.

W. EMMERICH, Die Welthandelscharta, JIR, Vol. 2 (1949) 690–735.

S.J. RUBIN, The Judicial Review Problem in the International Trade Organization, Harvard Law Review, Vol. 63 (1948–1949) 78–98.

V. TORNETTA, L'Organizzazione internazionale del commercio, Rivista di studi politici internazionali, Vol. 16 (1949) 22–50.

C. WILCOX, A Charter for World Trade (1949).

E.D. WILGRESS, A New Attempt at Internationalism, The International Trade Conferences and the Charter (1949).

W.A. BROWN, The United States and the Restoration of World Trade (1950).

H.S. PIQUET, The Havana Charter for an International Trade Organization (1950).

J.E.S. FAWCETT, The Havana Charter, Year Book of World Affairs, Vol. 5 (1951) 269–289.

A. RENOUF, The Abortive Charter for an International Trade Organization, Canadian Bar Review, Vol. 29 (1951) 53–69.

W. DIEBOLD, The End of the International Trade Organization (1952).

F. KRAPPEL, Die Havanna Charta und die Entwicklung des Weltrohstoffhandels (1975).

GÜNTHER JAENICKE

HOSTAGES

A. Notion

A hostage is a person forcefully detained by another without legal authority or in violation of national or international law for purposes of extracting from that person or another a ransom or concession. Below, the elements of this definition are examined.

1. Forceful Detention

The forceful detention of a person as a hostage presupposes that he or she has been forcefully seized, or seized by fraud, deception or trick. The act of hostage-taking cannot therefore be distinguished from that of unlawful seizure, as one cannot occur without the other.

2. The Status of Hostages

A hostage can be a person with or without official status. This classification concerning kidnapping and hostage-taking reflects a distinction made in various national criminal laws and in international criminal law as evidenced by international conventions on the subjects; cf. the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (annexed to → United Nations General Assembly Res. 3166(XXVIII); hereinafter referred to as UN Diplomats Convention; → Diplomatic Agents and Missions; → Protected Persons; → International Crimes); the 1979 UN Convention Against the Taking of Hostages (annexed to UN GA Res. 34/146; hereinafter referred to as the UN Hostages Convention); and the four Geneva Conventions of August 12, 1949 (hereinafter referred to as Geneva Conventions) and their two Additional Protocols of 1977 (hereinafter referred to as 1977 Additional Protocols; → Geneva Red Cross Conventions and Protocols). These conven-

tions are supplemented by regional conventions concerning the protection of diplomats and related conventions; cf. the 1972 → Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (ILM, Vol. 10 (1971), p. 255; hereinafter referred to as OAS Convention); the 1976 European Convention on the Suppression of Terrorism (ETS, No. 90; hereinafter referred to as European Terrorism Convention; → Terrorism).

As a person with official status, the hostage could be a person of international significance to whom is owed a duty of special care (OAS Convention, Art. 1), such as a head of State, head of government or minister of foreign affairs and their accompanying family members, a representative or official of a State, or an official or agent of an international organization, who is entitled to special protection at the time and place of the commission of the crime (UN Diplomats Convention, Art. 1), or a member of the armed forces (→ United States Diplomatic and Consular Staff in Tehran Case; → United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)).

As a person without official status, the hostage could be a victim of certain acts of "terror-violence" such as kidnapping, hijacking and unlawful use of bombs or weapons (OAS Convention, Art. 1; European Terrorism Convention, Art. 1).

3. *The Hostage-Taker*

A hostage-taker can be a person with or without official status who is acting either on his own behalf or for the benefit of another, who also may be or may not be a public official irrespective of whether he is acting in his official capacity or with or without legal authority. Under conventional international criminal law, the Fourth Geneva Convention prohibits the taking of civilian hostages (→ Civilian Population, Protection); under → customary international law, a → *jus cogens* principle prohibits the unlawful seizure of an individual in a given State by public officials of another State or others acting for or on behalf of such foreign public officials.

4. *Act of Hostage-Taking*

The act of hostage-taking must be committed without legal authority in the territory in which it occurred, by → use of force, trick or deceit, such as kidnapping (UN Diplomats Convention, Art. 2; UN Hostages Convention, Art. 1; European Terrorism Convention, Art. 1); hijacking of international means of transportation (UN Diplomats Convention, Art. 2; European Terrorism Convention, Art. 1); unlawful use of weapons or bombs (European Terrorism Convention, Art. 1); or threats or attempts to commit such conduct (UN Diplomats Convention, Art. 2; UN Hostages Convention, Art. 1; European Terrorism Convention, Art. 1).

The act of hostage-taking must also be against the will of the hostage even though the hostage may subsequently alter his attitudes toward the hostage-taker or his continued seizure.

Hostage-taking can occur between nationals of different States as well as between citizens of the same State regardless of their respective official status if that act constitutes a violation either of national criminal laws or international criminal law.

Finally, hostage-taking can take place through the violation of means which are internationally protected, such as civil aviation (1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft (UNTS, Vol. 704, p. 219), Art. 1(a); 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Art. I (UNTS, Vol. 860, p. 105; hereinafter referred to as 1970 Hague Convention); and 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (UST, Vol. 24, p. 565); → Air Law; → Aircraft; → Civil Aviation, Unlawful Interference with).

5. *Motive*

The motive of the hostage-taker is immaterial to the characterization of the act as criminal if it constitutes a violation of national criminal laws or international criminal law defining the act in question, irrespective of whether it be for private profit or in exchange for a concession, benefit or advantage for the hostage-taker or another.

B. Normative Application

1. *In General*

The bases for the distinction between nationally proscribed acts of hostage-taking and internationally proscribed acts of hostage-taking is the existence of an international convention prohibiting the taking of certain protected persons. Essentially, however, an act of hostage-taking acquires an international dimension when one of the following five elements is present in the context of the unlawful seizure:

(a) The act takes place in more than one State;

(b) The act takes place in a territory wherein no State can claim exclusive national jurisdiction (the → high seas if the law of the flag does not apply (→ Flag, Right to Fly), → Antarctica, outer space, the moon or other → celestial bodies (→ Space Law; → Jurisdiction of States));

(c) The act involves citizens of more than one State (→ Nationality);

(d) The act affects internationally protected persons, i.e., diplomats members of international organizations; or

(e) The act is committed by means of internationally protected objects such as international civil aviation.

2. *Contexts of Application*

Hostage-taking can be committed both in the contexts of → peace and war. Although the proscriptions against such conduct in some international criminal law conventions apply in both contexts (e.g. UN Diplomats Convention, UN Hostages Convention, OAS Convention, European Terrorism Convention, Tokyo Convention, 1970 Hague Convention, Montreal Convention), others apply only in the context of → armed conflict or belligerent occupation (the Fourth Geneva Convention and the 1977 Additional Protocols; → Occupation, Belligerent). It must be noted that with respect to the context of → war the Fourth Geneva Convention and the Additional Protocols prohibit the seizure of civilian hostages by an occupying force regardless of whether the conflict is of an international or non-international character (Fourth Geneva Convention, Arts. 3 and 147; Protocol I, Art. 51; Protocol II, Art. 13; see also Art. XLVI of the Regulations respecting the Laws and Customs of War on Land (annexed to Hague Convention IV of October 18, 1907; → Hague Peace Conferences of 1899 and 1907).

In time of peace the national criminal laws of the State wherein the act took place determine the legality of the act, as do certain specific international criminal law conventions on the taking of civilian hostages or internationally protected persons. In addition, the taking of a hostage by citizens or agents of one State in another State may also constitute a violation of international law – irrespective of whether the hostage is a national of the State of the hostage-taker or of the State within which the taking occurred or of another State – in that it constitutes a violation of the → sovereignty of the State wherein the act took place if it was committed without the knowledge and approval of the legal authorities of the State wherein the act occurred (→ Internationally Wrongful Acts). Furthermore, such an act would also constitute a violation of internationally protected → human rights which prohibit the unlawful seizure and arbitrary arrest and detention of a person without legal authority. In this case the principle of territoriality would apply and such an act of seizure would constitute an arbitrary arrest and detention (1948 Universal Declaration of Human Rights, Arts. 3 and 9; 1966 International Covenant on Civil and Political Rights, Art. 9; 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 5; 1969 American Convention on the Protection of Human Rights, Art. 7; see → Human Rights, Universal Declaration; → Human Rights Covenants; → European Convention on Human Rights; → American Convention on Human Rights).

3. *Relationship between National Criminal Laws and International Criminal Law*

The illegality of hostage-taking as defined above derives from national criminal law sources as well as international criminal law. As a result, a single act of hostage-taking can be considered a violation of both national law and international criminal law, whenever the person seized and held or the manner in which the seizure and holding was completed constitute a violation of national criminal law in addition to a violation of international law.

Although national criminal laws prohibit the common crime of kidnapping, they also constitute the legal process through which international criminal law proscriptions are enforced. This is so because all international criminal law conventions concerning the taking of civilian hostages and the seizure of diplomats and other internationally protected persons are enforced through the national criminal laws of the State wherein the act occurred. The only exceptions to this would be acts of hostage-taking that would constitute the international crimes of → war crimes and → crimes against humanity, which have been prosecuted not only before national tribunals but also before international tribunals (The Hostage Case, Trial of William List and Others, Case 7 of the U.S. Military Tribunal in Nuremberg; → Nuremberg Trials).

4. The Duty to Prosecute or Extradite

Because there does not exist at present an → international criminal court with the competence to prosecute such offences, an act of hostage-taking deemed an international crime or containing an international dimension is in fact subject only to prosecution by one or more States. This national competence to prosecute derives from the maxim *aut dedere aut judicare* embodied in international criminal law conventions which impose upon signatory States the duty to prosecute or extradite violators of the internationally proscribed conduct and to prosecute alleged offenders if extradition is not performed (UN Diplomats Convention, Arts. 3 and 8; UN Hostage Convention, Arts. 8, 9(2), and 10; OAS Convention, Arts. 3 and 5; European Terrorism Convention, Arts. 3, 4 and 7; 1970 Hague Convention, Arts. VII and VIII; Montreal Convention, Arts. 7 and 8; → Extradition).

In national legal systems, the legal irrelevance of the motive of the hostage-taker is evidenced by the majority of national criminal laws which do not consider the ultimate motive of the hostage-taker as one of the constitutive elements of the crime. Under international criminal law, similarly, the motive of the hostage-taker whether political or otherwise is irrelevant, as neither the UN Hostages Convention, the UN Diplomats Convention, the OAS Convention, the 1976 European Terrorism Convention, the 1963 Tokyo Convention, the 1970 Hague Convention, nor the 1971 Montreal Convention contain an exception or exclusion for the motive of the hostage-taker. Furthermore, under the provisions of the Fourth Geneva Convention, civilian hostage-taking constitutes a grave breach when committed by the military personnel of an occupying power or when the seizure of hostages is a form of punishment or deterrence against certain acts hostile to an occupying force and as a means of controlling the occupied population. In this case the motive of hostage-taking is immaterial and the act remains a grave breach (Arts. 3 and 147).

The offender's political motive will be considered of importance only in extradition proceedings under the "political offence exception".

Although the alleged hostage-taker's motive, even if political or ideological, will often be no bar to such individual's extradition, the motives of the State requesting extradition will likely be a bar to such request if its purpose is to prosecute or punish such individual because of his race, nationality or political opinion (UN Hostages Convention, Art. 9; European Terrorism Convention, Art. 5; 1951 Convention relating to the States of Refugees (UNTS, Vol. 189, p. 137), Arts. 1 and 33; 1967 Protocol relating to the Status of Refugees (UNTS, Vol. 606, p. 267), Art. 1; → Refugees).

If the alleged offender is not extradited, the State having jurisdiction over the territory in which the act was allegedly committed is obligated under international criminal law conventions to assert such jurisdiction in order to prosecute the alleged offender (UN Diplomats Convention, Art. 3; UN Hostages Convention, Art. 5; European Terrorism Convention, Art. 6; Tokyo Convention, Art. 3; 1970 Hague Convention, Art. IV; Montreal Convention, Art. 5). In addition, State parties to such international criminal law conventions are obligated to afford each other mutual assistance in connection with any criminal proceedings that might be undertaken (UN Diplomats Convention, Art. 10; UN Hostages Convention, Art. 11; European Terrorism Convention, Art. 8; 1970 Hague Convention, Art. X; Montreal Convention, Art. 11; → Legal Assistance between States in Criminal Matters).

Convention against the Taking of Hostages, UN GA

Res. 34/146, December 18, 1979; ILM, Vol. 18 (1979) 1457–1463.
Measures to Prevent International Terrorism, UN Doc. A/C.6/418 (1972).
Measures to Prevent International Terrorism, UN Doc. A/C.6/L.866 (1972).
Measures to Prevent International Terrorism, UN Doc. A/2969 (1972).
R.S. BRACH, Inter-American Convention on the Kidnapping of Diplomats, Columbia Journal of Transnational Law, Vol. 10 (1971) 392–412.
P. JUILLARD, Les enlèvements de diplomates, AFDI, Vol. 17 (1971) 205–231.
J. VERIN, Torture and Hostage-Taking (1971).
C. BAUMANN, The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism (1973).
B. DESCHUTTER, Prospective Study of the Mechanisms to Repress Terrorism, in: Réflexions sur la définition et la répression du terrorisme (1974) 251–266.
J.J. LADOR-LEDERER, Legal Approach to International Terrorism, Israel Law Review, Vol. 9 (1974) 194–220.
V. ABELLAN HONRUBIA, Terrorismo Internacional, Revista española de derecho internacional, Vol. 28 (1975) 33–56.
M.C. BASSIOUNI (ed.), International Terrorism and Political Crimes (1975).
J.J. PAUST, A Survey of Possible Legal Responses to International Terrorism, Georgia Journal of International and Comparative Law, Vol. 5 (1975) 431–469.
B.M. JENKINS, Hostage Survival – Some Preliminary Observations (1976).
H. SOUCHON, Hostage-Taking: Its Evolution and Significance, International Criminal Police Review, Vol. 229 (1976) 168–172.
R. LINKE, Das Europäische Übereinkommen zur Bekämpfung des Terrorismus vom 27. Januar 1977, Österreichische Juristen-Zeitung, Vol. 32 (1977) 230–236.
J.J. A. SALMON, Convention européenne pour la répression du terrorisme, Journal des tribunaux, Vol. 92 (1977) 497–502.
R. STURM, Zur Bekämpfung terroristischer Vereinigungen, Monatsschrift für Deutsches Recht, Vol. 31 (1977) 6–10.
A. EVANS and J. MURPHY, Legal Aspects of International Terrorism (1978).
R. CRELINSTIN and D. SZABO, Hostage-Taking (1979).
R. FRIEDLANDER, Terrorism: Documents of International and National Control, 3 vols. (1979).
M.C. BASSIOUNI, S. HERTZBERG and C. ZAMMUTTO, The Protection of Human Rights in the Criminal Process under International Instruments and National Constitutions (1981).
M.C. BASSIOUNI, Common Characteristics of Conventional International Criminal Law, Case Western Reserve Journal of International Law, Vol. 15 (1983) 27 et seq.
M.C. BASSIOUNI, International Extradition in U.S. Law and Practice, 2 vols. (1983).

M. CHERIF BASSIOUNI

HUMAN RIGHTS

1. Notion

Human rights are those liberties, immunities, and benefits which, by accepted contemporary values, all human beings should be able to claim "as of right" of the society in which they live. Since World War II, human rights have achieved universal recognition and have become a major concern of → international relations and a growing domain of → international law. In national constitutions, and by international instruments of varying political and legal significance, virtually all States have embraced the idea of human rights and have indicated general agreement as to their content. By international agreement and partly by → customary international law, a growing international law of human rights creates obligations upon States to recognize, respect and ensure designated rights of persons subject to their jurisdiction and provides international remedies for failure by a State to meet these obligations (→ International Obligations, Means to Secure Performance; → Reporting Systems in International Relations).

2. The Antecedents of Contemporary Human Rights Law

It was long accepted as dogma that the individual was not a → subject of international law. That meant that, in general, international law imposed obligations, accorded rights, and provided remedies only to States – not to individuals (→ Individuals in International Law). The proposition was interpreted also as implying that claims by individuals upon their own societies, and how a State treated its own inhabitants, generally were not matters dealt with by international law. That was not inaccurate as a description of the traditional law (in the absence of special agreements), but in principle nothing in international law precluded States from assuming obligations and making law, by custom or by convention, dealing with individuals, regulating their treatment even by their own governments, and giving them legal rights and remedies.

Although the contemporary international law of human rights grew in response to World War II atrocities, it drew on older sources and had various precedents. International law and 18th cen-

tury human rights theory both had → natural law antecedents and common progenitors in Grotius, Vattel, and Locke. Some human rights obligations were early included in treaties – for example, those in which States undertook to tolerate heterodox religious worship and to accord basic civil rights to religious dissenters, provisions that helped establish the secular State and modern international law. Customary law early held States responsible for → denial of justice and other injuries to → aliens, developing an international standard of justice for aliens, confirmed by a network of bilateral → treaties of friendship, commerce and navigation, that corresponds strongly to the treatment which international law later recognized as the rights of all human beings. In the 19th century, when major States abolished → slavery in their own countries, a prohibition on slavery and the slave trade became customary law and was later codified in widely-accepted treaties. Seeking to mitigate the horrors of → war, States developed law to forbid particularly cruel weapons (→ Weapons, Prohibited) and to protect prisoners and civilian populations during war (→ Humanitarian Law and Armed Conflict).

International law of human rights advanced in small important steps following World War I. In order to remove a potential cause of international friction, some States were asked to assume obligations, notably in the so-called minority treaties guaranteed by the → League of Nations, to respect the rights of ethnic, national, linguistic, religious, or other → minorities among their inhabitants. The League of Nations Covenant provided that the → mandate system should be governed by "the principle that the well-being and development of such peoples form a sacred trust of civilisation", and required mandatory powers to establish "conditions which will guarantee freedom of conscience and religion" and other rights (Art. 22); and specific mandatory agreements, e.g. for South-West Africa, committed the mandatory power to promote the welfare and rights of the inhabitants. All members of the League undertook to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend", and "to secure just treatment of the native inhabitants of territories under their control" (Art. 23). In a major development, the → International Labour Organisation (ILO) launched a series of conventions setting → minimum standards for labour and a variety of other social conditions; more than 100 of these conventions have come into force, and many of them have been accepted by many States.

Broader human rights law came in the wake of World War II. The victors imposed human rights obligations in peace treaties with Bulgaria, Finland, Hungary, Italy and Romania (→ Peace Treaties of 1947; see also → Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinions)) and included human rights violations in the Nuremberg Charter and in the indictments under that charter (→ Nuremberg Trials). In the → United Nations Charter, the promotion of respect for human rights was declared a purpose of the → United Nations and member States undertook legal obligations to help achieve that purpose.

3. *Human Rights in International Agreements and in Customary Law*

Of the numerous references to human rights in the UN Charter, at least one is clearly of normative character. By Art. 56, "All Members pledge themselves to take joint and separate action in co-operation with the [United Nations] Organization for the achievement of the purposes set forth in Article 55"; one of those purposes is the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". The precise content and import of that undertaking are subject to controversy and have not been authoritatively determined, but at least deliberate, gross violations of human rights by a UN member would appear to be a violation by that State of its pledge to take action to promote respect for and observance of human rights. Thus, for example, the → International Court of Justice (ICJ) has declared → apartheid to be "a flagrant violation of the purposes and principles of the Charter" (see the advisory opinion on Namibia, ICJ Reports (1971) p. 57; → South West Africa/Namibia (Advisory Opinions and Judgments)).

Increasingly, the UN Charter provisions have been linked in international law to the Universal Declaration of Human Rights, adopted by the

→ United Nations General Assembly in 1948 without dissent, albeit with numerous abstentions including the Soviet Union and the Socialist Countries in Eastern Europe (→ Human Rights, Universal Declaration (1948)). The legal character of the Declaration itself has been debated, but it has been argued that the pledge by members in the UN Charter to promote respect for human rights, while there undefined, has been made concrete and definite by the Universal Declaration, and that failure by any member to respect the rights recognized in the Declaration is therefore a violation of the Charter. Alternatively, it has been urged, the Charter and the Universal Declaration have combined with other international resolutions and declarations and other practice of States to create a customary international law of human rights requiring every State to respect the rights set forth in the Declaration. There are indeed numerous UN resolutions and statements referring, for example, to the duty of States to "fully and faithfully observe the provisions of the ... Universal Declaration" (UN GA Res. 1904 (XVIII) of November 20, 1963, Art. 11; → International Organizations, Resolutions.) While most States would probably not agree that any action by a State contrary to any provision of the Declaration is a violation of the Charter or of customary international law, almost all would agree that some infringements of human rights as enumerated in the Declaration are violations of the Charter or of customary international law.

The international law of human rights includes also a number of international human rights agreements, some of which have been adhered to by many States. The principal agreements are the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (→ Human Rights Covenants). There are also comprehensive regional human rights agreements, e.g., the → European Convention on Human Rights (1950) and the → American Convention on Human Rights, as well as the → African Charter on Human and Peoples' Rights that has been concluded but has not yet come into effect (→ Human Rights, African Developments). There are also numerous conventions dealing with particular rights, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (→ Genocide), the International Convention on the Elimination of All Forms of Racial Discrimination (1966) (→ Racial and Religious Discrimination), the Convention on the Political Rights of Women (1953) (→ Sex Discrimination), the Convention relating to the Status of Refugees (1951) (→ Refugees), and conventions on the abolition of slavery and → forced labour. These conventions, and others, were prepared under the auspices of the United Nations. Others are products of other organizations, such as UNESCO's Convention on the Elimination of Discrimination in Education (1960) (→ United Nations Educational, Scientific and Cultural Organization), and the many conventions of the International Labour Organisation. (For a convenient collection of the principal UN conventions, see Human Rights, A Compilation of International Instruments; ILO Conventions are collected in International Labour Conventions and Recommendations 1919–1981 (1982).) Also, the → Helsinki Conference and Final Act on Security and Cooperation in Europe contain undertakings to observe the provisions of the Universal Declaration and of any human rights agreements to which the participants are party, as well as additional, specific undertakings for cooperation to remove restrictions to family unification, marriage between citizens of different States, travel, and access to and circulation and exchange of information. It is accepted that the Final Act is not a legally binding international agreement, but that does not deprive it of all normative import (see Buergenthal).

4. Human Rights Recognized in International Law

The Universal Declaration of Human Rights is the accepted general articulation of recognized human rights. With some variations, the same rights are recognized by the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The particular conventions deal with rights that are recognized in the Universal Declaration and in the Covenants, and elaborate the scope of such rights, the obligation of States parties, and the remedies for violation.

The rights recognized in the Universal Declaration include the right to life, liberty and security

of the person; freedom from slavery or servitude; freedom from → torture or cruel, inhuman or degrading treatment or punishment; recognition as a person before the law; equality before the law and equal protection of the law; remedies for violations of fundamental rights; freedom from arbitrary arrest, detention or exile (→ Denationalization and Forced Exile); a fair and public trial for persons charged with crime, with guarantees necessary for defence; the presumption of innocence; conviction only according to law and freedom from the application of *ex post facto* law; freedom from arbitrary interference with privacy, family, home or correspondence, and legal protection against such interference; freedom of movement and residence within a country, and the right to leave any country (→ Emigration); the right to marry and found a family, and equality of men and women in marriage and its dissolution; the right to own property and not to be arbitrarily deprived of it; and freedom of opinion and expression, assembly and association. The Universal Declaration also includes some political rights, for example, the right to take part in government and have equal access to public service, which are accepted as being human rights for every person but only in relation to "his country" (Art. 21(1) and (2); see also the right of everyone to return "to his country", Art. 13(2)). The Declaration also includes certain economic and social rights, for example, the right to social security; the right to work, to free choice of employment, and protection against unemployment; to rest and leisure; to a standard of living adequate for oneself and one's family; to education, which at elementary levels must be free and compulsory. The rights set forth in the Declaration are not subject to "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Art. 2).

Which of the rights recognized in the Declaration are binding on all States as a matter of customary law is disputed. It is plausible to conclude that as of the early 1980s a State, though not party to any covenant or convention, is guilty of a violation of customary international law, if as State policy, it practices, encourages or condones genocide, slavery or slave trade, the killing or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or consistent patterns of gross violations of internationally recognized human rights.

The rights set forth in the Declaration are restated, generally in greater detail and with legal precision, in the Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Cultural Rights. The Covenants include some rights not mentioned in the Universal Declaration. Both Covenants recognize a right of all peoples to → self-determination and their right to "freely dispose of their natural wealth and resources" (Art. 1; → Natural Resources, Sovereignty over). The Covenant on Civil and Political Rights forbids imprisonment for inability to fulfil a contractual obligation, a right not mentioned in the Declaration. The right to own property and not to be arbitrarily deprived of it (Universal Declaration, Art. 17) is not expressly mentioned in either Covenant, but while that omission has not been construed to be a rejection of the right, it is probably not obligatory on parties to the Covenant as a matter of law and the extent of the protection of the right to property under customary law is disputed.

The human rights recognized in the Declaration or the Covenants are not declared to be absolute. Art. 29(2) of the Universal Declaration provides: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." In the Covenant on Civil and Political Rights some provisions are expressly made subject to limitations: for example, the freedom of movement and residence within a country, and the right to leave a country "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others" (Art. 12(3)). Most civil and political rights are subject to derogation during public emergency where the life of the nation is at stake, to the extent strictly required by the exigencies of the situation, but

some rights, including freedom from torture and mistreatment, and freedom of conscience, are not subject to derogation even in emergency. The rights in the Covenant on Economic, Social and Cultural Rights are subject "only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" (Art. 4).

Inevitably, issues have arisen as to the meaning and scope of some of the rights, and of the permissible limitations upon them. Some have argued that the inherent right to life (Covenant on Civil and Political Rights, Art. 6) requires a State to forbid abortion, but the *travaux préparatoires* make it clear that the article did not intend that result. The *travaux* make it clear also that the prohibition on "arbitrary" arrest or detention (Art. 9(1)) is violated where arrest or detention is unjust or unreasonable even if it is permitted by domestic law. There has been debate as to whether single party government satisfies the right of every citizen to take part in the conduct of public affairs and to vote and to be elected at genuine elections guaranteeing the free expression of the will of the electors. Some governments of socialist States have asserted that socialism is the "*ordre public*" of their country and the Covenants therefore permit any limitation on rights that meets the needs of socialism (→ Socialist Conceptions of International Law). Free enterprise States have insisted that the right to work (Covenant on Economic, Social and Cultural Rights, Art. 6) requires equal access to opportunity to work and a freedom to select one's work, while some socialist States have insisted that the right requires the State to provide employment. While some of these and other issues have not been resolved, it is clear that the interpretation of the Covenants is a question of international law and not for any State to determine finally for itself.

There has been reference in international instruments and statements also to other kinds of rights, sometimes characterized as "third and fourth generation" rights, including rights to peace, to development, and to a healthful environment (→ Environment, International Protection). The right to development has also appeared, together with others, in references to group or "peoples'" rights (as distinguished from individual rights). While the "new generations" of rights, and the rights of peoples, have received increasing rhetorical affirmation, only a peoples' rights to self-determination and to dispose of its natural wealth, included in the International Covenants, have received authoritative acceptance in international law.

5. *The Character of State Obligations*

In the Covenant on Civil and Political Rights each State party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" (Art. 2(1)). The obligation to "respect" requires the State itself to refrain from violating any right, and the State would be responsible for any act or omission in violation of the Covenant by officials and other persons who engage the responsibility of the State under international law generally (→ Responsibility of States: General Principles). The obligation to "ensure" probably includes an obligation to prevent the infringement of rights even by private persons for whose actions the State is not internationally responsible in other circumstances (→ Responsibility of States for Activities of Private Law Persons). Thus, a State must prohibit and prevent one person from holding another in slavery, subjecting him to torture or degrading treatment, invading his privacy, discriminating against him on account of race or religion in respect of employment, etc. The State must enact any laws and regulations necessary to give effect to its obligation to respect and ensure the rights recognized. The Covenant also expressly requires States parties to prohibit propaganda for war or incitement to racial hatred (Art. 20). A State must also provide remedies, such as judicial or administrative injunction, against infringement of recognized rights. The Covenant requires the State to provide compensation for some violations, such as unlawful arrest or detention (Art. 9(5)), or conviction of crime that entails a miscarriage of justice (Art. 14(6)).

Particular human rights conventions may include additional obligations. For example, the Genocide Convention (Art. IV) requires States parties to make acts of genocide criminal and to prosecute and punish persons committing geno-

cide, "whether they are constitutionally responsible rulers, public officials or private individuals"; or to surrender them to the jurisdiction of an → international criminal court, if available. The Convention provides also that genocide is not to be considered a political crime for purposes of → extradition. The Convention on the Suppression and Punishment of the Crime of Apartheid requires parties to prohibit the offence and to try and punish an offender (Art. IV) and not to consider it a political offence for purposes of extradition (Art. XI).

In the Covenant on Economic, Social and Cultural Rights each State party "undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant" (Art. 2(1)). The limitations thus indicated do not detract from the binding legal character of the obligation. A State violates the agreement if it does not dedicate "the maximum of its available resources", or if it does not do what is necessary to achieve progressively "the full realization of the rights recognized" by the Covenant.

The human rights obligations under customary law require all States to respect and to ensure the rights protected.

6. Rights and Remedies

Like international agreements generally, the UN Charter and the various human rights covenants and conventions create rights and obligations among the States parties. Each State party is obligated to every other State party to carry out its undertaking to respect the rights of persons subject to its jurisdiction. By these undertakings the parties recognize that individuals have rights in some moral order, and agree to give effect to those rights in their domestic legal order. Whether they agree to create legal rights for the individual under international law has been disputed. At the least, the individuals subject to the jurisdiction of any State party are third party beneficiaries of the obligations of that State towards other State parties (see Henkin, International Human Rights as "Rights").

The UN Charter says nothing of remedies for violation of the human rights undertakings of members, but all the provisions of the Charter are implemented by the appropriate organs of the United Nations. The → United Nations Economic and Social Council has authorized consideration of individual complaints that appear to reveal a "consistent pattern of gross violations" of human rights, by a working group of the Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (ECOSOC Res. 1503 (XLVII) of May 27, 1970).

The principal covenants and conventions provide for international machinery to implement them. For example, the Covenant on Civil and Political Rights and the Convention on Racial Discrimination require parties to report on their compliance to the committee or commission created by the agreement. These agreements also provide optionally for States to submit to complaints by other States before the committee or commission or to agree that the body may consider complaints for or on behalf of individual victims. The European Convention and the American Convention established a human rights commission and a human rights court with jurisdiction and competence defined in those conventions.

Like all international agreements a human rights covenant or convention gives rise to remedies in favour of other State parties, and generally in favour of all other State parties equally, including any applicable provision for settlement of disputes between them. When a covenant or convention establishes special machinery and remedies, it may provide or contemplate that the special remedy shall replace the ordinary remedies between State parties. However, in the absence of an express provision or clear implication to the contrary, the special remedies generally supplement rather than replace the ordinary inter-State remedies. Other States, whether or not they are parties to the convention, sometimes respond to violations by limiting aid to or trade with the violating State (cf. legislation to that effect in the United States).

Human rights obligations under customary law are *erga omnes* and the ordinary inter-State remedies are available to any State (see → Barcelona Traction Case, ICJ Reports (1970) p. 32).

Domestic remedies for individuals claiming to be victims of violations of international human

rights obligations depend on domestic law (see e.g., in the United States, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)).

The law of human rights is a remarkable achievement and perhaps the most important development in international law in this century. That law has destroyed the myth that the manner in which a State treats its own inhabitants is not the concern of anyone else, and the myth that the individual is not a legitimate preoccupation of international law. The contemporary human rights law has moved beyond the narrowly political considerations that motivated the traditional protections for aliens and minorities to an authentic concern for every individual human being everywhere. The normative standards of international human rights law are generally as protective of the individual as those of the most enlightened national constitutions, and the derogations and limitations on rights permitted by international law also compare favourably with those acceptable in authentic democratic societies.

Traditional attitudes, however, continue to trouble the enforcement and implementation of human rights. Like all international law, human rights law is the law of the political system of nation States and is subject to international political forces. The usual forces for implementing international law – "reciprocal, horizontal enforcement" by the "victim" State (→ Reciprocity) – hardly operate in respect of human rights since ordinarily there is no victim State, and usually no State is prepared to identify with or champion individual victims. Except within the framework of the European human rights system, and to a lesser extent that of the Americas, States are still reluctant to submit their compliance with human rights law to meaningful external scrutiny, and other States are reluctant to apply such scrutiny. In particular, States have been reluctant to establish effective international institutions that would respond to charges by or on behalf of individuals who claim that their rights have been violated. International political bodies that consider human rights issues, such as those of the United Nations, often use and abuse human rights issues to serve other political interests. Much "enforcement" is left to the unstructured and uncertain influence of world opinion working through → non-governmental organizations and institutions, including the international communications media.

But the idea of human rights is rooted deeply and the international law of human rights is well-established and still growing. There is reason to hope that an idea so universal and profound will also produce the will and the institutions to make it a permanent and effective feature of international law and international life.

Human Rights, A Compilation of International Instruments, U.N. Doc. ST/HR/1 Rev. 2 (1983).

I. BROWNLIE (ed.), Basic Documents of Human Rights (3rd ed. 1983).

H. LAUTERPACHT, An International Bill of the Rights of Man (1945).

H. LAUTERPACHT, International Law and Human Rights (1950, repr. 1968).

L.B. SOHN and T. BUERGENTHAL, The International Protection of Human Rights (1973).

T. BUERGENTHAL (ed.), Human Rights, International Law and the Helsinki Accord (1978).

K. VASAK (ed.), Les dimensions internationales des droits de l'homme, 2 vols. (1978); [in English:] The International Dimensions of Human Rights, 2 vols. (1982) bibliography, 687–738.

L. HENKIN, International Human Rights as "Rights", Cardozo Law Review, Vol. 1 (1979) 425–447.

C. ZANGHI, La protezione internazionale dei diritti dell' uomo (1979).

M.S. McDOUGAL, H.D. LASWELL and L.C. CHEN, Human Rights and World Public Order (1980).

L. HENKIN (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights (1981).

J.M. BECET and D. COLARD, Les droits de l'homme, Vol. 1 (1982).

A.H. ROBERTSON, Human Rights in the World (2nd ed. 1982).

P. SIEGHART, The International Law of Human Rights (1983).

See also periodical articles in, for example, Human Rights Law Journal, Human Rights Quarterly, Human Rights Review and Revue des droits de l'homme.

LOUIS HENKIN

HUMAN RIGHTS, ACTIVITIES OF UNIVERSAL ORGANIZATIONS

1. Introduction. – 2. An Overview of the Institutions: (a) The General Assembly and its subsidiary organs. (b) Economic and Social Council (ECOSOC). (c) Other principal organs. (d) Human rights bodies founded upon

special conventions. (e) Specialized Agencies of the United Nations. – 3. Types of Human Rights Activities: (a) Developing awareness of human rights. (b) Standard-setting and interpretation. (c) Monitoring compliance with international standards. (d) Political supervision.

1. Introduction

This article focuses on the post-1945 activities of intergovernmental institutions whose membership is not limited geographically, in particular those of the United Nations system.

A considerable number of other entries are relevant to the present article, especially those concerned with international organizations, the → United Nations, the → United Nations General Assembly, and the → United Nations Specialized Agencies. In addition, the articles entitled → Human Rights, → Human Rights Covenants, → Human Rights, Universal Declaration (1948) and → non-governmental organizations cover much of the material which is essential to the subject-matter of this article. The → Geneva Red Cross Conventions and Protocols constitute important human rights instruments with universal participation (see also → Red Cross).

The principal historical precedents for the present human rights activities of universal organizations are the activity of the → League of Nations and the establishment of the → International Labour Organisation. While the promotion and protection of international human rights were not enshrined as such in the Covenant of the League, provision was made by the League for the protection of → minorities and for supervision of the administration of mandates. The protection of minorities was provided for in the series of "minorities treaties", signed in 1919, in special chapters inserted in the general peace treaties with Austria, Bulgaria, Hungary and Turkey (→ Peace Treaties after World War I), as well as in other treaties and declarations made before the Council of the League. The League of Nations mandate system, provided for in Art. 22 of the Covenant, placed formerly colonial territories, mainly in Africa and the Middle East, under a system of tutelage exercised by the mandatory powers on behalf of the League, with the supervision of the Assembly, the Council, and the Permanent Mandates Commission (→ Mandates; → Colonies and Colonial Régime). The third historical precursor to the human rights activity of universal organizations was the creation of the ILO.

One of the purposes of the United Nations is "[t]o achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 1(3) of the → United Nations Charter). While the obligation of member States to act jointly and separately to achieve the objective of universal respect for and observance of human rights is set out in Arts. 55 and 56 of the Charter, the organs within the system which are competent over human rights matters derive their mandate from articles of the Charter that determine the powers and functions of the various bodies (Arts. 7, 22, 60, 63 and 68). Those of the UN Specialized Agencies are set out in their own constitutions. Other institutions have been established by special human rights conventions.

2. An Overview of the Institutions

Numerous bodies created pursuant to the Charter carry out human rights activities, either as their primary purpose or along with other tasks assigned to them. All six of the "principal organs" established under Art. 7 have such activities. Other bodies have been established by States parties to specific human rights instruments, and by the Specialized Agencies under their constitutions.

(a) The General Assembly and its subsidiary organs

The UN General Assembly "may discuss any questions or any matters within the scope of the present Charter . . ." and "may make recommendations to the Members of the United Nations or to the Security Council or to both . . ." (Art. 10). In addition to "discussing" and "recommending", the General Assembly may initiate studies and make recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 13).

In carrying out its human rights function, the General Assembly has established a number of

special bodies by resolutions setting out their scope and membership, both of which are frequently expanded by subsequent resolutions. One of the more active of these bodies is the Special Committee on Decolonization (→ Decolonization).

Among the other subsidiary organs with significant human rights activities are the United Nations High Commissioner for Refugees (UNHCR; → Refugees, United Nations High Commissioner) and the Council for → Namibia. The General Assembly decided in 1949 (Res. 319(IV)) to establish the UNHCR, which replaced the → International Refugee Organisation in 1951. Acting according to its Statute of 1950 (Res. 428(V)), the UNHCR provides assistance to refugees, whose situation results from violations of human rights (persons who are victims of or who fear persecution by reason of their race, religion, nationality or political opinion).

Various other bodies or programmes have been created by the General Assembly to deal with other specific human rights problems, including the Special Committee against Apartheid (→ Apartheid), the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories (→ Israel: Status, Territory and Occupied Territories), the Committee on the Exercise of the Inalienable Rights of the Palestinian People (→ Palestine) and the United Nations Voluntary Fund for Victims of Torture.

(*b*) *Economic and Social Council (ECOSOC)*

One of the functions of the → United Nations Economic and Social Council is to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" (Art. 62(2) of the UN Charter). It may also draft conventions for submission to the General Assembly and call international conferences on matters falling within its competence, including human rights. In fact, its role is to a large extent concerned with examining, modifying or endorsing decisions and resolutions of the Commission on Human Rights. ECOSOC also enters into arrangements with the Specialized Agencies, receives reports from them and coordinates their activities (Arts. 63 and 64). To carry out these functions, ECOSOC holds one organizational and two regular sessions each year; human rights matters are normally dealt with at the first regular session, by the Social Committee. Most of ECOSOC's human rights work is carried out by two functional commissions (one on human rights and one on the status of women) and their subsidiary organs and by various *ad hoc* committees which it has established, particularly for the drafting of international conventions.

The Commission on Human Rights is one of the six functional commissions established by ECOSOC in 1946 pursuant to Art. 68 of the UN Charter. The terms of reference of the Commission, as set out in ECOSOC Resolution 6(I) and amended by Resolution 9(II), included drafting an international bill of rights and other declarations and conventions, protection of minorities, the prevention of discrimination and "any other matter concerning human rights not covered by" the above mentioned items. In 1979, the Commission was also entrusted with assisting ECOSOC in the coordination of human rights activities in the UN system (ECOSOC Res. 1979/36).

At its first session in 1947 the Commission established two sub-commissions, one on Freedom of Information and of the Press, which was discontinued in 1952, the other on Prevention of Discrimination and Protection of Minorities, which is described below. The Commission has also created many committees and working groups dealing with such issues as the human rights situation in Southern Africa or Chile, or situations submitted to it by the sub-commission which appear to reveal a consistent pattern of gross violations of human rights, or reports submitted under the Convention on the Suppression and Punishment of the Crime of Apartheid. Most of the Commission's work has had to do with its standard-setting function. In general the Commission functions under the direction of ECOSOC to which it submits proposals and recommendations drawn up during its annual sessions held in Geneva in February and March.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities was established by the Commission on Human Rights at its first session, in 1947. Its terms of reference were expanded by the Commission in 1949 to include undertaking studies and making recommendations to the Commission concerning the

prevention of discrimination of any kind relating to human rights and the protection of racial, national, religious and linguistic minorities, as well as other functions ECOSOC or the Commission may assign to it. Originally made up of 12 members, selected by the Commission to serve for three years in their individual capacities, its membership was expanded to 14 in 1959, 18 in 1965 and 26 in 1969. The Sub-Commission meets annually for about four weeks, considers a wide ranging set of agenda items, adopts resolutions and formulates recommendations and draft resolutions for the Commission, to which it reports. It frequently appoints special rapporteurs from among its members to prepare reports on particular questions and establishes working groups on special matters (→ Discrimination against Individuals and Groups; → Racial and Religious Discrimination).

Created in 1946, the Commission on the Status of Women prepares recommendations and reports to ECOSOC on promoting women's rights in political, economic, civil, social and educational fields and "on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights, and to develop proposals to give effect to such recommendations" (ECOSOC Res. 48(IV) of 1947; → Sex Discrimination). Originally composed of 15 members, it was increased to 18 in 1952, 21 in 1961 and 32 since 1966. The members are representatives of UN member States elected by ECOSOC for three-year terms. It adopts its own resolutions, submits draft resolutions for adoption by ECOSOC and reports to ECOSOC.

A special subsidiary organ set up by ECOSOC is the sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (ECOSOC Res. 1988(LX); decision 1978/10 of 1978 and ECOSOC Res. 82/83 of 1982). The Group examines the reports the States parties submit pursuant to Art. 16 on the measures taken and the progress made in achieving observance of the rights recognized in the Covenant.

(c) *Other principal organs*

With primary responsibility for the maintenance of international peace and security, the → United Nations Security Council has examined certain situations involving violations of human rights, such as South Africa's apartheid policy and control over Namibia, the Middle East, and → hostages in Iran. The Trusteeship Council carries out human rights activities within the → United Nations Trusteeship System, one of the basic objectives of which is "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . ." (Art. 76(c) of the UN Charter). It considers reports submitted by administering authorities, examines petitions from the population of trust territories, makes periodic visits to them, formulates a questionnaire on the political, economic, social and educational advancement of the population thereof and reports to the General Assembly.

Also regarded by the Charter as a principal organ of the United Nations, the Secretariat plays a crucial role in the promotion of human rights (→ International Secretariat). The → United Nations Secretary-General himself intercedes on occasion to seek solutions to human rights problems. The bulk of the human rights work of the Secretariat is carried out by the Centre for Human Rights, with offices in Geneva.

In exercising both its compulsory and its advisory jurisdiction, the → International Court of Justice has occasionally applied and developed the international law of human rights. Moreover, a number of United Nations instruments contain provisions whereby a party to the instrument may submit to the Court any dispute relating to the interpretation, application or fulfilment of the instrument.

(d) *Human rights bodies founded upon special conventions*

Various universal human rights treaties have provided for the creation of expert bodies entrusted with specific tasks related to the application of the treaties. The three most important are the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, and the Committee on the Elimination of Discrimination Against Women (→ International Covenant on Civil and Political Rights, Human Rights Committee).

Created pursuant to Art. 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by UN GA Res. 2106 A(XX) of December 21, 1965), the Committee on the Elimination of Racial Discrimination (CERD) is comprised of 18 experts "of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, . . ." for a term of four years.

CERD's functions are to consider reports submitted by States parties to the Convention, to make suggestions and general recommendations based on that examination, to assist in settling disputes among States parties concerning the application of the Convention and to receive and consider communications from individuals or groups of individuals within the jurisdiction of States parties which have recognized CERD's competence to receive such communications. Following its first session held in 1970, CERD meets in regular session twice a year and may meet in special sessions. CERD reports to the General Assembly on all its activities.

The Human Rights Committee was established in 1977 pursuant to Arts. 28 and 29 of the International Covenant on Civil and Political Rights (adopted by UN GA Res. 2200 A(XXI) of December 16, 1966). It is composed of 18 members who are nationals of States parties to the Covenant and "persons of high moral character and recognized competence in the field of human rights" serving in their personal capacity for a term of four years.

The tasks of the Committee, as set out in Arts. 40 to 45 of the Covenant, are to study reports from States parties on the measures they have taken to give effect to the Covenant and on the progress made, to transmit its reports and general comments to States parties, to help settle disputes among States parties concerning the application of the Covenant, provided the States concerned have accepted its competence to do so (Art. 41), and when necessary, to establish an *ad hoc* conciliation commission. It also considers communications under the Optional Protocol to the Covenant. The Committee holds three regular sessions per year, may hold special sessions and reports to the General Assembly.

The Committee on the Elimination of Discrimination Against Women was established in 1982 in accordance with Art. 19 of the Convention on the Elimination of All Forms of Discrimination Against Women (adopted by UN GA Res. 34/180 of December 18, 1979). It is made up of 23 "experts" chosen by the States parties but acting in their personal capacity. It examines reports from States parties and makes general recommendations in much the same way as CERD.

(*e*) *Specialized Agencies of the United Nations*

By virtue of the organic and formal ties the Specialized Agencies have with the United Nations pursuant to Arts. 57 and 63 of the Charter and the agreements between the Agencies and ECOSOC, the Specialized Agencies are committed to the human rights objectives of the Charter. They also have more specific human rights mandates set out in their own constitutions or in resolutions of their legislative bodies. Of the Specialized Agencies of the United Nations, two make a major contribution to the promotion of human rights: the → International Labour Organisation and the → United Nations Educational, Scientific and Cultural Organization. Several others contribute in smaller ways to that task.

The human rights activities of the ILO include the elaboration of international labour standards and procedures for their implementation. Established on April 11, 1919 as an autonomous institution associated with the League of Nations, the ILO is committed by its constitution to improving unjust working conditions and contributing to social justice. The constitution was amended in 1946 to incorporate the fundamental principles on which the United Nations is based and which were adopted in the Declaration of Philadelphia in 1944. The ILO was brought into relationship with the United Nations in December 1946 as a Specialized Agency.

UNESCO was established on November 4, 1946 with the constitutional purpose "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world without distinction of race, sex, language or religion, by the Charter of the United Nations" (Art. 1 of the

UNESCO Constitution of November 16, 1945). UNESCO's human rights activities cover standard-setting, research and teaching, and a procedure for handling complaints about violations of human rights.

The work of the → World Health Organization (WHO) is also relevant to international human rights in so far as it contributes to the realization of "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (International Covenant on Economic, Social and Cultural Rights, Art. 12). The objective of WHO is "the attainment by all peoples of the highest possible level of health", which is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (WHO Constitution, → Preamble and Art. 1). WHO has also cooperated in United Nations efforts to eliminate → torture, in particular, in the elaboration of "principles of medical ethics relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment" (see UN GA Res. 37/194 of December 18, 1982).

Similarly, the work of the → Food and Agriculture Organization constitutes the main contribution of a universal organization to the implementation of another economic and social right, namely, the right to an adequate standard of living in terms of nutrition and food.

3. *Types of Human Rights Activities*

The activities of universal organizations are traditionally grouped under activities of "promotion" and activities of "protection". The former aim at improvements in human rights performance in the future while the latter aim at redressing human rights abuses of the past. Promotion thus includes dissemination of information, elaboration of legislation, research and education, while protection includes → fact-finding and inquiry, investigation, receiving complaints and petitions, → conciliation and mediation, adopting decisions of a political or legal kind regarding the existence of violation and imposing → sanctions.

In practice, the distinction is rarely clear. The United Nations' constitutional purposes in the field of human rights are to "promote" and "encourage" and yet the acts of its organs deal more and more with violations of human rights. Moreover, institutions which receive complaints and petitions attempt to establish a dialogue with governments with a view to making improvements and preventing abuses in the future.

A further difficulty in attempting to define human rights activities of universal organizations is the multi-functional nature of most institutions. The same body may issue publications, adopt resolutions, conduct investigations, and seek a friendly settlement.

Given the interaction of promotion and protection and the multiple functions of most human rights bodies, four broad types of activities may be identified.

(*a*) *Developing awareness of human rights*

The Universal Declaration of Human Rights was proclaimed by the General Assembly "to the end that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights . . ." (→ Human Rights, Universal Declaration (1948), Preamble). Knowledge of human rights is a precondition for action to obtain the respect thereof. The activities of universal organizations, however valuable, have been insufficient to the task. The Department of Public Information of the United Nations and its equivalents in other organizations have published popularized versions of the Declaration, information sheets, press releases and other documents which are distributed worldwide through United Nations Information Centres. Some, but not many films have also been made.

UNESCO has taken a leading role in promoting human rights education and research. UNESCO's programme activities for the promotion of human rights include expert meetings, research projects, publications of all sorts, and the provision of fellowship and study grants. Problems of racism and apartheid have figured prominently in the research and publication activities. Technical assistance activities have been carried out for refugees and national → liberation movements. Curricula and materials have been produced for human rights teaching at various levels of education. The main impetus for these teaching activities came from the International

Congress on the Teaching of Human Rights, convened by UNESCO in Vienna in 1978, and the Plan for the Development of the Teaching of Human Rights which was approved by the General Conference in 1980. It also has established a Voluntary Fund for the Development of Knowledge of Human Rights through Teaching and Information, which unfortunately has received very little money.

The Centre for Human Rights administers a programme of advisory services which provides expert assistance to member States, organizes seminars on human rights questions and awards fellowships. The Centre prepares and issues publications which have become standard works of reference in the human rights field.

(*b*) *Standard-setting and interpretation*

The main United Nations body which draws up Declarations and Conventions dealing with human rights is the Commission on Human Rights. The first stage was the drafting of the International Bill of Human Rights which consisted of the Universal Declaration (1948) and the two International Covenants (1966). Numerous other declarations and conventions have been prepared with the assistance of the Commission and adopted by the UN General Assembly. Declarations have dealt with such subjects as the rights of the child (Res. 1386(XIV) of 1959), the elimination of all forms of racial discrimination (Res. 1904(XVIII) of 1963), territorial → asylum (Res. 2312(XXII) of 1967) and the elimination of all forms of intolerance and of discrimination based on religion or belief (Res. 36/55 of 1984). Among the issues dealt with by conventions are the international right of correction (Res. 630(VII) of 1952), all forms of racial discrimination (Res. 2106 A(XX) of 1965), the non-applicability of statutory limitation to → war crimes and → crimes against humanity (Res. 2391(XXIII) of 1968), and the crime of apartheid (Res. 3068(XXVIII) of 1973).

The Commission on the Status of Women performs a similar standard-setting function in its narrower field of competence. For example, it drafted the 1967 Declaration and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. Some of the conventions drawn up by the → International Law Commission are also relevant to human rights.

The legislative bodies of the Specialized Agencies, particularly the ILO and UNESCO, have made major contributions to the standard-setting work of the United Nations system. The International Labour Conference has adopted some 159 conventions and 168 recommendations. These instruments cover a wide range of workers' rights, including → forced labour, hours of work, the right to organize and collective bargaining.

UNESCO has prepared some 27 treaties which have been adopted either by the General Conference or special intergovernmental conferences convened by UNESCO, 29 recommendations and five declarations, most of which concern human rights. For those instruments adopted by the General Conference, a reporting procedure is provided in the Constitution. Certain conventions, like the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (UNTS, Vol. 249, p. 240; → Cultural Property, Protection in Armed Conflict) and the 1960 Convention Against Discrimination in Education (UNTS, Vol. 429, p. 93) have special implementation procedures, as does the 1966 Recommendation on the Status of Teachers and the 1978 Declaration on Race and Racial Prejudice.

The interpretation of the standards set by universal organizations may be entrusted to the International Court of Justice, either by virtue of its compulsory or advisory jurisdiction or by virtue of special provisions contained in numerous human rights treaties, which allow a party to the instrument to submit to the Court any dispute relating to the interpretation, application or fulfilment thereof. Among the relevant contentious cases the Court has decided are those dealing with the right of asylum (→ Haya de la Torre Cases), the rights of → aliens (→ United States Nationals in Morocco Case), the rights of the child (→ Guardianship of Infants Convention Case), Namibia (→ South West Africa/Namibia (Advisory Opinions and Judgments)) and the hostages in Tehran (→ United States Diplomatic and Consular Staff in Tehran Case (1980)).

The advisory opinions involving human rights included several on the international status of South West Africa/Namibia (1950, 1955 and 1956) and the consequences of South Africa's continued presence there (1971), human rights obligations of certain States (1950; → Interpretation of Peace

Treaties with Bulgaria, Hungary and Romania (Advisory Opinions)), and reservations to the genocide convention (1951; → Treaties, Reservations; → Genocide Convention (Advisory Opinion)).

(c) *Monitoring compliance with international standards*

Three procedures have been used by international organizations to monitor compliance with international obligations in the human rights field: reporting procedures, complaints procedures, and studies and investigation.

The most common implementation machinery provided in human rights instruments is the reporting procedure according to which States parties report on measures taken to secure respect for the rights enumerated in the substantive provisions. Both International Covenants require States parties to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized therein. The Conventions on the Elimination of All Forms of Racial Discrimination and of Discrimination Against Women contain similar provisions. In all four cases, the reports are submitted to the UN Secretary-General for consideration by a special committee (the Human Rights Committee, the Sessional Working Group of ECOSOC, CERD or the Committee on the Elimination of Discrimination Against Women).

The capacity of the reporting procedures to reveal deficiencies and encourage governments to improve their performance depends on a number of factors including the detailed nature of the guidelines and questionnaires, the independence, impartiality and expertise of the committee which reviews the reports, the capacity of the reviewing committee to require supplementary reports and clarifications and to draw on other information, the possibility for national and international → non-governmental organizations to review and comment on reports, the publicity given to the proceedings of the committee, and the capacity of the committee to adopt recommendations. The Human Rights Committee and CERD have been relatively successful in this regard. Representatives of the States whose reports are examined at a session of either body are invited to be present and to answer questions. If the report does not contain sufficient information, the Committee may request additional information, and it may make suggestions or general recommendations based on its examination of the report.

In the Specialized Agencies, reports are usually required on the application of human rights instruments adopted under their auspices. Member States of the ILO and of UNESCO are required to report on steps taken to bring conventions and recommendations before the competent authorities and to implement the provisions which are binding on them (Arts. 9 and 22 of the ILO Constitution, Art. IV of the UNESCO Constitution). The reports are reviewed by the Committee of Experts on the Application of Conventions and Recommendations of the ILO and the Committee on Conventions and Recommendations of UNESCO. The former body is more effective than the latter due to the fact that it is composed of 19 experts appointed in their personal capacity and having recognized qualifications and experience in the labour and social field. It reports its observations and makes direct requests to governments for additional information. Its findings are reviewed by the tripartite Conference Committee on the Application of Conventions and Recommendations, which reports to the General Conference, indicating the countries which have repeatedly failed to comply with their obligations under the ILO Constitution. The UNESCO Committee is made up of 20 members of the Executive Board who report to the Board, which in turn reports to the General Conference.

The second technique for monitoring compliance with international human rights standards is the complaints procedure. By virtue of procedures set out in constitutions, decisions of legislative bodies or special instruments, individuals, groups or States are permitted to submit complaints to certain universal human rights bodies. Various names are used for the complaints: "petitions" (Trusteeship Council and Special Committee Against Apartheid), "communications" (ECOSOC, Human Rights Committee, ILO and UNESCO), and "complaint" (ILO). Relatively strict conditions are placed on the handling of these complaints, which at most can lead to publication of a report and/or non-mandatory decisions of a political body. The procedure for complaints from one State against another, for exam-

ple under the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Civil and Political Rights or the UNESCO Convention Against Discrimination in Education, has never been used. The inter-State procedures of the ILO on the other hand have been used.

In accordance with ECOSOC Resolution 1503 (XLVIII), the Commission on Human Rights can examine communications concerning a situation which reveals a consistent pattern of gross and reliably attested violations of human rights. This lengthy and cumbersome procedure passes through confidential sessions of a Working Group of the Sub-Commission, the Sub-Commission, and a Working Group of the Commission before reaching the Commission, where only the list of States under review is made public. The Commission can call for a thorough study of a situation examined under this procedure or make an investigation through an *ad hoc* committee acting with the consent of the government concerned.

Under the Optional Protocol to the Covenant on Civil and Political Rights, the Human Rights Committee considers communications from individuals who claim to be victims of a violation of any of the rights set out in the Covenant by a State party to both the Covenant and the Optional Protocol. The Committee has considered some 167 cases, about 100 of which it has declared admissible. Of these it has expressed its "final views", including finding that there had been a violation of the Covenant, in 50 cases. Some 16 countries have been implicated, Uruguay having the largest number of cases brought against her (60).

Communications considered under the Optional Protocol are examined in closed meetings. The Committee first determines whether the communication meets the conditions of admissibility set out in Arts. 1, 2, 3 and 5(2) of the Optional Protocol and then examines the merits of the case with the help, if it so decides, of a working group of no more than five of its members. The Committee informs the State party and the individuals concerned of its findings and views and includes a summary of its activities under the Protocol in its report to the General Assembly.

The ILO has three types of procedures for handling complaints of human rights violations: the procedure whereby an employers' or a workers' organization may make a "representation" to the Director-General concerning a State which has allegedly failed to comply with its obligations under any ILO Convention (Art. 24 of the Constitution); the procedure whereby any ILO member may file a "complaint" against any other member for failing to secure the effective observance of any convention to which both are parties (Art. 26); and a special procedure, established jointly by the United Nations and ILO in 1950 concerning the Fact-Finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association.

The UNESCO procedure for handling communications alleging violations of human rights is set out in Executive Board Decision 104 EX/3.3, adopted in 1978. Any individual, group of individuals or non-governmental organization, claiming to be a victim of a human rights violation or to have reliable knowledge of such a violation may submit a communication to UNESCO. After it has been transmitted to the government concerned for comment, it is submitted to the Committee on Conventions and Recommendations which examines first whether the communication meets the conditions of admissibility. If it does, the Committee examines the merits in order to determine whether the case warrants further action; if so, the Committee's task is "to bring about a friendly solution designed to advance the promotion of the human rights falling within UNESCO's fields of competence" (Decision 104 EX/3.3, para. 14(k)). The procedure is confidential and is limited to alleged human rights violations falling within UNESCO's fields of competence. Communications may relate either to individual cases or to "questions of massive, systematic or flagrant violations". In the latter case, the Executive Board and the General Conference may consider the question in public, but have not yet done so. The Committee reports to the Executive Board on its work. At any stage of the procedure, the Director-General can intercede on behalf of the victim, in accordance with his role of "initiating consultations, in conditions of mutual respect, confidence and confidentiality, to help reach solutions to particular problems concerning human rights" (Decision 104 EX/3.3, para. 8(b)).

The third monitoring method used by universal institutions is that of studying a situation or a case

including as far as possible the application of fact-finding and investigation techniques (→ Fact-Finding and Inquiry).

The Commission on Human Rights has the authority to "call in *ad hoc* working groups of non-governmental experts in specialized fields or individual experts . . ." (ECOSOC Res. 9(II), Art. 3). In 1967, ECOSOC adopted Res. 1235, instructing the Commission "to examine information relevant to gross violations of human rights . . . ." In the same year it established a working group to investigate the charges of torture and ill-treatment of prisoners, detainees or persons in police custody in South Africa, the mandate of which was extended in 1969 to allegations of violations of human rights in the territories occupied as a result of hostilities in the Middle East. In 1975 a Working Group (later replaced by a Special Rapporteur) was created to examine the human rights situation in Chile and was able to visit that country to conduct an investigation in 1978. Other working groups have been established to deal with situations such as slavery and enforced or involuntary disappearances. Special Rapporteurs have been appointed to study the situation in El Salvador, Guatemala and Chile and the problem of summary or arbitrary executions. A Special Representative and a Direct Envoy have been appointed to report on Iran and Bolivia respectively. Finally, a person was designated by the Secretary-General to make a thorough study of the situation in Poland.

The Specialized Agencies and in particular ILO have made good use of the possibility they have to carry out fact-finding missions and prepare reports on human rights questions. Often this monitoring function is undertaken as a result of the discovery of violations through a complaints procedure and leads to action (or inaction) by a political body.

(*d*) *Political supervision*

Universal intergovernmental institutions operate under the authority of political organs which must approve programmes and budgets. The extent to which they can have human rights activities at all is limited by what the representatives of States will accept. The gradual increase in the amount of human rights action by international institutions that States will not reject as constituting interference in their domestic affairs (→ Domestic Jurisdiction) is a result of the dynamics of the human rights movement and the link between respect for human rights and the legitimization of power.

As the supreme authorities of universal institutions, the political organs exercise supervision over human rights questions. In the United Nations the political motivation of the decision-making process increases as the consideration of the matter passes from the Sub-Commission to the Commission, to ECOSOC and to the General Assembly. The political factors cannot, however, be neglected at any stage. The political supervision as exercised by all these bodies as well as by the legislative organs of the Specialized Agencies has been criticized as being too selective. For many years the political bodies seemed incapable of taking a firm stand against any countries other than South Africa, Israel and Chile since these countries were relatively isolated politically. Since the late 1970s this situation has evolved and a score or more countries from every continent now come under explicit political supervision for their human rights record.

The General Assembly exercises its power of supervision within its power to "discuss" and "recommend". In carrying out these functions, the General Assembly examines many human rights items on the agenda of any session: most of these items are referred to the Third Committee (Social, Humanitarian and Cultural), although several are referred to the Plenary or to the other main Committees. Approximately one-half of the items considered by the Third Committee concern human rights. While the ultimate decision of the Assembly is limited by Art. 13 to "recommending", the terminology used by the General Assembly in human rights shows a relatively broad interpretation of this power. In the operative paragraphs of its human rights resolutions, the General Assembly has adopted language according to which it: "affirms", "appeals", "approves", "asks", "calls upon", "condemns", "decides", "declares", "endeavours", "endorses", "expresses the earnest hope", "expresses regret and concern", "expresses its satisfaction", "invites", "is of the opinion", "notes with appreciation", "notes with regret", "recognizes", "requests", "resolutely condemns", "resolves",

"solemnly calls upon", "supports", and "urges".

While the formal investigative bodies, such as the Human Rights Committee or CERD may handle complaints, scrutinize reports, make general recommendations, or express their "findings" and "views", the political organs (and the Sub-Commission) have utilized their power to "condemn" and to call upon countries to modify their law and practice. At all these levels, the publicity given to findings and critical pronouncements of UN bodies constitutes the main restraining force on the behaviour of States, which are more sensitive than is often believed to the embarrassment of other governments pointing an accusing finger at them. Observers call this process "the mobilization of shame".

The range of human rights activities of universal institutions is vast and reflects the weaknesses as well as the strengths of the inter-State system with regard to the concrete realization of common goals which run counter to individual State performance. The trend, over the past three decades, has been toward wider acceptance of human rights standards, more thorough investigation of situations and scrutinization of reports, and stronger political supervision over the human rights performance of a greater variety of countries. Although progress is agonizingly slow, the possibility still exists for universal institutions to make States more accountable to their people and to the world community in the field of human rights, in sum to bring the deeds of States more in line with their lofty words.

United Nations, Human Rights: A Compilation of International Instruments (1983) UN Doc. ST/HR/1/Rev. 2.

United Nations, United Nations Action in the Field of Human Rights (1984) UN Doc. ST/HR/2/Rev. 2.

United Nations, Yearbooks on Human Rights.

International Labour Office, Conventions and Recommendations 1919–1982, Geneva (1982).

International Labour Office, Reports of the Committee of Experts on the Application of Conventions and Recommendations (Annual).

United Nations Educational, Scientific and Cultural Organization, Standard-Setting Instruments (1981, with later additions) [looseleaf].

L. SOHN and T. BUERGENTHAL, The International Protection of Human Rights (1973).

R.B. LILLICH and F.C. NEWMAN, International Human Rights: Problems of Law and Policy (1979).

B.G. RAMCHARAN (ed.), Human Rights: Thirty Years After the Universal Declaration (1979).

M. TARDU, Human Rights: The International Petition System. A Repertoire of Practice, 2 binders (1979, with later additions).

L. HENKIN (ed.), The International Bill of Rights, The Covenant on Civil and Political Rights (1981).

A.H. ROBERTSON, Human Rights in the World (2nd ed. 1982).

T.J.M. ZUIJDWIJK, Petitioning the United Nations – A Study in Human Rights (1982).

Columbia University in the City of New York, Center for the Study of Human Rights, Human Rights: A Topical Bibliography (1983).

P. SIEGHART, The International Law of Human Rights (1983).

K. VASAK and P. ALSTON (eds.), The International Dimensions of Human Rights, 2 vols. (1983).

H. HANNUM (ed.), Guide to International Human Rights Practice (1984).

T. MERON (ed.), Human Rights in International Law, 2 vols. (1984).

STEPHEN P. MARKS

HUMAN RIGHTS, AFRICAN DEVELOPMENTS

1. Historical Evolution of Human Rights in Africa: (a) Pre-colonial Africa. (b) Colonial experience with human rights. (c) Art. 63 of the European Convention on Human Rights. (d) Human rights provisions in pre-independence and post-independence constitutions. – 2. Lagos Conference on the Rule of Law, 1961. – 3. The Creation of the OAU. – 4. The United Nations and African States. – 5. Cooperation in the Field of Refugees. – 6. Obstacles in the Way of Regional Machinery for the Protection of Human Rights: (a) State sovereignty. (b) Human rights and development. (c) Military coups. – 7. The Promotion of a Convention on Human Rights. – 8. Developments Leading to the Drafting of the African Charter on Human Rights: (a) General background. (b) The Banjul conference on human rights. (c) Approval and signature of the Charter. – 9. An Overview of the Charter.

As far back as 1961, the African Conference on the Rule of Law in Lagos, Nigeria, resolved to invite "the African Governments to study the possibility of adopting an African Convention on Human Rights". While objective and independent observers might have judged the resolution as both ambitious and over-optimistic for its day, had the call been heeded or carefully studied it is possible that the diversity of historical misfortunes

that distorted the cause of human rights in Africa would have been greatly mitigated. In fact, it was only in June 1981 that the → African Charter on Human and Peoples' Rights was approved by the Council of Ministers of the → Organization of African Unity (OAU) meeting at Nairobi, Kenya.

1. *Historical Evolution of Human Rights in Africa*

(*a*) *Pre-colonial Africa*

It would be wrong to assume that the authoritarianism so common in some newly independent African States is in accord with the spirit and practice of traditional African political systems (see also → History of the Law of Nations, Africa). For instance, the people of non-centralized societies such as the Ibos of Nigeria and the Nuer in the Sudan had very strong egalitarian and democratic traditions. A universal feature of indigenous African political systems existed in the Basuto pitso in Southern Africa, where important decisions affecting the community as a whole would be debated in public assemblies.

The Ashanti of Ghana, the traditional tribal life in Kenya, and the Oba (i.e. the king) and the Yoruba people of Nigeria, had checks and balances and sanctions against the abuse of power. Government was limited in certain tribal societies by the peoples' power to remove a ruler who disregarded "constitutional checks". For instance, the natives of Buganda, now part of Uganda, who were known as the Baganda, killed many of their Kabakas (kings) in defence of their rights and freedoms.

Before assuming his position of power, a traditional ruler among the Ashanti people of Ghana went through a ritual in which an important tribal person, who acted as the link between the chief and his people, *inter alia*, declared: ". . . when we give you advice, listen to it. We do not want you to abuse us (or) to be miserly . . . we do not want one who disregards advice, we do not want you to regard us as fools, we do not want aristocratic ways, we do not want bullying, we do not like beating. Take the stool . . . ." The consent of the chief to these remarks in taking the "stool" represented the constitutional acceptance of the obligation on his part to adhere to the wishes of his people.

The argument that the socio-political background of African States does not accommodate the type of democratic tradition which is closely associated with Europe, and the respect for → human rights is largely incorrect. Human rights were not alien to traditional African societies. Even slaves and serfs enjoyed certain rights, although such rights were inferior to those of the ordinary citizens.

Certain legal writers have, however, emphasized the point that, in the main, African customary law is essentially concerned with the protection of group rights such as those of tribal groups, ethnic groups, lineages, clans and African families. The argument in support of "group law" as opposed to strictly "individual law", as is the case in Western States, is that the individual in an African society is expected to play a very active role within his own group. However, post-independent Africa, with frequent abuses of individual and group rights, has not clearly illustrated this presumption. What is more common today is the pre-emption of peoples' rights by autocratic régimes.

(*b*) *Colonial experience with human rights*

Colonial administration in Africa had a dismal, if not a disgraceful record of respect for human rights. This fact has lead many African leaders to question the standing of former colonial powers to make any virtuous references to the concept of human rights, let alone to the need to establish a convention on the protection of human rights in Africa (→ Colonies and Colonial Régime). They claim that the colonial powers deliberately perturbed the natural "rapports" among the different social groups in Africa and superimposed new rules and regulations on the existing public and private institutions.

The checks and balances surrounding the powers of the traditional rulers were destroyed in certain instances, converting the latter into a single native authority. Colonial administrations, according to many African writers, denied their colonial subjects certain elementary human rights such as the freedom of speech, freedom of the press and freedom of association and assembly. The right of trade unions to strike was denied the miners in the Nigerian coal mines in 1949. Many African intellectuals and future leaders were victimized. For example, Dr. Kwame Nkrumah, the

first president of Ghana was jailed because of his struggles for human rights. Jomo Kenyatta, the first president of Kenya, was imprisoned and placed under solitary confinement for many years. Valuable works of art were removed from African countries by colonial powers and some of these objects can still be found in the museums of many European countries (→ Cultural Property).

(c) *Art. 63 of the European Convention on Human Rights*

The attitude adopted by certain European countries with regard to the operation of Art. 63 of the → European Convention on Human Rights (1950) created some doubts in the minds of African intellectuals during the colonial era as to the willingness of European powers to respect and protect human rights in the colonial territories. They felt that if the concept of human rights had been as vital and as universal as some European powers contended, the Convention should have extended automatically to all their colonial subjects without the need to "declare by notification" that it would. Art. 63 provides in part:

"1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

2. . . .

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements."

It was pointed out that Art. 63 was a direct encouragement to colonial powers not to make any declaration to that effect and Great Britain, for instance, was decidedly against any outside authority taking over a function which it considered to be essential to sound progressive administration.

(d) *Human rights provisions in pre-independence and post-independence constitutions*

Detailed provisions for the protection of human rights featured prominently in the pre-independence constitutions of many colonial territories. Their standards were as high as those obtaining in European countries. And the legal commitment by African governments to observe them scrupulously raised the expectations of their citizens.

Constitutional provisions on human rights also bore a great resemblance to the rights enumerated in the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)).

Furthermore, the influence of European legal philosophy has continued to dominate the national judicial systems in most of Africa. The Spanish legal system still applies in Equatorial Guinea; the Portuguese in Angola and Mozambique; the British common law system is predominant in all former British colonies; and the French legal system predominates in the French-speaking African territories with the exception of Zaire which was formerly under Belgian colonial administration.

Evidence of the influence of the European Convention on Human Rights was particularly strong in the case of the independence constitution of Nigeria. The rights of → minority groups were included in the constitution at the London Conference in 1957 essentially due to the fears expressed by these groups that their rights might be suppressed or ignored by the more numerous and politically dominant groups in Nigeria after gaining independence. Many other African countries incorporated in their national constitutions and fundamental laws the provisions of the European Convention. The francophone States in Africa also expressly included in their constitutions the French Declaration of the Rights of Man and the Citizen as well as the Universal Declaration of Human Rights.

Effective institutional devices essential for the enjoyment of human rights were established, such as an independent judiciary. The constitutions of Ghana, Kenya, Nigeria and those of many other African States contain detailed rules and procedures for the protection of human rights. The institution of the Ombudsman was also created in certain countries such as Tanzania, Senegal, Ghana and Nigeria to look into complaints arising from administrative malpractices against individual citizens.

While these standards inspired the confidence of Africans that their governments would show concern for their rights and would also protect them, in time they realized that there was a great difference between the declaration of intention by

a State to implement these objectives and the actual implementation of the rights by a newly independent State facing the challenges of development.

2. *Lagos Conference on the Rule of Law, 1961*

The Lagos Conference in 1961 was confronted, as Elias put it, with the "age-old problem of all known systems of jurisprudence – the individual *versus* the State". The organizers had the foresight to convene eminent legal minds in Africa and other countries to deal with the crucial issue of the rule of law on the eve of → decolonization in most African countries. The → International Commission of Jurists, under whose auspices the Conference was organized, had rightly guessed that post-independent Africa would easily lend its ears to the principles of law formulated at the Conference. However, what they did not immediately take into consideration was that most leaders of independent Africa would turn their attention first to another age-old problem – national security – which has often been used as a pretext to suppress the freedom of the press, freedom of association, individual rights, and as the reason for establishing military and authoritarian régimes. The policies of rapid economic development and industrialization were also given priority over individual rights.

The concern of many African lawyers for personal freedoms was highlighted by the proposal made by some of them that an African convention for the protection of human rights be drafted. The convention would fit into an international system for the protection of human rights, already existing in Europe and taking form in Latin America. Although that suggestion found general support, the first expression of African unity came with a political institution, known as the Organization of African Unity which was established in May 1963 to promote the unity and solidarity of African States. The suggested human rights convention remained only as an idea.

3. *The Creation of the OAU*

The Conference of Heads of State and Government adopted the Charter of the OAU in Addis Ababa on May 25, 1963.

The primary concern of the OAU in the field of human rights is the total liberation of Africa from colonial domination. The → preamble of the OAU Charter contains notions of human rights such as the "inalienable right of all people to control their own destiny", freedom, equality, justice and dignity; it makes reference to human progress and to "the aspirations of our peoples for brotherhood and solidarity". The OAU continues to promote and protect human rights in the following fields: (1) the → self-determination of peoples; (2) non-discrimination; (3) protection of and assistance to → refugees; (4) economic, social and cultural rights; (5) education; (6) science and technology and (7) the settlement of disputes. The Organization has adopted several resolutions in the field of human rights.

4. *The United Nations and African States*

When the Universal Declaration of Human Rights was adopted by the → United Nations General Assembly on December 10, 1948 (Res. 217 A (III)), only four African States – Ethiopia, Liberia, Egypt and South Africa – were then independent members of the → United Nations. As of 1983, 50 African States have acceded to the → United Nations Charter and its human rights provisions.

The UN Charter contains some substantive stipulations on human righs. For instance, membership of the United Nations involves subscribing to the purposes of the Organization, one of which is to "achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms . . ." (Art. 1(3)). Under Art. 13(1)(b) reference is also made to "the realization of human rights and fundamental freedoms for all without distinction . . . ." "[R]espect for the principle of equal rights and self-determination of peoples . . .", of special importance to Africans, is contained in Art. 55, followed by Art. 56 which urges all UN member States to cooperate for the achievement of the provision under Art. 55.

The United Nations has also concluded a number of human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination which entered into force on January 4, 1969 and now has as many as 37 African States parties to it (→ Racial and Religious Discrimination). The Covenant on Economic, Social and Cultural Rights and the

Covenant on Civil and Political Rights, adopted in 1966, had been ratified or acceded to by 17 African countries by the end of 1983 (→ Human Rights Covenants). The presumption is that both severally and jointly, members of the United Nations are under a legal obligation to conform to the standards laid down in these conventions. There are of course several other UN conventions dealing with human rights and fundamental freedoms, but what is particularly encouraging is that the Organization has laid down implementation procedures to cope with any "consistent pattern of gross and reliably attested violations of human rights" as was the case in Uganda and Equatorial Guinea.

The Charter of the OAU makes specific references to the UN Charter and to the Universal Declaration in its eighth preambular paragraph and in Art. II(1)(e). Art. II(1)(d) also talks about the eradication of all forms of colonialism from Africa. The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 adopted as UN GA Res. 1514(XV), condemned certain forms of colonialism and denounced these as being contrary to the UN Charter and in violation of the principles of human rights.

African States have actively and successfully challenged certain UN declarations and resolutions which did not sufficiently protect their interests in all matters relating to human rights. They have also collaborated with Asian States, some Latin American States and the socialist States of Eastern Europe in placing priority on the international protection of certain rights which they believed to be beneficial to the dignity of the black race.

5. Cooperation in the Field of Refugees

One of the areas of agreement in the protection of human rights to which attention has been drawn relates to the protection of → refugees. This is a monumental African problem because the continent is considered to have the highest number of refugees in the world. The principal cause was that the process of decolonization in Africa has been accompanied by internal strife in many African States. The result was that thousands of individuals – men, women, children – deserted their homelands. There are presently about four million refugees in Africa.

On October 24, 1965, in its Resolution No. 26, the OAU Assembly of Heads of State and Government meeting at Accra, Ghana, reminded the members of the Organization that had not already done so to ratify the UN Convention of 1951 on the Status of Refugees. OAU members were also urged to apply the provisions of that Convention to refugees in Africa.

Apart from the 1951 Convention, many OAU member States have readily entered into bilateral agreements to relieve one another of refugee problems. There are many examples of such accords between African States.

The Assembly of Heads of State and Government of the OAU adopted at its sixth session held at Addis Ababa on September 10, 1969 an OAU Convention Governing the Specific Aspects of Refugees in Africa (UNTS, Vol. 1001, p. 45). It entered into force in November 1974. The Convention complemented the UN Convention of 1951. The OAU Convention of 1969 explicitly recognized in its Preamble that the UN Convention of 1951 as modified by the Protocol of 1967 "constitutes the basic and universal instrument relating to refugees". Another significant move by the OAU was the incorporation in integral form of the substantive articles of the UN Declaration on Territorial Asylum of 1967 (→ Asylum, Territorial). The latter forbids the rejection of individuals at the frontier, their return or expulsion to a territory where their lives would be in danger or would be threatened.

The 1969 OAU Convention on Refugees in Africa can be regarded as the most advanced and up-to-date instrument dealing with that subject in the world.

The OAU also has a refugee section called the Bureau for the Placement and Education of African Refugees, which deals with all matters relating to refugees in the continent. The same section is responsible for coordinating the assistance of voluntary agencies to refugees in Africa.

6. Obstacles in the Way of Regional Machinery for the Protection of Human Rights

(a) State sovereignty

The African attitude to State → sovereignty was hardened by the creation of the OAU, which laid considerable stress on the concept of "non-interference in the internal affairs of states" (Art.

III(2) of the Charter). Also, the UN Charter provision under Art. 2(7) on non-interference "in matters which are essentially within the domestic jurisdiction of any state" has become the "normative escape clause" from any unpleasant obligation to which a State would not want to expose itself. Other world powers have applied that provision in the UN Charter so rigidly that it would be foolish for any newly independent State with a colonial background not to want to do the same thing (→ Domestic Jurisdiction).

(*b*) *Human rights and development*

One view on this topic is that the precarious process of nation building constitutes an obstacle to the protection of human rights at the national level. Another view is that experience in too many instances has shown that it is precisely in times of economic, political or societal crisis that the maintenance of a régime of human rights is most crucial to physical survival and the protection of human dignity.

In the name of development, certain African governments have tortured, deported, detained and exiled individuals, and have deprived trade unions of their fundamental rights (→ Torture; → Aliens, Expulsion and Deportation). The question whether the present stage of development of most African States would not adequately accommodate the respect for certain rights or whether development would indeed prevent the enforcement of the basic needs of individuals as against the avaricious attitude of a few, continues as a matter of urgent debate.

(*c*) *Military coups*

The wave of military *coups d'état* in the African continent was another obstacle to the establishment of a human rights convention. Instability came about as a result of unfair distribution of the resources of the State, causing a deep sense of public anger, resentment and frustration. However, the military forces who seized power often lacked experience in the art of government and adopted methods which were authoritarian, ruthless and oppressive. It would serve no useful purpose to enumerate all the atrocities that have been committed in the name of national security, underdevelopment, tribal differences and political stability. Suffice to say, this was a period in the political history of Africa that was not too conducive to the creation of a convention and a commission on human rights.

7. *The Promotion of a Convention on Human Rights*

In his work "The Future of Pan-Africanism" published in 1961, Dr. Azikiwe, the former President of Nigeria, advocated the promulgation by African States of an African Convention on Human Rights as an earnest of their belief in the rule of law, democracy as a way of life, respect for individual freedom, and respect for human dignity. In subsequent years, eminent personalities in the legal profession and in the field of politics also pronounced on the necessity of creating a regional human rights commission for Africa.

Sporadic debates were organized on a regional level within the academic circles in Africa, in the form of seminars and conferences with the collaboration of the United Nations, first to gain the support of African intellectuals and secondly to draw the attention of policy makers in the higher echelons of government to the necessity of establishing a convention and a machinery to deal with matters relating to human rights.

The Seminar on Human Rights in Developing Countries, organized in Dakar, Senegal from February 8 to 22, 1966 by the United Nations in cooperation with the Government of Senegal was one of such endeavours (see UN Doc. ST/TAO/HR/25). Like the Lagos Conference on the Rule of Law, 1961, the Seminar in Dakar ended with a call for an African convention which would encourage and secure the protection of human rights. Other important seminars were held at Cairo (1969), Addis Ababa (1971), Dar-es-Salaam (1973) and Dakar (1978).

8. *Developments Leading to the Drafting of the African Charter on Human Rights*

(*a*) *General background*

Pessimistic attitudes adopted by certain African governments and those who made repeated calls for an African convention stemmed partly from the fact that earlier endeavours for such an innovation never met with any real success. Furthermore, there were negative appraisals of the OAU as a suitable structure to provide the framework for a regional convention: Its Charter was not particularly encouraging on the subject,

nor did the OAU make any open criticism of or draw public attention to violations of human rights.

However, by the end of the 1970s and the beginning of the 1980s, the need for an African human rights machinery became more and more apparent. International attention was focused on Africa. These developments led to the conclusion that the OAU, whatever its past record may have been, should be made politically and actively involved in the whole movement towards the creation of a regional organ for human rights. Further steps were taken in this direction.

The Bokassa inquiry in May 1979, preceding the 16th Ordinary Session of the OAU Assembly of July 1979, was held at a timely moment. The decision to hold an inquiry to investigate the allegations of murder of school children in the "Central African Empire" (now a Republic) was taken at Kigali, Rwanda, during the 6th Summit meeting of the Franco-African Conference. A commission of five judges from the Ivory Coast, Liberia, Rwanda, Senegal and Togo was established; a report was to be submitted to the Heads of State who instituted the commission. The commission found against "Emperor" Bokassa and against the authorities of Zaire for collaboration. It was the first time in African history that a fact-finding commission had been established against a Head of State with his personal approval (→ Fact-Finding and Inquiry). The findings were also made public.

The 16th Ordinary Session of the OAU Assembly of Heads of State and Government as held in Monrovia, Liberia, from July 17 to 20, 1979 (see AHG/Dec. 115(XVI)). The Assembly adopted a resolution without a vote calling on the Secretary-General of the OAU to "organize as soon as possible in an African capital a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human Rights providing, *inter alia*, for the establishment of bodies to promote human rights". The draft decision was introduced by Senegal and supported by The Gambia, Mali, Mauritania and Liberia.

At the request of the UN Commission on Human Rights and at the invitation of the Government of Liberia, the UN Secretary-General organized a seminar in Monrovia, Liberia, from September 10 to 21, 1979, on the creation of regional commissions of human rights with special reference to Africa (see UN Doc. ST/HR/SER.A/4). Thirty African governments attended. Also present were the representatives of → United Nations Specialized Agencies, and other international bodies. The seminar dealt with the role of regional institutions in the field of human rights, past efforts and earlier recommendations on an African commission, a model regional convention on human rights and further measures to be taken. The seminar concluded that an African Commission should be established. It requested the OAU Secretary-General to transmit to the OAU all the proposals and recommendations made at the seminar for consideration.

From November 28 to December 8, 1979, a meeting of African experts was held in Dakar, Senegal, to prepare the first draft of the proposed African Charter. The stated objective of the gathering was to prepare an African human rights instrument based upon an African legal philosophy and responsive to African needs.

(*b*) *The Banjul conference on human rights*

A ministerial conference met from June 9 to 15, 1980, to study and approve a draft of the OAU Charter on Human Rights, with a recommendation to the OAU Assembly of Heads of State and Government in Freetown, Sierra Leone. As work on the proposed Charter had not been completed before the summit, the Assembly instructed the ministers to set up a second meeting in order to complete the draft Charter.

At a second meeting convened in Banjul, The Gambia, in January 1981, the work was finally completed in the presence of 35 representatives of African governments.

(*c*) *Approval and signature of the Charter*

The Draft African Charter on Human and Peoples' Rights was approved by the Council of Ministers of the OAU, meeting in Nairobi, Kenya, in June 1981 (CM/1149(XXXVII)). The 18th summit of African Heads of State and Government which met a few days later in Nairobi, Kenya, approved and signed the "African Charter on Human and Peoples' Rights" with no further amendments.

As of August 1983, about 16 African Governments had ratified and deposited their instru-

ments of ratification with the Secretary-General of the OAU as provided under Art. 63(2) of the Charter.

In accordance with Art. 63(3) of the Charter, it "shall come into force three months after the reception by the Secretary-General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity". A simple majority would represent 26 members of the Organization as there are at present 50 independent African member States of the OAU.

9. An Overview of the Charter

The Charter begins with ten Preambular paragraphs which list the aims, objectives and the duty to promote and protect human rights in Africa.

It is divided into three main parts, into six chapters with a total of 68 articles. The first part contains the peoples' rights and duties. The second part relates to the measures of safeguard. The third deals with the general aspects of the Charter.

Under the first chapter of Part I of the Charter, 26 articles confer varying degrees of rights on individuals, of which the right to life is the most important (Art. 4). Discrimination in the enjoyment of the rights provided under the first chapter is prohibited by Art. 2. Due process of law is fully guaranteed in the Charter under Art. 7 which, if properly put into effect, will alleviate the great burden imposed on the legal profession and the judiciary. The → minimum standards of justice and treatment previously denied to so many in respect of the dignity inherent in every human being is covered in Art. 5. Freedom of association is enshrined in Art. 10. The list of rights in the Charter is close to those specified in the national constitutions of many African countries and those found in most international human rights instruments. Both civil and political rights and economic, social and cultural rights are given prominence. But the problem is whether the OAU member States will implement the obligation imposed by Art. 1 of the Charter that parties to the Charter, in addition to giving recognition to such rights, shall ". . . undertake to adopt legislative or other measures to give effect to them".

A catalogue of duties are imposed on individuals and these are clearly enumerated in the second chapter of Part I of the Charter under Arts. 27 to 29.

Part II provides in Chapter I for the "Establishment and Organization of the African Commission on Human and Peoples' Rights" (Arts. 30 to 44). An important stipulation is found in Art. 45, which relates to the mandate of the Commission. Procedural matters, communications from OAU member States and "other communications" feature under Arts. 46 to 59. Four articles deal with the principles to be applied by the Commission (Arts. 60 to 63). For further details see the article → African Charter on Human and Peoples' Rights.

It is to be hoped that the Charter will grow into a great and dependable institution such as the European Convention on Human Rights and thus bring hope and healing to a wounded continent and its peoples.

Organization of African Unity: Banjul Charter on Human and Peoples' Rights, ILM, Vol. 21 (1982) 58–68.

International Commission of Jurists, African Conference on the Rule of Law, Lagos, Nigeria, January 3–7, 1961 (1961).

K.A. BUSIA, Africa in Search of Democracy (1967).

K. VASAK, Les droits de l'homme et l'Afrique, Vers les institutions africaines pour la protection internationale des droits de l'homme, RevBelge, Vol. 6 (1967) 459–478.

L.O. ADEGBITE, African Attitudes to the International Protection of Human Rights, in: A. Eide and A. Schou (eds.), International Protection of Human Rights (1968) 69–81.

K. M'BAYE, Les réalités du monde noir et les droits de l'homme, Revue des droits de l'homme, Vol. 2 (1969) 382–394.

P. WEIS, The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems, Revue des droits de l'homme, Vol. 3 (1970) 449–464.

T.O. ELIAS, Africa and the Development of International Law (1972).

A.H. ROBERTSON, African Legal Process and the Individual, Revue des droits de l'homme, Vol. 5 (1972) 465–478.

O. EZE, Prospect for International Protection of Human Rights in Africa, African Review, Vol. 4 (1974) 79–90.

H.W.O. OKOTH-OGENDO, National Implementation of International Responsibility, Some Thoughts on Human Rights in Africa, East African Law Journal, Vol. 10 (1974) 1–16.

B.G. RAMCHARAN, Human Rights in Africa: Whither Now?, University of Ghana Law Journal, Vol. 12 (1975) 88–105.

A.G. MOWER, JR., Human Rights in Black Africa: A Double Standard?, Revue des droits de l'homme, Vol. 9 (1976) 39–70.

E.G. BELLO, The Doctrine of State Sovereignty, Some Notes on its Relevance to the Developing Countries, Europäische Grundrechte Zeitschrift, Vol. 4 (1977) 210–219.

E.G. BELLO, Human Rights, The Rule of Law, ICLQ, Vol. 30 (1981) 628–637.

P. KUNIG, Das völkerrechtliche Nichteinmischungsprinzip. Zur Praxis der Organisation der afrikanischen Einheit (OAU) und des afrikanischen Staatenverkehrs (1981).

P. KUNIG, The Protection of Human Rights by International Law in Africa, GYIL, Vol. 25 (1982) 136–168.

K. M'BAYE and B. NDIAYE, The Organization of African Unity, in: K. Vasak (ed.), The International Dimensions of Human Rights (1982) 583–630.

EMMANUEL G. BELLO

HUMAN RIGHTS AND HUMANITARIAN LAW

1. Notion

Both → human rights and humanitarian law contain rules for the treatment and protection of human beings based on considerations of humanity. Traditionally the term human rights law is primarily employed for rules valid in times of peace between the individual and his State. Humanitarian law usually designates the rules valid in times of → war or → armed conflict between a belligerent and the nationals of an enemy State (→ Humanitarian Law and Armed Conflict; → Enemies and Enemy Subjects; → War, Laws of). Not all the rules of war are covered. The term is limited to the *jus in bello*, excluding the *jus ad bellum*, and a distinction is made between the proper humanitarian rules and "those rules . . . not specifically humanitarian in character" (resolution of the → Institut de Droit International, Wiesbaden, August 13, 1975, Art. 2, AnnIDI, Vol. 56 (1975) p. 541), e.g. the rules for hostilities on the battlefield. Main elements of humanitarian law are the rules for the treatment of the victims of armed conflicts, as codified in the Geneva Conventions of 1949 (→ Geneva Red Cross Conventions and Protocols). A distinction between the "Law of The Hague" (→ Hague Peace Conferences of 1899 and 1907) and the "Law of Geneva" no longer corresponds to present law. Rules regarding the victims of armed conflicts such as → prisoners of war are also contained in the Hague conventions. Moreover rules regarding the conduct of hostilities have recently been included in the Additional Protocols to the Geneva Conventions of 1977.

A clear distinction between human rights and humanitarian law was not possible according to the traditional concepts. The law of human rights is, in principle, also applicable in emergency situations which threaten the life of a nation (Art. 4(1) of the International Covenant on Civil and Political Rights; → Human Rights Covenants) or even in war (Art. 15 of the → European Convention on Human Rights (1950)). Rules for the treatment of a State's own nationals involved in non-international conflicts have been introduced into the Geneva Law (common Art. 3 of the 1949 Conventions, Protocol II, 1977; → Civil War).

The relationship between the two concepts is the subject of controversy. On the one hand, Pictet in 1969 sought to establish a general term "humanitarian law", comprising the laws of The Hague and Geneva, and also the law of human rights as subdivisions. In 1968, the International Conference on Human Rights in Tehran on the other hand, introduced the new term "human rights in armed conflict" which comprised the law relating to victims of armed conflicts, and also the rules regarding the conduct of operations, without distinguishing between rules specifically humanitarian in character and other rules. This terminology has not found general acceptance by scholars (see the resolutions of the Institut de Droit International, Zagreb (AnnIDI, Vol. 54 II (1971) p. 465) and Wiesbaden, *supra*). Significantly, Art. 60(5) of the → Vienna Convention on the Law of Treaties uses the term "treaties of a humanitarian character" apparently for both human rights and humanitarian law.

2. Historical Evolution

The rules in both categories developed separately and without any connection between each other. Organs of the → United Nations – the main promoters of the human rights movement – took no active interest in a further development of the laws of armed conflict for a long period following the prohibition of the → use of force in international relations pursuant to Art. 2(4) of the

→ United Nations Charter. Activities by the International Conference of the → Red Cross to further develop humanitarian law and to modernize its rules in the light of the changed conditions did not prompt a favourable response on the part of the United Nations and its members.

This situation changed abruptly after the 1967 Six Day War between → Israel and the Arab States had stirred up world opinion and aroused a new interest in the rules of armed conflict. The International Conference on Human Rights adopted at Tehran on May 12, 1968 Resolution XXIII (UN Doc. A/CONF.32/41) requesting the → United Nations Secretary-General to study steps for securing the better application of existing humanitarian international conventions, and also a possible revision of existing conventions. Under the title "Human Rights in Armed Conflict" this Resolution established a link between these two fields of international law for the first time. This initiative was confirmed by Resolution 2444 (XXIII) of December 19, 1968 in the → United Nations General Assembly and led to reports of the Secretary-General (UN Docs. A/7720 of November 20, 1969 and A/8052 of September 18, 1970) containing a thorough investigation of the relationship between human rights and humanitarian law.

In its turn the International Committee of the Red Cross (ICRC) invited governmental, Red Cross, and other experts to consultations at a Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflict at Geneva (1971). In the documentation for this Conference (CE 1/b, January 1971, Vol. 1, Introduction, pp. 28–32) the ICRC strongly emphasized the particular character of traditional humanitarian law, being based on entirely different concepts from those on which the law of human rights had developed. The detailed rules of humanitarian law could not be replaced by the excessively general guarantees contained in human rights instruments. This position may have been influenced by the strong criticism expressed by writers against a one-sided orientation on human rights concepts.

During the diplomatic conference of 1974 to 1977 which followed, a more conciliatory position was taken. Though no reference was inserted into the Additional Protocols declaring human rights instruments generally applicable in cases of armed conflict, the dispositions on humane treatment (Protocol I, Art. 75; Protocol II, Arts. 4 to 6) are largely inspired by the standard achieved in the Human Rights Covenants.

3. Current Legal Situation

Human rights and humanitarian rules of armed conflicts are codified in separate instruments (→ Codification of International law). Their reciprocal application is a legal problem (see section 4). According to the Additional Protocols, certain rules which may be suspended during a state of emergency (Art. 4(1) of the Covenant on Civil and Political Rights) continue to be applicable during armed conflicts. This applies for instance to certain judicial rights guaranteed in Art. 14 of the Covenant (see Protocol I, Art. 75(4); Protocol II, Art. 6). By such provisions of humanitarian law the standard established by the Covenant is raised – at least in cases of armed conflicts. Certain detailed rules implement and give concrete shape to general guarantees, for instance relating to relief (Protocol II, Art. 5(1)(c)) or the benefit of certain working conditions (Art. 5(1)(e)). In some cases, additional guarantees are added such as the prohibition on carrying out the death penalty on mothers of young children (Protocol II, Art. 6(4) compared with Art. 6(5) of the Covenant).

4. Special Legal Problems

In so far as the fields of application of the instruments in both categories overlap, their reciprocal application is appropriate. In this regard no doubts exist where a non-international conflict taking place inside the borders of a State is concerned (Protocol II or common Art. 3 of the 1949 Conventions). All participants find themselves within the territory of the State concerned, and are subject to its jurisdiction (see Art. 2(1) of the Covenant on Civil and Political Rights; → Jurisdiction of States). Additional Protocol II and common Art. 3 of the Conventions have to be applied together with the Covenant.

The problem is whether, in an international conflict, the Covenant is to be applied along with the Geneva Conventions and Additional Protocol I. The persons involved are either not within the

territory of the State party or not subject to its jurisdiction. It has been argued that – like the European Convention and decisions based on it – a jurisdiction with actual authority and responsibility would be sufficient, and that therefore the Covenant would also apply if a State is in actual control of all or part of the territory of another State (→ Occupation, Belligerent). The requirement that the pertinent act is committed within its territory would not be relevant (Buergenthal). It is open to doubt whether this interpretation will be accepted by State practice.

As far as the instruments of both categories are applicable, a reciprocal application is not excluded by either of them. The → Preamble of Protocol II expressly mentions "that international instruments relating to human rights offer a basic protection to the human person" (para. 2). Art. 1(2) of Protocol I puts "other international agreements" at the same level as the Protocol itself (→ Martens' Clause). Also in the Covenant the principle is expressed that it enshrines "minimum rules", and that its rules do not exclude the application of other international conventions (Covenant on Civil and Political Rights, Art. 4(1) regarding the suspension of obligations and Art. 5(2) regarding restrictions or derogations).

5. Evaluation

The biblical figure of the "good Samaritan" inspired the Red Cross movement. The idea of charity has not played the same role in the creation of international protection for human rights. Bloody revolutions were necessary in order to make people conscious of the dignity of the human being, claiming rights rather than asking for grace.

Historic sources have now lost much of their colour. The idea of "humanity" has universally gained in esteem and respect and nowadays appears as a common denominator of all efforts aiming at the protection of the individual.

Essential differences remain between the two concepts. The concept of "human being", whether as the object or subject of human rights (→ Individuals in International Law), has contours which are vague and difficult to grasp. The addressees of humanitarian law are discernable figures: → combatants, the → wounded, sick and shipwrecked, → prisoners of war and internees. The law focuses on their sufferings.

It is true that the antagonism which formerly existed between the two concepts has faded away. This does not justify the merging of both concepts into one, the result of which might be a rather low level of protection and a loss of the merits which they each separately possess.

J. PICTET, Les principes du droit international humanitaire (1966).

D. BINDSCHEDLER-ROBERT, A Reconsideration of the Law of Armed Conflicts, in: Conference on Contemporary Problems of the Law of Armed Conflicts, Geneva, 15–20 September 1969 (1971).

G.I.A.D. DRAPER, The Relationship between the Human Rights Regime and the Laws of Armed Conflict, Israel Yearbook on Human Rights, Vol. 1 (1971) 191–207.

H. MEYROWITZ, Le droit de la guerre et les droits de l'homme, Revue du droit public et de la science politique en France et à l'étranger (1972) 1059–1105.

K.J. PARTSCH, La protection internationale des droits de l'homme et les Conventions de Genève de la Croix-Rouge, Revue internationale de droit comparé, Vol. 26 (1974) 73–85.

M. MUSHKAT, The Development of International Humanitarian Law and the Law of Human Rights, GYIL, Vol. 21 (1978) 150–168.

A. CASSESE (ed.), The New Humanitarian Law of Armed Conflict, 2 vols. (1979–1980).

D. SCHINDLER, Kriegsrecht und Menschenrechte, in: Menschenrechte, Föderalismus, Demokratie, Festschrift Werner Kägi (1979) 327–349.

A.S. CALOGEROPOULOS-STRATIS, Droit humanitaire et droits de l'homme, La protection de la personne en période de conflit armé (1980).

M. BOTHE, K.J. PARTSCH and W. SOLF, New Rules for Victims of Armed Conflicts (1981).

T. BUERGENTHAL, To Respect and to Ensure: State Obligations and Permissible Derogations, in: L. Henkin (ed.), The International Bill of Rights (1981) 73–77.

KARL JOSEF PARTSCH

HUMAN RIGHTS COMMISSION OF THE ARAB STATES

1. Background

Although the Covenant of the League of Arab States (→ Arab States, League of) contains no reference to the specific topic of the promotion and protection of → human rights, the League reacted favourably to the decision of the United Nations Commission on Human Rights which declared 1968 a year for celebrating the Universal

Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)). The League Council adopted Decision No. 2259/46 on September 12, 1966 which established a "special commission" to pursue the execution of an extensive programme proposed by the Political Committee of the League. On March 18, 1967 a steering committee was instituted by the Council (Decision No. 2304/47) with the view to collaborate with the special commission in the execution of its mandate.

2. *Establishment*

The League responded to a note received from the → United Nations Secretary-General on December 12, 1967 concerning the eventual establishment of an Arab regional commission for human rights. Consequently, the League Council adopted Decision No. 2443/50 of September 3, 1968 approving the Political Committee's recommendation on the establishment of such a commission, which was to be considered as one of the Permanent Technical Committees of the League in accordance with Art. 4 of the Covenant. This implied that the League's intention was to undertake the task of collaboration between the Arab regional commission and the United Nations Commission on Human Rights. Moreover, the League expressed its support for the idea of holding an international conference in which all regional commissions for human rights would take part, and the League's desire to receive assistance from the → United Nations in the field of human rights.

3. *Organizational Structure*

As are all the permanent technical committees of the League, the Human Rights Commission of the Arab States is composed of one or more representatives of the member States, and the → Palestine Liberation Organization as a full member of the League. Each member has one vote; proxy voting is not permitted. The quorum consists of a majority of the member's representatives. The League Secretariat participates in the Commission's work. In consultation with the Secretariat, the Commission can invite governmental institutions or → non-governmental organizations to attend its meetings, as it has done on a number of occasions. The President of the Commission is appointed by the League's Council from the candidates presented by member States for a two-year term, upon the recommendation of the Political Committee (e.g. Council Decision No. 4104/76 of September 9, 1981).

The administrative function of the Commission is performed by the Secretariat of the League. The League Secretary-General formulates the agenda of the Commission but member States can propose the addition of other items. This agenda with the relevant documents are forwarded to members together with the invitation to attend the meetings.

The Commission's task is to submit to the League's Council proposals concerning rules of cooperation between member States. It studies all subjects referred to it by the Council, the Secretary-General or a member State and issues appropriate recommendations. Decisions of the Commission are adopted by the majority of members present in the meeting.

4. *Activities*

Soon after the establishment of the Commission, a regional Arab conference on human rights was held in Beirut from December 2 to 10, 1968. The conference adopted eight decisions. Most of them dealt with problems of human rights and humanitarian law raised by Israeli practices both in Israel and in the Arab territories occupied by Israel after 1967 (→ Israel and the Arab States; → Israel: Status, Territory and Occupied Territories). Decision No. 4 touched directly upon the specific work of the Commission which had to be supplementary to the United Nations activities in the field of human rights. The Commission was to cooperate with the → United Nations Specialized Agencies and with the international regional commissions for human rights in the application of programmes related to human rights, with special emphasis on problems of the rights of civilian inhabitants in the Arab territories occupied by Israel (→ Civilian Population, Protection). The Commission was to invite member States to establish national commissions for human rights which were to cooperate with the regional commission.

The Commission worked on many levels to reach the objectives outlined in these directives. During its first meeting, the Commission mainly examined problems relating to violations of human rights perpetrated by the Israeli authorities. In its second meeting, a plan of work was adopted

aimed at informing international institutions and public opinion of these violations. This topic continued to be the major preoccupation of the Commission during its following meetings. Consequently, the Commission dealt with the rights of → combatants during war or armed conflicts in the application of the Geneva Conventions of 1949 (→ Geneva Red Cross Conventions and Protocols), the struggle for legitimacy of the Palestinian resistance and the protection of → holy places and historical sites under international law. It also collaborated actively with the *ad hoc* committee of experts which had been charged by the United Nations Commission on Human Rights (Decision No. 6 XXV) to launch an inquiry into the situation of the Arab population in the territories occupied by Israel.

This particular interest did not make the Commission overlook the promotion of human rights in Arab States. At its second meeting, it invited member States to institute national commissions for human rights, the objective of which was the establishment of collaboration for common Arab action in the field. Decisions issued after its fifth meeting indicated the intention of the Commission to coordinate the activities of the national commissions.

The Commission decided during its fourth meeting to ask the League Secretary-General to elaborate on a proposal for an Arab charter of human rights. In September 1970, the League Council decided to confer the task of preparing a proposal of an Arab "declaration" of human rights to a committee of experts (Decision No. 2668/30). This committee adopted a draft in 1971 which reflected the major provisions of the international instruments relating to human rights with the necessary modifications to take into account the particularity of the Arab world. The draft was sent to member States for comments but the replies received indicated insufficient support.

The draft was brought up again for discussion in the Commission and underwent several modifications. What is remarkable in the form of the latest version is that the instrument is no longer called a declaration but rather a pact, and that in Art. 40, its submission for ratification by the State parties is proposed. The League Council decided at its 79th session in 1983 to refer it once again to member States for comments.

5. Evaluation

The Human Rights Commission of Arab States has succeeded in its mission concerning human rights in the occupied territories, for this problem constitutes common ground for all Arab States. But it has not improved progress in the promotion of human rights in the Arab countries themselves.

It could be said that its failure in the past can be explained by the fact that Arab States are too disunited in their ideological and socio-economic outlooks to have a unitary approach to human rights. First, some of them, such as Saudi Arabia and the Sultanate of Oman, consider Islam as the only source of their national legislation. Thus they refuse any conception of human rights which does not conform to Muslim law (→ History of the Law of Nations: Islam; → International Law, Islamic). Other Arab States, however, consider Islam merely as a principal source of national legislation and accept the contents of the Universal Declaration of Human Rights and other international instruments inspired by it. Secondly, the Arab States have neither opted for the same political system nor chosen the same model of socio-economic development; consequently, they do not have the same conception of priorities in the different categories of human rights.

The Human Rights Commission of the Arab States remains an institution for the promotion of human rights. It could be more efficient if it were to become an institution for the protection of human rights, but this is a question which depends upon the political will of the Arab States; this remains the crux of the problem.

S.P. MARKS, La Commission permanente arabe des droits de l'homme, Revue des droits de l'homme, Vol. 3 (1970) 101–108.

N. ASFAHANI, The League of Arab States Position regarding Human Rights, Al-Seyassa Al-Daowlia, No. 39 (1975) 28–33 [in Arabic].

B. BOUTROS-GHALI, The League of Arab States, in: K. Vasak (ed.), The International Dimensions of Human Rights, Vol. 2 (1982) 575–581.

H.S. NAFA'A, The League of Arab States and Human Rights, Shooune Arabiya, Vol. 13 (1982) 486–506 [in Arabic].

R. DAOUDI, Teaching of Human Rights in Arab Countries, Bulletin of Peace Proposals, Vol. 14 (1983) 69–71.

RIAD DAOUDI

HUMAN RIGHTS COMMISSION OF THE OAS *see* Inter-American Commission on Human Rights

HUMAN RIGHTS COVENANTS

A. Historical Background. – B. General Character of the Covenants. – C. The Rights Guaranteed: 1. International Covenant on Civil and Political Rights: (a) The content of the rights guaranteed. (b) Limitations of the rights guaranteed. 2. The International Covenant on Economic, Social and Cultural Rights. – D. The Supervision Procedures: 1. The International Covenant on Civil and Political Rights: (a) The reports. (b) The communications. 2. The International Covenant on Economic, Social and Cultural Rights.

A. Historical Background

Prior to 1940 the protection of → human rights on the international plane was embryonic and fragmented. The Covenant of the → League of Nations had only envisaged the protection of such categories of people as → minorities and the inhabitants of territories under → mandate. The Constitution of the → International Labour Organisation adopted a wider approach but referred only to the protection of workers as such.

World War II provoked an unprecedented shock and was regarded in many quarters as a crusade for human rights. Henceforth the international community was confronted with the challenge "to protect every man and to protect the rights of all men" (René Cassin). For this reason international action in favour of human rights figures among the objectives of the → United Nations Charter. It is therefore the duty of the → United Nations and its members, to promote the protection of human rights (Preamble, para. 2, Arts. 1(3) and 55(c)). It was for this purpose that a Charter of Human Rights was contemplated. On December 10, 1948 the → United Nations General Assembly adopted the Universal Declaration (→ Human Rights, Universal Declaration) and for the first time a common comprehensive international standard, which should be guaranteed to every man, was defined. Although this Declaration, at least as an international custom, appears to have a binding force superior to that of a simple resolution of the General Assembly, this view is not shared unanimously (→ International Organizations, Resolutions). For this reason it was agreed from the beginning that the Declaration should be followed by a convention, which would determine the implementation of the Declaration and establish an appropriate supervisory mechanism. In theory, the procedure for producing such treaties was simple: an initial draft by the Human Rights Commission; debate in the Third Committee of the General Assembly; and adoption of the text by the General Assembly. In practice, difficulties emerged at each stage and it took 20 years to complete the work commenced in 1946. On December 16, 1966, by Resolution 2200 A the General Assembly unanimously adopted two distinct covenants rather than a single convention: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The latter Covenant was accompanied by an Optional Protocol concerning communications (complaints) from individuals. This Protocol was adopted by 66 votes against 2 with 38 abstentions (including the Eastern European bloc).

The Civil Rights Covenant entered into force in 1976 and as of early 1985 comprises 80 accessions and ratifications. It provides for the establishment of a Human Rights Committee entrusted with the task of supervising its implementation. The Committee consists of 18 members elected by the member States from among their nationals. These members serve in their personal capacity and take their decisions by majority vote of the members present (→ International Covenant on Civil and Political Rights, Human Rights Committee). The Covenant on Social Rights also entered into force in 1976 and as of early 1985 comprises 84 accessions and ratifications.

B. General Character of the Covenants

The dual international instruments on human rights might appear surprising. In fact the original intention was to draft a single convention which, like the Universal Declaration, would cover the complete spectrum of human rights. During the preparation process of these texts numerous States remained in favour of a single document, insisting on the necessary correlation between such a unique document and the unity of man-

kind. Despite their strength, these arguments did not prevail. In support of dual legal instruments it was claimed that there are two distinguishable categories of rights. On the one hand there are civil and political rights, the "classic" and relatively ancient freedoms. These are regarded as implying "the right to do", which essentially postulates non-interference by the State, and are therefore amenable to immediate application. On the other hand, there are social and cultural rights, regarded as "the right to claim", which presupposes a positive duty on the part of the community. The realization of these rights is necessarily relative and gradual.

It may not be doubted that there is a difference in nature, albeit not systematic, between civil and political rights on the one hand and social rights on the other. However, certain social rights, such as the right to strike, do not constitute the right to claim; like the freedoms of assembly and association, these are individual rights which are collectively exercised and do not require a positive action on the part of the community. Conversely, the effective protection of certain civil rights sometimes requires active intervention on the part of the community.

On the level of legal technique, the difference between "the right to do" and "the right to claim" is generally recognized. This explains the fact that two separate Covenants, comprising distinct supervisory procedures, were needed. (This same duality is to be found in Europe where the → European Social Charter and the → European Convention on Human Rights coexist.)

The difference in nature between the respective undertakings assumed by States is clearly expressed in the texts of the Covenants. State parties were to give the Covenant on Civil and Political Rights immediate effect through appropriate legislative or other measures and by making available an effective remedy to any person whose rights have been violated (Art. 2(2) and (3)). Such obligations are equally and immediately enforceable by all States regardless of their régimes or levels of economic development.

In contrast, each State party to the Covenant on Economic, Social and Cultural Rights agreed only to take steps "to the maximum of its available resources" towards a progressive realization of the rights recognized in that Covenant (Art. 2(1)). Thus the Covenant on Social Rights deserves to be qualified as a "promotional convention". It is not justified to defer the recognition of those rights which do not depend on the level of economic resources, as is the case in trade union rights guaranteed by Art. 8 of the Covenant or the right to respect the freedom which is indispensable to scientific research and creative activities recognized by Art. 15.

The duality of instruments should not overshadow the intimate, interdependent relationships between the rights which the Covenants enunciate. The combination of these rights permits one to perceive human beings in both their material and spiritual dimensions. It is beyond doubt that civil liberties and social rights are intimately and mutually connected. This is the reason why the Universal Declaration proclaimed both categories of rights with neither discrimination nor hierarchy. It could be retorted that the need for unity is not seriously hindered by the coexistence of two Covenants, since in practice there is a great measure of parallelism in their respective ratifications. In general, and with the encouragement of the UN General Assembly, the States which adhere to one Covenant accede concurrently to the other.

Furthermore, both Covenants emphasize their common inspiration. Thus, for example, the similarity between the two → preambles and between the provisions relating to the right to → self-determination, can be noted. Moreover, each Covenant includes an almost identically drafted Art. 5, intended to prevent an abusive reliance on their provisions (cf. Art. 17 of the European Convention) or their misuse as a pretext for refusing to abide by an internal or international measure more favourable to human rights (cf. Art. 60 of the European Convention). Finally the Covenants equally emphasize the fundamental requirement of non-discrimination in the exercise of the rights recognized (Art. 2), by insisting in particular on the equality of the sexes (Art. 3) (→ Discrimination against Individuals and Groups; → Sex Discrimination).

C. The Rights Guaranteed

1. International Covenant on Civil and Political Rights

(a) The content of the rights guaranteed

The draftsmen of the Covenant endeavoured to

clarify and develop the somewhat general provisions of the Universal Declaration. The relevance of → sovereignty and the differences in economic régimes account for the omission of rights such as the right of → asylum and the respect for private property. On the other hand the international consequences entailed by → decolonization induced the draftsmen of the Covenant to place the right of self-determination, and its corollary the right to dispose freely of natural resources (→ Natural Resources, Sovereignty over), in the first part of the Covenant, distinct from the other rights. This has provoked numerous discussions and elicited many reservations. For the → developing States, such a provision, expanding upon the celebrated Declaration of 1960 (UN GA Res. 1514(XV)) on the granting of independence to colonial countries and peoples (→ Colonies and Colonial Régime), was of fundamental importance. They consider the right of peoples to self-determination to be a prerequisite for the enjoyment of other human rights. Other States regard the right of peoples – in itself a complex concept – not as a human right but rather as a collective right of a group. It can be argued that human rights relate to the relationship between individuals and the community (or between individuals) whereas the rights of peoples, especially their economic rights, are on a different level, that of the relationship between groups. It should, however, be noted that nowhere else does the Covenant touch upon the rights of groups. Even Art. 27, dealing with the protection of minorities, regards the members of minority groups rather than the groups as such as the beneficiaries of the recognized rights (→ Individuals in International Law). As for the other rights, the Covenant on Civil and Political Rights remains close to the principles enunciated by the Universal Declaration and presents in this respect great similarity to the European Convention on Human Rights. The dangerously imprecise provision of Art. 20, whereby any → propaganda for war should be prohibited (a provision which attracted reservations and interpretative declarations by several western States including France; → Treaties, Reservations) should be noted, together with the curious omission of the right not to be expelled from the territory of the State of which one is a national (a right which is recognized by the Protocol No. 4 to the European Convention; → Denationalization and Forced Exile). The other fundamental rights are well expressed: the right to life (Art. 6); prohibition of → torture and of inhuman or degrading treatment or punishment (Art. 7); guarantee against arbitrary arrest or detention (Art. 9); the right to liberty of movement and the freedom to leave any country, including one's own (Art. 12); the right to a fair trial (Art. 14); the right to respect of privacy and family life (Art. 17); the right to freedom of thought, conscience and religion (Art. 18); the right to freedom of expression (Art. 19); the right to peaceful assembly (Art. 21); the right to freedom of association (Art. 22); and the right of citizens to take part in the conduct of public affairs (Art. 25).

In certain cases the definitions of the UN Covenant are more complete and comprehensive than those of the European Convention. Thus, in criminal matters, the Covenant expressly recognizes the right to have a conviction or sentence reviewed by a higher tribunal, the right to compensation in the case of a miscarriage of justice and the principle *ne bis in idem*. The Covenant also provides for procedural guarantees in cases of deportation of → aliens (→ Aliens, Expulsion and Deportation). On all these matters the European Convention comprises no equivalent provisions but this lacuna will perhaps be filled in an additional protocol which is in the process of being drafted. On the other hand, the prohibition of capital punishment is henceforth the subject of Protocol No. 6, whereas within the United Nations there is no consensus on this issue.

(*b*) *Limitations of the rights guaranteed*

Similar to Art. 15 of the European Convention, Art. 4 of the Covenant allows States parties to derogate from several of its provisions in time of public emergency which threatens the life of the nation. However, the Covenant does not permit derogation from certain inalienable rights, including the right to life, freedom from torture and inhuman treatment, freedom from → slavery and servitudes, non-applicability of retroactive law, right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. These latter rights constitute, therefore, the "hard core" of fundamental rights, a kind of → *jus cogens* of human rights. However, it is not certain that compliance with these obliga-

tions can always be effectively supervised by the Human Rights Committee, which has already encountered difficulties in this respect.

Except for these "hard core" rights, the exercise of the rights recognized by the Covenant can be subject to limitations. These are defined in two different ways.

One approach adopted in several provisions (Arts. 6, 9, 12 and 17) consists of the enunciation of a right accompanied by a limitation. Such limitation is admissible only as long as it is not arbitrary. For example, Art. 9(1) provides: "No one shall be subjected to arbitrary arrest or detention." In view of the great imprecision of the term "arbitrary", it is difficult to assess whether a limitation is legitimate or arbitrary. In comparison, the European Convention follows a different approach in establishing a list of circumstances in which limitations are permitted (thus Art. 5 lists the cases where a person can be deprived of his liberty); this method offers more tangible guarantees to the persons concerned.

According to a second approach, adopted for other rights, the authorized restrictions are defined in a comparable manner in both the Covenant and the European Convention. This may be illustrated by a general clause like the one contained in Art. 22(2) of the Covenant: "No restrictions may be placed on the exercise of this right [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedom of others" (→ Ordre public (Public Order); cf. Arts. 8 to 11 of the European Convention).

Within the framework of the European Convention, the Commission and the Court exercise, in this respect, significant control in appraising the necessity of a given limitation by reference to the canons of a "democratic society" (see for example the decision in the case of the Sunday Times of April 26, 1979, Series A, No. 30).

Within the framework of the Covenant it is far from clear that the Committee is capable of exercising such strict control. This might stem from the fact that the very notion of a "democratic society" in this context is a less homogeneous concept than the one shared by the European society.

2. The International Covenant on Economic, Social and Cultural Rights

As has already been remarked, the Covenant on Social Rights also contains a general clause of non-discrimination in favour of the beneficiaries of the rights guaranteed. However, Art. 2(3) includes a rather curious exception: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." It has sometimes been suggested that the purpose of this clause is to prevent foreign investors from relying upon the Covenant. It must, however, be noted that the Covenant contains no provision on the right to own private property (→ Aliens, Property; → Foreign Investments).

In 1948 the Universal Declaration contained only six provisions relating to social rights. In accordance with the tendencies which developed since that period, the Covenant is much more comprehensive: The list of rights is much longer and their implications much more pronounced. They relate essentially to the right to work and to just and favourable conditions of work; the right to form and join trade unions, including the right to strike; the right to social security; protection of the family; the right to an adequate standard of living, including adequate food, clothing and housing; the right to health; the right to education; the right to participate in cultural life and enjoy the benefit of scientific progress.

According to Art. 2 of the Covenant, each State party undertakes to take steps with a view to achieving progressively the full realization of the rights recognized to the "maximum of its available resources". Several provisions introduce, however, a more detailed timetable for their implementation. Such is the case of Art. 14 with regard to compulsory and free primary education. Other provisions are of immediate application as in the case of the freedom to form and join a trade union, since compliance with this provision does not depend on financial considerations.

The norms determined by the Covenant are expressed in rather general terms which do not always define the exact scope of the rights. The numerous texts prepared by the United Nations

and by its Specialized Agencies, however, usefully clarify these rights (→ United Nations Specialized Agencies). This is especially the case of the Conventions of the International Labour Organisation in the areas of trade union activities and social security matters (→ Labour Law, International Aspects; → Social Security, International Aspects). On certain points the European Social Charter, whose content – which is very similar to that of the Covenant – has been largely refined through the supervision procedure, can provide a useful reference. In this respect, however, the differences in the economic structure of the States should not be under-estimated.

It should be emphasized that the implementation of social rights depends to a certain degree on cooperation and international solidarity (Arts. 23 and 24 of the Covenant).

D. The Supervision Procedures

1. *The International Covenant on Civil and Political Rights*

The Covenant provides for an optional supervisory procedure by means of State and individual petitions. The only general obligation incumbent upon the member States is the presentation of periodic reports to the Human Rights Committee (see for details → International Covenant on Civil and Political Rights, Human Rights Committee).

(*a*) *The reports*

According to Art. 40, the States undertake to submit reports on the measures they have adopted which give effect to the rights recognized and to indicate the factors and difficulties, if any, affecting the implementation of the Covenant. The reports are to be presented within one year of the entry into force of the Covenant for the parties concerned, and thereafter when the Committee so requests. General directives concerning the form and the substance of these reports have been adopted in order to ensure a uniform presentation and to provide a full account of the situation in each State.

These reports are examined by the Human Rights Committee in the presence of representatives of the States concerned. The latter may be requested to reply to questions put to them. The Committee then transmits its own reports which may include general comments as it may consider appropriate. This supervisory system is of some significance since the Human Rights Committee is an independent body entitled to express any critical views. In practice the minutes of the debates on the reports submitted by the States often contain useful information. Moreover the general comments of the Committee are at present more detailed and enable the member States to comprehend more easily the content and implications of the rights recognized. However, real progress will only be achieved when the Committee acquires the right to make specific remarks and to diversify its sources of information. It may be added that frequently the States' reports are belatedly submitted and the content of some is so incomplete that it cannot bear serious scrutiny.

(*b*) *The communications*

State communications constitute the first type of petition instituted by Art. 41 of the Covenant: "A State Party . . . may at any time declare . . . that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant." A procedure including the following stages is established: an attempt at direct settlement between the States; the → good offices of the Committee; and an *ad hoc* conciliation commission (Art. 42; → Conciliation and Mediation). However, the Committee has no power to make a decision nor can it formulate an opinion on the substance of the claim, a right which the → European Commission of Human Rights possesses. Furthermore, this system which operates on the basis of → reciprocity is only optional. As of June 30, 1985, 16 States had made the declaration provided by Art. 41 but no State has yet resorted to this procedure.

Ratified at present by 31 States, the Optional Protocol of the International Covenant on Civil and Political Rights creates another supervisory procedure that of individual communications. A State party to the Covenant may recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be the victim of a violation by that State party of any of the rights set out in the Covenant.

The Committee has first to decide on the admissibility of the communication. Following a procedure, similar to the one pursued by the European Commission of Human Rights, the Committee has to consider whether all domestic remedies have been exhausted (→ Local Remedies, Exhaustion of). It is to consider inadmissible any communication which is anonymous, incompatible with the provisions of the Covenant, or which it considers as an abuse of the right of petition. In order to avoid duplication of procedures, the States parties to the European Convention on Human Rights which have ratified the Optional Protocol have made a reservation according to which the Human Rights Committee will have to decline jurisdiction in cases where communications presented to it have already been examined by the European Commission of Human Rights. In its decision of July 23, 1982 concerning Communication No. R.26/121 directed against Denmark, the Human Rights Committee has duly taken into consideration this reservation and declared the communication inadmissible, thus ending the controversy on the validity of such a reservation (Report of the Human Rights Committee, UN Doc. A/37/40, pp. 232–233).

When a communication is admissible, the Committee, after having gathered from the parties all the necessary information, forwards its views to the State party concerned and to the petitioner. In its seventh Report for the year 1983, the Committee indicates that since the entry into force of the Protocol, it has examined 147 communications: 49 were concluded by "views" under Art. 5(4) of the Optional Protocol; 64 were concluded as inadmissible, discontinued or withdrawn; 12 admissible communications are awaiting a decision on the merits; 22 are pending at the pre-admissibility stage.

The ratio of admissible individual communications is relatively high. On substance the Committee's views were of variable content. It would appear that the Committee did not hesitate in a number of communications to record the violation of rights recognized in the Covenant and sometimes to recommend the necessary measures to be taken. Thus in its Communication No. R.1/5, the Committee declared that Uruguay had infringed several provisions of the Covenant, in particular those prohibiting arbitrary detention and torture. The Committee expressed the view that the Uruguayan Government "was under an obligation to take immediate steps to ensure strict observation of the provisions of the Covenant and to provide effective remedies to the victims" (Report, UN Doc. A/34/40 Annex VII, p. 129).

Finally, in the consideration of individual communications, the Human Rights Committee has demonstrated an authority which may be contrasted with the prudence which characterizes the examination of the reports. Although formally the Committee's views are devoid of any legal force, they do carry a certain weight since they represent the opinion of an independent international organ. The fact remains that this is only an optional procedure and that many States thus enjoy immunity which is not conducive to the effective protection of human rights.

2. The International Covenant on Economic, Social and Cultural Rights

The mechanism established under the Covenant on Social Rights rests essentially upon the consideration of reports submitted by the States parties on the measures which they have adopted and the progress made in achieving the observance of the rights recognized by the Covenant (Art. 16(1)).

The → United Nations Economic and Social Council (ECOSOC) is the body entrusted with examining these reports. In fact, in order to facilitate its task, the Council has decided to establish from among its members a group of experts (whose composition and procedure have been adopted by Resolution 1982/33 of May 6, 1982). This group is composed of 15 members elected by the Council from among the representatives of the States parties to the Covenant. Its function is to put forward general proposals and recommendations after having considered the reports submitted by the States, according to a procedure similar to the one adopted by the Human Rights Committee and after having examined reports submitted by certain Specialized Agencies (e.g. ILO and UNESCO).

In its Resolution 1988(LX) of May 11, 1976, ECOSOC had adopted a programme according to which the States parties should present their reports by stages every two years, each time on a specific group of articles of the Covenant according to detailed directives issued by the General

Secretariat of the United Nations. Finally, under Art. 22, ECOSOC may submit "from time to time" to the General Assembly reports with recommendations of a general nature concerning the implementation of the Covenant. At present this supervisory system is particularly flexible and rather unsatisfactory even when the particular nature of the obligations assumed by the States is taken into account. Several factors justify this assessment: the short sessions devoted to the consideration and debate of the frequently incomplete reports, the excessive delay in the submission of these reports, the weak nature of the investigatory means, and essentially the fact that at all levels the control is effected by inter-State organs.

In fact, the members of the group of experts are not independent, but represent their respective States. Furthermore ECOSOC's powers are restricted and experience shows that it does not intend to exceed them. Even the general observations, similar to those of the Governmental Experts' Committee (see for example the report of a working party of the Governmental Experts' session entrusted with the examination of the implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/1983/41 of May 12, 1983), are at present particularly laconic and uninstructive for the States parties. Furthermore this body bears a heavy workload and its functioning is hindered by political considerations peculiar to every inter-State body. In these circumstances, it may be doubted whether this system allows an effective and objective protection of the rights enunciated by the Covenant. By comparison, the control mechanism established by the Covenant on Civil and Political Rights appears more promising and has already yielded more tangible, albeit limited, results for the protection and the promotion of human rights.

International Covenant on Economic, Social and Cultural Rights, UN GA Res. 2200 A, December 16, 1966; UNTS, Vol. 993 (1983) 3–106.

International Covenant on Civil and Political Rights, UN GA Res. 2200 A, December 16, 1966; UNTS, Vol. 999 (1983) 172–346.

J. MOURGEON, Les pactes internationaux relatifs aux droits de l'homme, AFDI, Vol. 13 (1967) 326–363.

H. GURADZE, Die Menschenrechtskonventionen der Vereinten Nationen vom 16. Dezember 1966, JIR, Vol. 15 (1971) 242–273.

M. BOSSUYT, La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels, Droit international et droit comparé, Vol. 8 (1975) 783–820.

G. COHEN-JONATHAN, Les rapports entre la Convention européenne des droits de l'homme et le Pacte des Nations Unies sur les droits civils et politiques, in: Régionalisme et universalisme dans le droit international contemporain (1977) 313–339.

A.G. MOWER, The Implementation of the U.N. Covenant on Civil and Political Rights, Revue des droits de l'homme, Vol. 10 (1977) 271–295.

E. SCHWELB, The International Measures of Implementation of the International Covenant on Civil and Political Rights, Texas ILJ, Vol. 12 (1977) 141–186.

E.W. VIERDAG, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, Netherlands Yearbook of International Law, Vol. 9 (1978) 69–105.

P. ALSTON, The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights, ColJTransL, Vol. 18 (1979) 79–118.

M. LIPPMAN, Human Rights Revisited: The Protection of Human Rights under the International Covenant on Civil and Political Rights, NILR, Vol. 26 (1979) 221–277.

E. DECAUX, La mise en vigueur du Pacte international relatif aux droits civils et politiques, RGDIP, Vol. 84 (1980) 487–534.

M. NOWAK, The Effectiveness of the International Covenant on Civil and Political Rights, Stocktaking after the First Eleven Sessions of the UN Human Rights Committee, Human Rights Law Journal, Vol. 1 (1980) 136–170.

L. HENKIN (ed.), The International Bill of Rights (1981).

E. MOSE and T. OPSAHL, The Optional Protocol to the International Covenant on Civil and Political Rights, Santa Clara Law Review, Vol. 21 (1981) 271–331.

A.H. ROBERTSON, Human Rights in the World (2nd ed. 1982) 28–69, 178–184.

L.B. SOHN, The New International Law: Protection of the Rights of Individuals rather than States, American University Law Review, Vol. 32 (1982) 1–63.

K. VASAK (ed.), The International Dimensions of Human Rights, Vol. 1 (1982) 111–173, 303–362.

GÉRARD COHEN JONATHAN

HUMAN RIGHTS, UNIVERSAL DECLARATION (1948)

1. Historical Background

The idea of drafting an international bill of rights has been considered by many observers as

implicit in the → United Nations Charter, but even before the → United Nations was established as an organization, preliminary steps had been taken towards this goal.

There are seven specific references to → human rights and freedoms in the UN Charter (the → Preamble and Arts. 1, 55, 56, 62, 68 and 76), but nowhere in the Charter are these defined. Some delegations to the 1945 San Francisco Conference, including those of Chile, Cuba and Panama, sponsored provisions which would have guaranteed the protection of specified rights in the Charter, and Panama even urged that a bill of rights be incorporated into the Charter.

One of the Conference committees, which was charged with the task of considering the preamble, purposes and principles of the Charter, was sympathetic to the idea but decided that "the present Conference . . . could not proceed to realize such a draft . . . . The Organization, once formed, could better proceed to consider the suggestion and to deal effectively with it through a special commission or by some other method. The Committee recommends that the General Assembly consider the proposal and give it effect" (Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. 6 (1945) p. 456).

Under Art. 68 the → United Nations Economic and Social Council (ECOSOC), however, was instructed to set up a commission for the promotion of human rights; it was generally understood that this commission would draft an international bill of rights (→ Human Rights, Activities of Universal Organizations). ECOSOC established a Commission on Human Rights, on February 15, 1946, deciding that the work of the Commission should primarily be devoted to submitting proposals, recommendations and reports on an international bill of human rights.

Furthermore, ECOSOC instructed the United Nations Secretariat to prepare a "documented outline" of the bill. In effect the outline was a draft → declaration which was based on a number of proposals submitted by individuals and organizations, as well as the drafts submitted to the San Francisco Conference by the delegations of Chile, Cuba and Panama. The outline contained 48 articles in which civil, political, economic and social rights were catalogued and defined.

The Commission on Human Rights held its first session from January 27 to February 10, 1947, having before it a number of working papers prepared by the secretariat and also a number of draft bills submitted by governments and various organizations.

A drafting committee of eight members was appointed (Australia, Chile, China, France, the Lebanon, the Soviet Union, the United Kingdom and the United States). The drafting committee met from June 9 to 25, and after a long debate requested a working group, consisting of the representatives of France, the Lebanon and the United Kingdom, to study the opinions which had been expressed. The working group in turn requested the French representative, René Cassin, to prepare a new draft.

Two views on the form the preliminary draft bill should take were put to the drafting committee. Some representatives thought that the preliminary draft should take the form of a declaration; others felt that a convention was more appropriate. A declaration would be a recommendation by the → United Nations General Assembly to member States; it would have moral and political weight without legal compulsion being exercized over members. On the other hand, a convention would be legally binding on those member States which accepted it; its application, however, would be limited to the same States parties.

At its second plenary session held in Geneva in December 1947, the Commission on Human Rights dealt with the report submitted by the drafting committee, which included drafts for an international declaration and an international convention on human rights. It was at this point that the concept of an international bill of human rights comprising three parts began to materialize, consisting of a declaration, a convention and measures for implementation.

On June 18, 1948, at the end of its third plenary session, the Commission on Human Rights adopted a draft of the Declaration with twelve of its members voting in favour, four (Byelorussia, the Soviet Union, the Ukraine and Yugoslavia) abstaining. The draft Declaration was thus ready for consideration by the UN General Assembly at its third regular session.

Eighty-one long meetings of the Third Commit-

tee of the General Assembly dealt with 168 formal draft resolutions containing amendments to the various articles of the draft Declaration in an atmosphere affected by the gathering Cold War. Attempts to postpone the adoption of the Declaration were, however, defeated and on the night of December 6, 1948 the Third Committee, its task completed, forwarded its report to the plenary of the General Assembly, just in time for that body to adopt the Declaration on the night of December 10 (UN GA Res. 217(III)). At that time, the United Nations had 56 member States: 48 voted in favour, none against, and 8 abstained (Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukraine and Yugoslavia).

2. *Contents of the Universal Declaration*

The Universal Declaration of Human Rights is the first enumeration of human rights and fundamental freedoms by the United Nations and contains 30 articles, of which Art. 29 relates to duties and limitations, and Art. 30 to abuse. Art. 29 affirms that everyone has duties to the community "in which alone the free and full development of his personality is possible"; according to Art. 30, nothing in the Declaration "may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

The Preamble to the Universal Declaration of Human Rights states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". It further recalls that in joining the United Nations, member States have "pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms", and that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge".

The Universal Declaration is based on three premises: firstly, all human beings are born free and equal in dignity and rights (Art. 1); secondly, everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration may be fully realized (Art. 28); and thirdly, those rights determined in it apply to everyone without any form of discrimination whatsoever (Art. 2; → Discrimination against Individuals and Groups).

According to Art. 2 everyone is entitled to all the rights and freedoms set forth in the Universal Declaration "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Furthermore, no distinction is to be made "on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, non-self-governing or under any other limitation of sovereignty".

The lengthy list of rights and fundamental freedoms propounded in the Declaration may be classified into five groups.

(*a*) *Inherent personal rights*

Examples of these are the right to life, liberty and security (Art. 3); the right not to be held in → slavery or servitude (Art. 4) nor subjected to → torture or to cruel, inhuman or degrading treatment or punishment (Art. 5); the right of everyone to recognition everywhere as a person before the law (Art. 6); the right of equality before the law and to equal protection of the law without any discrimination (Art. 7; → Racial and Religious Discrimination; → Sex Discrimination).

(*b*) *Rights guaranteeing personal security*

These include the right of everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law (Art. 8); the right not to be subjected to arbitrary arrest, detention or exile (Art. 9; → Denationalization and Forced Exile); the right of everyone to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and for any criminal charge against him (Art. 10); the right to be presumed innocent until proved guilty and not to be held guilty on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed, and the right not to suffer a heavier penalty than the one that was applicable at the time the

penal offence was committed (Art. 11); the right to be protected against arbitrary interference with privacy, family, home, correspondence, honour and reputation (Art. 12); finally, the right to seek and to enjoy in other countries asylum from persecution (→ Asylum, Territorial), although this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations (Art. 14).

(*c*) *Rights relating to the political life of the individual*

These are rights which protect the individual's freedom of thought, conscience and religion, including the freedom to change religion or belief and the freedom to practice religion or belief in teaching, worship and observance, alone or in community with others (Art. 18); the freedom of opinion and expression (Art. 19); the freedom of peaceful assembly and association (Art. 20); the right to take part in the government of each country, directly or through freely chosen representatives (Art. 21(1)); the right to choose the government through periodic and genuine elections (Art. 21(3)); and the right of everyone to equal access to public service in his or her country (Art. 21(2)).

(*d*) *Economic and social rights*

Among these are the individual's right to own property, alone or in association with others, and not to be arbitrarily deprived of his property (Art. 17; → Expropriation and Nationalization); the right to participate in the realization, "through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (Art. 22); the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment (Art. 23; → Labour Law, International Aspects); the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Art. 24); the right to a standard of living adequate for health and well-being, and the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood (Art. 25(1); → Social Security, International Aspects); the protection of motherhood and childhood (Art. 25(2)); the right to education, which should be free, at least in the elementary and fundamental stages, and should be directed to the "full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms", in order to "promote understanding, tolerance and friendship among all nations, racial or religious groups" (Art. 26(1) and (2)); the priority right of parents to choose the kind of education that is given to their children (Art. 26(3)); and the right to participate in the cultural life of the community (Art. 27).

(*e*) *Rights concerning the social and juridical life of individuals*

Instances of these are the individual's right to leave any country, including his own, and to return to his country (→ Emigration), and freedom of movement and residence within the borders of each State (Art. 13); the right of everyone to a → nationality and not to be arbitrarily deprived of his or her nationality nor denied his or her right to change his nationality (Art. 15); the right to marry and to found a family, which is the "natural and fundamental group unit of society and is entitled to protection by society and the State" (Art. 26).

3. *Legal Problems and Evaluation*

The adoption of the Universal Declaration of Human Rights was recognized as a great achievement and it immediately acquired a moral and political authority not held by any other contemporary international instrument with the exception of the UN Charter itself.

Today, the Declaration has become an international standard with binding character as part of the law of nations. It has inspired many treaties, *inter alia*, the → European Convention on Human Rights (1950), which, according to its preamble, is a first step towards the collective enforcement of some of the rights stated in the Universal Declaration. Furthermore, it is reflected in many national constitutions (e.g. the Spanish Constitution of 1978 in which many of its provisions are reproduced) as well as in the decisions of both national and international courts.

Although the Universal Declaration of Human Rights is not in itself binding, it constitutes evidence of the interpretation and application of the relevant provisions of the UN Charter. If the Declaration is now part of positive international law and therefore binding on all States, this is not because it was adopted by the UN General Assembly, important as that may have been, but because of the emergence of a → consensus evidenced by the practice of States that the Declaration is now binding as a part of international law, whatever the intention of its authors may have been in 1948.

The above assertion may be supported by three lines of argument: Firstly, the Universal Declaration may be considered as an expression of → general principles of law recognized by civilized nations in the terms of Art. 38 of the Statute of the → International Court of Justice, since at least certain fundamental rights propounded in the Declaration have been frequently applied by international tribunals in cases concerning the treatment of → aliens; secondly, it may be affirmed that the Declaration as such now has the force of law just as it has acquired the force of → customary international law, because UN General Assembly Declarations may provide the basis for a subsequent concordant practice of States which will transform the resolution into customary international law; finally, the Universal Declaration may be considered as an authoritative interpretation of the UN Charter, which is generally accepted and therefore has binding force.

Unfortunately, when in 1971 the ICJ upheld the right of the United Nations to terminate South Africa's → mandate over South West Africa (a right first claimed by the UN General Assembly on October 27, 1966) on the grounds that South Africa's administration was contrary to the very mandate, the United Nations Charter and the Universal Declaration of Human Rights, the Court did not have to base its opinion on the Declaration (→ South West Africa/Namibia (Advisory Opinions and Judgments)).

Nevertheless, since the UN Charter stipulates that human rights shall be enjoyed by all without distinction as to race, sex, language or religion (although the Charter does not define human rights), the ICJ held that to "establish, . . . and to enforce, distinctions, exclusions, restrictions and limitations based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter" (ICJ Reports (1971) p. 57).

The → Advisory Opinion of the Court therefore took judicial notice of the Universal Declaration; it would, however, have been an improvement had the Court referred to at least some of its provisions which clearly had bearing on the case, although no doubt this is implied in paras. 130 and 131 of the Advisory Opinion by the Court's references to their violation.

Although when referring to the development of international law and → non-self-governing territories, the Court was prepared to consider Res. 1514(XV) (Declaration on the Granting of Independence to Colonial Countries and Peoples) as a further "important stage in this development", it is regrettable that the Court was not prepared to consider the Universal Declaration of Human Rights in the same terms. Nevertheless, it is submitted here, for the reasons indicated above, that the provisions of the Declaration today enjoy the status of binding law.

Universal Declaration of Human Rights, UN GA Res. 217(III), December 10, 1948.

R. CASSIN, La Déclaration universelle et la mise en oeuvre des droits de l'homme, RdC, Vol. 79 (1951 II) 237–367.

N. ROBINSON, The Universal Declaration of Human Rights (2nd ed. 1958).

E. SCHWELB, Human Rights and the International Community, The Roots and Growth of the Universal Declaration of Human Rights, 1948–1963 (1964).

A. VERDOODT, Naissance et signification de la Déclaration universelle des droits de l'homme (1964).

J.P. HUMPHREY, The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in: B.G. Ramcharan (ed.), Human Rights: 30 Years After the Universal Declaration (1979) 21–37.

JUAN CARRILLO SALCEDO

HUMANITARIAN LAW *see* Human Rights and Humanitarian Law; Humanitarian Law and Armed Conflict

IMMIGRATION

1. Concept

Immigration is a process of voluntarily entering a country other than one's own for the purpose of permanent settlement. It is to be distinguished from → emigration (leaving one's native country), → migrant worker movements, admission of → refugees, and other merely temporary or coerced transfers of population across national → boundaries (→ Denationalization and Forced Exile; → Population, Expulsion and Transfer). Thus, problems of defining "permanent settlement" on the one hand and "voluntary entry" on the other hand are raised by the concept of immigration. On the question of "permanence" no universal agreement exists, although several countries classify immigrants as permanent after a year of residence. The term "immigrant", however, does not apply to officials of foreign States, their employees or family members, or other alien visitors resident for long periods of time for purposes of study, trade, or recreation. Persons falling into these and related categories are ordinarily classified as non-immigrant → aliens. The question of "voluntariness" mainly points to a person's reasons for immigrating. Some persons immigrate to improve their economic and social status; others to join immigrant relatives abroad; and still others to escape anticipated political or religious oppression. Generally, immigration is "voluntary" if the migrant enters a new State or country, for whatever reason, as a matter of his or her own volition.

2. History

With respect to those nations receiving the largest influx of immigrants during the last two centuries, immigration law may be divided roughly into three overlapping stages of national policy. These stages may be designated as promotional, regulatory, and restrictive.

During the first stage most immigrant nations followed a policy of open borders, allowing aliens to enter without regard to their numbers or background. Between 1820 and 1920 over 50 million persons from Europe alone were admitted into the United States, Canada, Australia, New Zealand, South Africa, Brazil, Argentina and Uruguay. These States lured millions of settlers to their shores by such devices as land grants, easy homestead policies, promises of early naturalization, immigrant labour contracts of limited duration, exemption of foreign born residents from military service (→ Aliens, Military Service), and the payment of overseas transportation charges.

In the second stage, as the policy of open borders created immediate and increasing pressure to control and slow down the process of immigration, regulation increased, taking the form of steerage legislation, compulsory reports on arriving aliens, and a comprehensive system of alien registration, including the installation of inspection systems abroad and rigid examinations of immigrants at ports of entry. As domestic labour began to feel the pinch of cheap immigrant workers, new immigration became more difficult through the imposition of head taxes, bonding requirements, and prohibitions upon the solicitation of foreign labour.

Finally, and beginning roughly in the late 19th century, many nations added to their established systems of regulation new and ever increasing measures of restriction and exclusion. Today, qualitative and numerical controls on the admission of aliens are a common feature of national immigration policy.

3. The Right to Immigrate

Several international human rights instruments grant persons the freedom to leave a State, but there is no corresponding duty on the part of a receiving State to allow persons to enter its territory as immigrants (see also → Aliens, Admission). "The reception of aliens", according to one authoritative view, "is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory" (L. Oppenheim, International Law, Vol. 1 (8th ed. by H. Lauterpacht, 1967), pp. 675–676).

Thus, the question of a right to immigrate arises only under bilateral or multilateral treaties among States. Under the → Bancroft Conventions, the United States was able to facilitate immigration to its shores by encouraging various European States to recognize a person's right to expatriate himself and to acquire a new → nationality. More recently the 1963 Convention on Reduction of Cases of Multiple National-

ity (ETS, No. 43) sought to achieve the same result among member nations of the → Council of Europe. Immigration rules promulgated by the → European Economic Community generally recognize the right of EEC nationals to enter a member State and, under certain conditions, to reside there permanently. Additionally, the right to asylum, like the admission of refugees, is often the subject of special national legislation or treaties among specified countries (→ Asylum, Diplomatic; → Asylum, Territorial). Finally, numerous international organizations – e.g., the Office of the United Nations High Commissioner for Refugees (→ Refugees, United Nations High Commissioner), the → Intergovernmental Committee for Migration, the → International Labour Organisation, and the → Organisation for Economic Co-operation and Development – have been increasingly concerned with the claimed right of persons to immigrate.

4. *National Regulation*

Immigration law has been used to accomplish variety of local purposes. It has often served as a vehicle for general economic expansion or for the recruitment of labour in certain areas of the economy. But it also serves to control population growth (→ World Population), to determine the character of a community, including its racial composition and general social structure, to protect home labour markets, and even to regulate welfare policy. But immigration policy may also flow from humanitarian impulses, as when special provisions are enacted to allow refugees to obtain permanent residence in the country of refuge; Canada's Immigration Act of 1976 and the Indochinese Refugee Resettlement Program adopted by the United States in 1975 are examples of such legislation.

(*a*) *Entry requirements: general*

A major part of immigration regulation deals with the process of application and entry. Visas or authorizations to immigrate normally have to be procured either outside the country of entry or at the port of entry (→ Border Controls). In the case of an EEC national, however, no entry visa is required by member States; all that is necessary is a valid identity card or → passport. National regulations ordinarily require aliens applying for immigrant status to produce the proper travel documents, employment vouchers, or other needed certificates. Any false representation in these documents results in denial of entry. In addition, aliens are often required to undergo medical and other examinations to ascertain eligibility for immigrant visas. Common grounds of inadmissibility are prior criminal record, restricted returnability, medical reasons, no prospect of employment, and the possible threat to internal security. Depending on the State involved, other excludable categories cover sexual deviants, anarchists, polygamists, homosexuals, and persons who advocate violent opposition to government. In most countries the process of admission is monitored and controlled by the ministry of labour, although the United States places this function in the hands of the Immigration and Naturalization Service, an agency of the Department of State.

(*b*) *Preferences*

Nearly every receiving nation has imposed a ceiling on the number of immigrants it will admit. These ceilings may be imposed on a country-by-country basis, as in the United States, or they may take the form of a general world-wide ceiling. Within these ceilings many States have established an order of preference based usually on familial, occupational, ethnic, and occasionally linguistic considerations. Such criteria play differential roles in modern State practice. Job skills and linguistic competence in English or French, for example, are high on Canada's list of priorities. Great Britain's distinction between patrial and non-patrial British citizens, resulting in the imposition of more stringent immigration requirements on the latter, effectively disfavours certain non-white ethnic groups (→ British Commonwealth, Subjects and Nationality Rules). Familial concerns, on the other hand, are central factors within the EEC and the United States.

United States policy is an illustration of a preference system operating within specific numerical limitations. Legislation enacted in 1980 establishes a world-wide limit of 270,000 immigrants annually, not counting refugees. Foreign States, however, are subject to an annual limitation of 20,000 chargeable to the overall ceiling. Within

these limits the policy combines family reunification with occupational preferences.

(c) *Procedures*

Immigration officials enjoy wide latitude in determining whether particular aliens fall into any of the preference or excludable categories. Their discretion may even extend, as in England, to a determination that the entry of a particular person would not contribute to the public good. Immigration rules pertaining to eligibility for admission are accordingly administered with great flexibility, although some rules may be ignored in special hardship cases. Other decisions, such as the denial of visas by consular officials (→ Consuls), are virtually beyond challenge under current State practice. Still other practices, like the rights of notification, review, and appeal, especially at the port of entry, are more the products of legislative grace than of either State constitutional or international law.

General international law, however, requires the protection of alien immigrants subsequent to their arrival. The degree of protection depends on the legal system of the receiving State, the particular basis of an immigration decision, and the right invoked by the immigrant. Most States have felt themselves obliged to adopt at least minimal standards of legal redress. Some States such as the United States and EEC countries have gone measurably beyond international standards. For example, United States courts have increasingly required immigration officials to bring their practices into line with domestic constitutional search and seizure requirements. In the EEC States full access to the judiciary is afforded. With regard to the latter, finally, the United Kingdom has adopted a statutory right of appeal, although in certain cases this right can only be invoked from abroad.

5. *Specific Legal Problems*

One set of legal problems arising out of current State practice deals with issues such as the (1) standing of excluded potential immigrants (i.e. their right legally to challenge an order of exclusion), (2) standing of interested third parties (e.g., family members and employers), (3) reentry rights of nationals or resident aliens, (4) reluctance of a State to admit its own nationals who fail to meet admission requirements, (5) immigration of infants or orphans, particularly when someone in the country of origin claims priority rights, and (6) refusal of admittance owing to "emergency" border closings. Another set of problems, originating in the broad and sometimes unfettered discretion of immigration officials, revolves around the due process rights of arriving immigrants. Immigrants do not enjoy the constitutional safeguards normally accorded by domestic law to criminal defendants, notwithstanding the substantial deprivation of liberty associated with proceedings involving arrest, detention, interrogation, exclusion, and deportation (→ Aliens, Expulsion and Deportation).

The preference structure of modern State practice has also given rise to problems. This structure is often criticized for being inflexible, unfair, and discriminatory: Inflexible because rigid ceilings on immigration result in the creation of large backlogs of applicants in some preference categories while other categories remain unfilled; unfair because the emphasis on family relations hinders the immigration of deserving persons without family ties; and discriminatory because some preference systems are exclusionary in effect if not in law. Racial exclusion policies that were once a common feature of immigration law in Great Britain, Australasia, and North America were for the most part repealed during the 1970s. Yet the emphasis on family relations, certain linguistic competences, and patriality – notably Great Britain's preference for persons "connected" with the United Kingdom – have a disproportionately adverse impact on potential immigrants from certain regions. It has not been entirely resolved whether certain forms of preferences or discriminations may under certain circumstances amount to a violation of the rules on → racial and religious discrimination.

6. *Evaluation*

Any long-term solution to these problems of law and policy must recognize that the most visible pattern shift in immigration since 1975 has been in its geographic origin. The largest number of immigrants to Western nations have come from Asia and Latin America rather than from Europe and Africa. The sociological and economic impact of this shift is uncertain and hotly debated,

especially in the light of unemployment and population growth in immigrant receiving countries. Political factors and humanitarian concerns are increasingly important in the determination of immigration policy. As noted in this article, immigration law has begun to adjust to these pressures and changes. Yet the fundamental theories behind the laws have changed very little, and it is not at all certain whether traditional theory can really meet today's needs.

I. MACDONALD, Race Relations and Immigration Law (1969).
R. PLENDER, International Migration Law (1972).
C. GORDON and H. ROSENFIELD, Immigration Law and Procedure, 2 vols. (Rev. ed. 1974).
F. AUERBACH, Immigration Law of the United States (1976).
J. EVANS, Immigration Law (1976).
G. GOODWIN-GILL, International Law and Movement of Persons between States (1978).
U.S. Immigration Policy and the National Interest, the Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States (1981).
D. TURPIN, Le nouveau régime juridique des étrangers en France: changement et continuité, Revue critique de droit international privé, Vol. 71 (1982) 25–58.
U.S. Immigration Policy-Symposium, Law and Contemporary Problems, Vol. 45, No. 2 (1982).

DONALD P. KOMMERS

INDIGENOUS POPULATIONS, PROTECTION

1. Notion, History

Legal definitions of indigenous populations vary from one country to another so as to include objective (ethnic, cultural, linguistic), subjective (individual determination) or functional (conditions of living) criteria, or a combination of these. Generally, an indigenous population can be described as the original inhabitants of a territory who have been overcome, often outnumbered, but not assimilated by later settlers of different cultures and ethnic backgrounds who control the national → governments. Indigenous populations which fall within this category are e.g. Australian Aborigines, American Indians, circumpolar Inuit (Eskimos), New Zealand Maori and Scandinavian and Soviet Sami (Lapps). It has been estimated that indigenous populations number a total of 100 to 200 million people in more than 40 → States and that their numbers are increasing in absolute and often relative figures in most of the countries concerned.

The term indigenous, alternatively referred to as aboriginal, native or "primitive", used to have a broader connotation inasmuch as it applied in general to the peoples of territories colonized by far-away, mainly European, powers (→ Colonies and Colonial Régime). The European concept of international law of that period tended to see such territories as *terra nullius*, i.e. available to occupation by the so-called "civilized" States (→ Territory, Acquisition; → Territory, Discovery). With the promotion of political → decolonization, however, colonized peoples of geographically separate (overseas) territories have gained the right to external → self-determination and, in many cases, have already emerged as independent States.

2. Current Legal Situation

Indigenous populations within the metropolitan → boundaries of established States are today frequently characterized and treated as national or ethnic → minorities. The current process of decolonization has not been extended to them for reasons of → territorial integrity and political independence of the States. As minorities they are entitled to passive and active measures in the form of equal treatment and non-discrimination (→ Discrimination against Individuals and Groups) and protection, e.g. through the exercise of internal self-determination leading to functional autonomy (cf. → Autonomous Territories). In addition to special rights normally accorded to minorities (e.g. Art. 27, International Covenant on Civil and Political Rights; → Human Rights Covenants), indigenous populations have in particular claimed and sometimes obtained land rights, frequently involving rights to natural resources, peculiar to their immemorial possession of and close association with the land on which they live.

Several international organizations have taken up questions relating to indigenous populations. The → International Labour Organisation has adopted a series of instruments, including Con-

vention No. 107 and Recommendation No. 104, both of June 26, 1957, concerning the protection and integration of indigenous populations in independent countries. While the Convention has been criticized for its emphasis on integration and assimilation, it contains significant provisions, for example Art. 11 which stipulates that "[t]he right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized". As of December 1982, 27 States had ratified the Convention which entered into force in 1959.

The → United Nations General Assembly has on several occasions commented upon and encouraged efforts aimed at guaranteeing the well-being and prosperity of indigenous populations. During the 1982 and 1983 sessions of the Assembly, such references were made in Resolutions 38/14 (annex) on the Second Decade to Combat Racism and Racial Discrimination, 37/46 and 38/21 on the report of the Committee on the Elimination of Racial Discrimination, 37/183 and 38/102 on the human rights situation in Chile and 37/184 and 38/100 on the human rights situation in Guatemala (→ International Organizations, Resolutions).

Under the auspices of the United Nations Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed in the early 1970s José R. Martínez Cobo as Special Rapporteur to undertake a Study of the Problem of Discrimination against Indigenous Populations (→ Human Rights, Activities of Universal Organizations). The Study, completed in 1983, contains a valuable compilation of applicable national, regional and international policies and legal instruments. In a related development, the Sub-Commission established in 1982 a five-member pre-sessional Working Group on Indigenous Populations. The Working Group, which held its first meeting in August 1982, is entrusted with the tasks of, *inter alia*, receiving and analyzing reports and other information from governments and organizations, including those organized by the indigenous populations themselves, and giving special attention to the evolution of standards concerning indigenous rights.

In their Declarations, the 1978 and 1983 World Conferences to Combat Racism and Racial Discrimination (UN Docs. A/CONF.92/40 and A/CONF.119/26) endorsed, *inter alia*, the rights of indigenous peoples to maintain their traditional structure of economy and culture and recognized the special relationship of indigenous peoples to their land and its natural resources. In their Programmes of Action, the Conferences urged States, *inter alia*, to recognize the rights of indigenous peoples to have an official status with their own representative organizations and their own languages for administration and education; to make funds available for investments in the economic life of the areas concerned, with indigenous participation in the determination of their use; and to allow indigenous peoples to develop cultural and social links with their own kith and kin everywhere. In addition, the 1983 Conference stated that indigenous populations should be free to manage their own affairs to the fullest practicable extent and that they should be consulted in all matters concerning their interests and welfare.

The → Organization of American States has frequently dealt with issues involving indigenous populations. Its activities include eight Inter-American Indian Conferences, held in the period 1940–1981 and resulting in a number of recommendations; educational and development programmes of the Inter-American Indian Institute; and probings of the → Inter-American Commission on Human Rights, e.g. in its country reports on Columbia and Guatemala. In a decision of October 3, 1983, the → European Commission of Human Rights referred to the Norwegian Sami as a minority group which, under Art. 8 of the → European Convention on Human Rights (1950), would in principle be entitled to claim the right to respect for their particular life style as being "private life", "family life" or "home".

Various → non-governmental organizations (NGOs), both those representing indigenous peoples and those not, have actively participated in the on-going discussion about indigenous rights. They have held two international conferences at Geneva, in 1977 on Discrimination against Indigenous Populations in the Americas and in 1981 on Indigenous Peoples and the Land. Several NGOs organized by indigenous peoples have obtained

consultative status (Category II or Roster) with the → United Nations Economic and Social Council.

3. *Special Legal Problems*

As pointed out in Martínez Cobo's above-mentioned Study, indigenous populations constitute the majority of the populations in at least two States, Bolivia and Guatemala. In such cases, it is hard to characterize the Indians in question as minorities entitled to non-discrimination and protection, even though tactically these may be necessary points of departure. It seems much more appropriate to deal with their problems in the context of one form of internal self-determination, i.e. their right to participate in the national governments in proportion to their numbers.

There may also be indigenous peoples who are entitled to the exercise of political decolonization because they live in territories which are geographically separate from the metropolitan States concerned and because they fulfil the other criteria laid down in General Assembly Resolutions 1514(XV) and 1541(XV). The Inuit of → Greenland, notwithstanding the island's alleged constitutional integration with Denmark in 1953, may constitute an example of this situation.

Finally, many indigenous peoples now within independent countries concluded treaties with colonizing States, individual colonies and/or successor States during the early stages of colonization. It can be argued that the historical circumstances, means of adoption and contents of these treaties give rise to a series of legal questions (→ Indigenous Populations, Treaties with).

4. *Evaluation*

There are but a few binding international rules specifically applicable to indigenous populations. To make matters worse, acceptance of and compliance with these rules has been abysmal up to modern times. Compliance with individual and other minority rights, as far as indigenous populations are concerned, also leaves much to be desired. Frequent reports from many parts of the world of mass-scale violations of indigenous rights have reached such proportions that accusations of ethnocide, → apartheid and even → genocide are not uncommon.

The last few years have seen increased international attention to indigenous problems. This is apparent from the political and legal activities described above. It is too early to tell, however, whether the words will be translated into deeds.

International Labour Organisation, Convention (No. 107) concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, UNTS, Vol. 328 (1959) 247–269.

Indigenous Peoples, Living and Working Conditions of Aboriginal Populations in Independent Countries, ILO Studies and Reports, New Series, No. 35 (1953).

J.R. MARTÍNEZ COBO, Study of the Problem of Discrimination against Indigenous Populations, UN Docs. E/CN.4/Sub.2/476 and Add. 1–6 (Final Report, First Part), E/CN.4/Sub.2/1982/2 and Add. 1–7 (Final Report, Supplementary Part), and E/CN.4/Sub.2/1983/21 and Add. 1–8 (Final Report, Last Part).

A.H. SNOW, The Question of Aboriginals in the Law and Practice of Nations (1919).

M.F. LINDLEY, The Acquisition and Government of Backward Territories in International Law (1926).

F.B. HIGGINS, International Law Consideration of the American Indian Nations by the United States, Arizona Law Review, Vol. 3 (1961) 74–85.

D. SANDERS, The Formation of the World Council of Indigenous Peoples, International Work Group for Indigenous Affairs, Doc. No. 29 (1977).

G. BENNETT, Aboriginal Rights in International Law (1978).

H.R. BERMAN, The Concept of Aboriginal Rights in the Early Legal History of the United States, Buffalo Law Review, Vol. 27 (1978) 637–667.

J.H. CLINEBELL and J. THOMSON, Sovereignty and Self-Determination: The Rights of Native Americans under International Law, Buffalo Law Review, Vol. 27 (1978) 669–714.

L. SWEPSTON, The Indian in Latin America: Approaches to Administration, Integration, and Protection, Buffalo Law Review, Vol. 27 (1978) 715–756.

G. ALFREDSSON, International Law, International Organizations, and Indigenous Peoples, Journal of International Affairs, Vol. 36 (1982) 113–124.

D. OPEKOKEW, The First Nations: Indian Governments in the Community of Man (1982).

R.L. BARSH, Indigenous North America and Contemporary International Law, Oregon Law Review, Vol. 62 (1983) 73–125.

GUDMUNDUR ALFREDSSON

INDIGENOUS POPULATIONS, TREATIES WITH

1. Notion, History

In the process of expanding their metropolitan territories, some colonizing States, individual colonies and successor States entered into → treaties with indigenous populations (defined in → Indigenous Populations, Protection). This practice was employed in various parts of the world, e.g. what is now the United States, Canada and New Zealand. In 1763, a British Royal Proclamation formalized this approach with regard to her colonies in America by prohibiting the issuance of patents to lands claimed by an Indian tribe unless the Indian title had first been extinguished by purchase or treaty cession (→ Colonies and Colonial Régime).

To take one country as an example, the United States concluded over 370 treaties with American Indian nations in its first 100 years of existence. The treaties were ratified by the President, on behalf of the United States with the advice and consent of the Senate under the treaty-making provision of the Constitution. Treaty contents varied considerably, but they frequently included peace → guarantees and land cessions by the Indians with delineation of → boundaries (→ Territory, Acquisition). Some of the treaties also contained Indian → recognition of United States → sovereignty. A series of early 19th century United States Supreme Court decisions, the best known of which are Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), led, however, to the reduction of all Indians to dependent nations under federal protection and guardianship. It must, however, be added that these and other United States judgments are not free from ambiguity in so far as they frequently refer to Indian sovereignty and statehood and to unique distinctions and anomalies in the Indian-United States relationships. Congress also passed legislation, such as the Indian Removal Act of May 28, 1830 and the General Allotment of February 8, 1887, which resulted in apparent treaty violations, and on March 3, 1871 it adopted an Act (Indian Department Appropriations Act) which, although purporting to uphold the validity of earlier treaties, discontinued the practice of treaty-making. It is the United States view that the treaties with the Indians, like all treaties to which the United States is a party, can be superseded by federal statutes, the difference of course being that the Indians are not allowed to seek international remedies on the same basis as foreign States.

Other national and international awards affecting indigenous populations were largely parallel to the United States pattern, irrespective of whether the peoples concerned enjoyed treaty relationships with a metropolitan power or not. The same was generally true for other colonized peoples. It was not uncommon for colonizing powers, for example Great Britain and France, to enter into treaties with overseas, non-European peoples, but respect for these treaties and other agreements dissolved in the face of colonizing interests and conflicts between colonizing powers which tended to consider these populations as objects rather than → subjects of international law. In the 1926 Cayuga Indians Case (RIAA, Vol. 6, p. 173) and in the 1928 → Palmas Island Arbitration, the tribunals held that the agreements in question were not treaties in the international law sense. In the 1933 → Eastern Greenland Case, the → Permanent Court of International Justice ignored Inuit rights even though the Court in its judgment relied partially on insular integrity, i.e. Danish control over the Inuit on the western coast of Greenland.

In the → Western Sahara Advisory Opinion, the → International Court of Justice partially reversed this old pattern of disrespect for indigenous rights. The Court found that agreements between colonizing States and local rulers of socially and politically organized peoples were to be "regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*" (ICJ Reports (1975) p. 39). In a separate opinion in the same case, Judge Ammoun carried the argument further by stating that the concept of *terra nullius* stands condemned. In this context, he mentioned in particular the American Indians (p. 86).

2. Current Legal Situation

The process of political → decolonization has brought about the demise of treaties and agree-

ments between colonizing States and indigenous peoples if they stand in the way of the exercise of the right to external → self-determination by geographically separate (overseas) countries and peoples. Treaties between States and indigenous populations within metropolitan countries, on the other hand, have enjoyed protection, to the degree they have been protected at all, by national institutions which have generally viewed such matters as falling within the → domestic jurisdiction of the States. International bodies have not attempted to deal seriously with issues relating to these treaties. It has also to be admitted that the issues give rise to more questions than answers, with seemingly valid international law arguments on both sides.

Currently, a first question could be whether indigenous sovereignty or the right to external self-determination can be based on the treaties. States would undoubtedly assert their sovereignty along the following lines: (a) Indigenous recognition, by treaty or otherwise, explicitly or implicitly, leaves no doubt as to State authority; (b) subsequent long-term and effective exercise of legislative, judicial and executive control over an indigenous population and its territory clearly demonstrates State sovereignty; (c) by integrating an indigenous territory within or contiguous to the metropolitan country, a State did not violate international law of the period when the treaties were concluded or when the incorporation was accomplished; (d) modern international law only acknowledges the right to external self-determination for overseas colonies; an extension of this right to other entities within existing State boundaries would upset the territorial integrity of a great many States and could constitute threats to international peace and security (→ Peace, Threat to).

The arguments of indigenous peoples would be likely to read: (a) If an indigenous population had authority to enter into treaties and to cede portions of its land, especially when the counterpart observed constitutional procedures for their ratification, it is a logical conclusion, barring provisions to the contrary, that the indigenous community retained sovereignty over the remaining territory; (b) territories not ceded or parts thereof, e.g. reservations, have in many cases stayed intact with indigenous populations, traditional systems of government and external relations, thus meeting essential standards for statehood (→ State); (c) even if a treaty provision recognized State authority, the treaty's validity in whole or in part can be challenged because of fraudulent conduct and the use of force by the State in obtaining the treaty and because of material breaches by the State (→ Treaties, Validity); (d) similarly, with regard to effective State control, this was maintained by the → use of force, often excessive and brutal, against which an indigenous population could only protest, and protest they did; (e) the current distinction under international law between indigenous peoples overseas and those living in metropolitan countries, as beneficiaries and non-beneficiaries of the right to external self-determination, is arbitrary and unacceptable to the latter, especially those with treaty relationships, who have never been consulted on this point.

If neither indigenous sovereignty nor a right to external self-determination can be based on these treaties, there arises a second question as to whether the treaties, as a result of international or national norms, provide protection beyond the special rights due to such peoples without treaties. Although it is an unsatisfactory solution to many indigenous populations, here States are more likely to give an affirmative reply. In the United States, for example, the treaties take precedence, in theory at least, over conflicting state laws and they are supposed to be interpreted from Indian standpoints if the language is unclear.

3. Concluding Remarks

The International Conference on Discrimination against Indigenous Populations in the Americas, held by → non-governmental organizations at Geneva in 1977 (→ Discrimination against Individuals and Groups; → Human Rights), stated in its Declaration of Principles that treaties and other agreements between indigenous populations and States should be recognized and applied under international law and that they should not be subject to unilateral abrogation or changes by any State (→ Unilateral Acts in International Law). It is certain that indigenous populations will continue to press for the recognition and implementation of their treaty rights in both international and national fora, e.g. through the newly

established five-member Working Group on Indigenous Populations of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities (→ Human Rights, Activities of Universal Organizations).

W.E. WASHBURN, The American Indian and the United States, A Documentary History, 4 vols. (1973).
For additional bibliography, see → Indigenous Populations, Protection.

GUDMUNDUR ALFREDSSON

INDIVIDUALS IN INTERNATIONAL LAW

1. General Remarks

It has been observed that the transformation of the position of the individual is one of the most remarkable developments in contemporary → international law. This position nevertheless remains highly controversial: It seems difficult to formulate a thesis which both reflects a general consensus between writers and conforms with State practice.

The existence of an objective international order based on the international community is generally accepted. Its main participants are States, but theoretically individuals may also find a place in this community (→ Subjects of International Law). The questions whether, and if so how, rules of international law extend to the individual depends largely upon the definition of the relationship between → international law and municipal law. Both the opinions of learned writers and State practice vary widely with respect to the problem of this relationship.

It remains questionable whether international rules, addressed primarily to States, only create obligations for States to respect the interests of individuals or whether rights of individuals themselves are created by such rules and can be enforced by individuals at the international level. Even when individuals have access to international organs (→ Standing before International Courts and Tribunals), it can not be excluded that their claims are admitted simply in order to remind States to fulfil their obligations.

In this situation it does not seem advisable to separate the individual's substantive or material position from his formal capacity to protect his own rights, even if such capacity is of the utmost importance in defining his legal position. On the other hand, not all instances where the individual appears as the beneficiary of State obligations need be examined.

2. Schools of Thought

Owing to the influence of → natural law, according to a theory which remained valid until the middle of the 19th century, the individual was regarded as a subject of rights and duties under international law. Thereafter, the theory of State → sovereignty brought about a remarkable change leading to the thesis that only States create rules of international law, that such rules are valid only for States, and that no place is left for the individual. According to this thesis, only States have access to international organs. To the extent that international law concerns itself with the interests of individuals, it does so not by creating rights and duties of individuals as such but rather by obliging States to treat individuals in a certain manner. Only a few such obligations existed at that period, thus facilitating the application of the prevailing doctrine. The international character of those exceptional international organs which were accessible to individuals was denied (→ Mixed Claims Commissions).

Criticism of this "classical" doctrine came from various sources (→ International Law, Doctrine and Schools of Thought in the Twentieth Century). The sociological school in France (e.g. Duguit, Scelle, Politis) at an early stage not only regarded the human being and his protection as the object of the whole legal order, including international law, but even considered the individual to be its exclusive subject. States had only the function of providing a "legal machinery" for regulating the rights and duties of collectivities of individuals.

After World War II a humanitarian ideology (e.g. Lauterpacht) sought a counterbalance to the → power politics of sovereign States, recognizing a world community of individuals which were subjects of international law alongside States.

A third school of thought takes a realistic approach. It seeks to redefine the relationship between the individual, his State and the interna-

tional order, and derives from a trend apparent in international practice to show greater concern for the protection of human dignity (→ Human Rights). According to this school, corporate bodies – i.e. States and other entities – remain the primary subjects of the international order. In exceptional cases, however, the legal capacity of individuals to protect their own interests at the international level, and even their *locus standi* before international organs, may be recognized.

This third doctrine today prevails amongst learned writers although the → International Law Commission's attempt to codify it in the → Vienna Convention on the Law of Treaties was not successful. A formulation proposed by the Special Rapporteur Sir Humphrey Waldock failed to obtain general approval and was finally withdrawn. Opposition to this formula was voiced from various sides. Tunkin of the Soviet Union referred to one of the main tenets of Soviet legal doctrine that the individual is not, and cannot be, a subject of international law (→ Socialist Conceptions of International Law). Ago of Italy and other members from States with a Roman law tradition also raised objections (Schwelb, 1973, pp. 6–12). It should, however, be noted that these discussions took place before the international → human rights covenants were accepted by the → United Nations General Assembly.

3. *The Role of the Individual in the Law-Making Process*

In general, rules of international law are created by States. However, the question must be considered whether individuals take part in any way in the process of the elaboration of such rules.

(*a*) *Principal sources of international law*

The principal → sources of international law enumerated in Art. 38(1) (a) to (c) of the Statute of the → International Court of Justice (ICJ) reveal only a marginal role for the individual. Besides the international conventions referred to in Art. 38(1) (a) of the Statute there are also treaties between States or international organizations and private law persons, but these only rarely have an impact on the law-making process (→ Contracts between States and Foreign Private Law Persons; → Contracts between International Organizations and Private Law Persons). Both → customary international law and the → general principles of law, referred to in Art. 38(1) (b) and (c) respectively, require confirmation by State practice or recognition.

(*b*) *Subsidiary sources*

The subsidiary sources of international law referred to in Art. 38(1) (d) present a different situation. Though delivered by independent judges, judicial decisions are mostly the result of a collegiate decision by an international organ. Publicists too are individuals; their teachings, however, exercise substantial influence only when they are based on an analysis of State practice and are practice-oriented. A purely theoretical and personal argument may influence the determination of a rule of law, but this occurs only rarely and should not be over-emphasized.

(*c*) *Representative bodies in international organizations*

The main participation of individuals occurs in the decisions of a legislative or quasi-legislative character taken by international organizations (→ International Organizations, Resolutions). Representative bodies created in some organizations, such as the → Council of Europe or the → European Communities, participate in the law-making process by the elaboration of international instruments (→ Parliamentary Assemblies, International). An initiative taken by one such quasi-parliamentary body led to the acceptance of an instrument of the highest importance for the improvement of the status of the individual in international law, namely the → European Convention on Human Rights (1950).

Most of these bodies are limited to consultative functions. Some enjoy the exercise of a right of initiative, but no more: Final and formal decision is reserved to States in the conclusion of a → treaty.

Less prominent still is participation of individuals in organs of the → United Nations. A status of → observers only is granted to → non-governmental organizations, and then only in the → United Nations Economic and Social Council, not in the other principal organs.

4. *Rights and Duties of Individuals*

(*a*) *The laws of armed conflict*

International concern for the fate of human beings was first expressed in the laws of → war (→ War, Laws of). Significant developments took place at an early stage. The Geneva Conventions since 1864 (→ Geneva Red Cross Conventions and Protocols; → Humanitarian Law and Armed Conflict), as well as the work of the → Hague Peace Conferences of 1899 and 1907, recognized the individual as the beneficiary of State obligations much earlier than did the laws of peace. The system of protection followed the traditional concept of international law; only in 1949 was the personal capacity of individuals to be concerned with "the rights secured to them" (Third Convention, Art. 7) recognized by enunciating an "unrestricted right to apply to the representatives of the protecting powers" and to present complaints to them (Third Convention, Art. 78; Fourth Convention, Arts. 30, 52 and 101; → Protecting Power). At that time sanctions first appeared for acts forbidden by international law.

This last extension stems from the prosecution of → war crimes after World War II in the → Nuremberg trials and the → Tokyo trial, in which the responsibility of individuals in international law played an important role. Such responsibility for acts committed before and during hostilities was based largely on judgments of national courts which had to deal with crimes punishable under national law (→ Quirin, ex parte). It is questionable whether these judgments constituted a sound basis for attributing personal responsibility for criminal acts under international law (→ Crimes against the Law of Nations). It is significant that it has not been possible to reach a consensus regarding the codification of the principles which constituted the basis for these war crimes trials in an international convention; all attempts have failed to establish a court for the punishment of → international crimes (→ International Criminal Court). The Genocide Convention of 1948 (→ Genocide) provides that competence rests with national tribunals or "such international penal tribunal as may have jurisdiction" (Art. VI). As in other fields in which the material penal law is based on international law (e.g. → Piracy), the trial is conducted by national courts.

Initially it was expected that the system of prosecution of war crimes would lead to a fundamental transformation of international law. In retrospect, it only appears to be an episode of history.

(*b*) *Specific examples from the laws of peace*

Customary international law at an early stage developed rules relating to the protection of → aliens. The standard achieved is nearly equal to that of the present standard for the protection of human rights (see Mosler, p. 72). The legal basis, however, is different. As the → Permanent Court of International Justice (PCIJ) remarked in the → Mavrommatis Concessions Case: "by taking up the case of one of his subjects . . . a State is in reality asserting its own rights" (Series A, No. 2, p. 12) being injured in the person of its subject. The State was not legally obliged to take up the case; it did not act as trustee of the injured national and had no obligation to transmit any eventual compensation to the injured person. It is open to doubt whether the humanitarian concerns involved or the standard of protection achieved (see Mosler, p. 72) justify the statement that aliens are protected as individuals. The home State is entitled to take up the case only if the injured person was a national at the time of the injury (→ Diplomatic Protection; → Nationality; see however the discussion in AnnIDI, Vol. 36 II (1931) p. 202).

A further incentive for change in the traditional doctrine arose from the protection of national → minorities in the → peace treaties after World War I and in special conventions concluded in connection therewith. The German-Polish Convention of 1922, for example, provided for the Upper Silesian Arbitral Tribunal to which individuals had access (→ German Interests in Polish Upper Silesia Cases). In connection with this protection the PCIJ ruled that "the very object of an international agreement . . . may be the adoption . . . of some definite rules creating individual rights and obligations and enforceable by the national courts" (→ Jurisdiction of the Courts of Danzig (Advisory Opinion), Series B, No. 15, pp. 17–21). It must be noted, that the → great powers

strongly rejected attempts to extend the system of the protection of minorities to other members of the → League of Nations (AnnIDI, Vol. 34 (1928) pp. 276–280). On the other hand the essence of this system influenced the work of the → Institut de Droit International in the preparation of its Declaration on the International Rights of Man of 1929 (AnnIDI, Vol. 35 II (1929) p. 298).

The concept of → self-determination, developed by President Wilson (→ Wilson's Fourteen Points), constituted the basis for the protection of national minorities after World War I. Under the → United Nations Charter it justifies a special protection for the inhabitants of → non-self-governing territories. The control system developed by the League of Nations for territories under → mandate was adopted by the → United Nations trusteeship system under which the Trusteeship Council accepts and examines individual petitions (UN Charter, Art. 87).

Finally the system for the protection of → refugees (see also → Refugees, League of Nations Offices; → Refugees, United Nations High Commissioner) should be mentioned here, as well as the multitude of international conventions in the social and economic field concluded under the auspices of the United Nations Economic and Social Council and numerous → United Nations Specialized Agencies such as the → International Labour Organisation and the → World Health Organization (Texts in Human Rights, A Compilation of International Instruments, UN Doc. ST/HR/1/Rev.2, 1983; → Human Rights, Activities of Universal Organizations).

(c) *General protection of the human being*

General protection is realized primarily by the guarantee of human rights and fundamental freedoms for all. Not all such guarantees imply the recognition of a certain legal status or capacity of the individual in international law. When the Institut de Droit International at its New York session in 1929 drafted its Declaration on the International Rights of Man, it carefully avoided defining the status of the individual in contradiction with the then leading doctrine. No such definition is to be found in the references to the task of protecting human rights in the UN Charter or in the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)). The Charter contains binding provisions regarding racial discrimination (→ Racial and Religious Discrimination) and other flagrant violations of the purposes and principles of the Charter by failure to observe and respect human rights and fundamental freedoms (see the 1971 Advisory Opinion of the ICJ in the case of → Namibia, ICJ Reports (1971) p. 57; → South West Africa/Namibia (Advisory Opinions and Judgments)). It does not, however, define these guaranteed human rights and therefore it is impossible to conclude from its provisions whether the obligations contained in it are imposed on member States or confer rights on individuals themselves. The Universal Declaration, accepted by a General Assembly resolution, is by its very nature unable to confer personal rights on anyone.

The question whether the legal position of the individual has undergone a change by the introduction of human rights into international law can be answered only on the basis of legally binding international instruments. These instruments can have universal character, i.e. primarily the human rights covenants, or also regional character such as the → European Convention on Human Rights (1950) and the → American Convention on Human Rights (1969). The practice of the organs of the UN Human Rights Commission (see also → International Covenant on Civil and Political Rights, Human Rights Committee) as well as of the Committee on Conventions and Recommendations of the → United Nations Educational, Scientific and Cultural Organization, both of which work primarily on the basis of the Universal Declaration, must be left aside, though their activities are of practical importance for the effective protection of the individual.

For the Covenant on Economic, Social and Cultural Rights the situation is clear: A State must fulfil its obligations "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" (Art. 2(1)). The Covenant is of a "promotional" character. It does not confer subjective rights upon individuals.

The relevant provision of the Covenant on Civil and Political Rights is different. Each State party undertakes "to respect and to ensure . . . the

rights recognized" (Art. 2(1)), and "to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized" (Art. 2(2)). No time limit is fixed; on the contrary, during the elaboration of the text a provision that this obligation had to be fulfilled "within a reasonable time" was deleted in order to strengthen the obligation. Thus, the obligations undertaken by this Covenant were meant to be implemented immediately upon ratification (see UN Doc. A/Conf.32/5 of July 20, 1967, para. 62; see also Schwelb, 1969, with an analysis of the drafting history).

Surprisingly, certain countries concluded from this interpretation that the provisions of the Covenant could be regarded as self-executing (see Council of Europe, Doc. H(70) 7 August 1970; → Self-Executing Treaty Provisions). The Committee of experts on human rights only mentioned this possible interpretation without accepting it. This would presuppose that individuals have acquired their own subjective rights. There is, of course, a great difference between whether an obligation has to be fulfilled by States parties immediately or whether it is transformed into a right of the individual. The incorporation of an international convention into domestic law according to the rules valid in a particular State may have this effect for the internal implementation of the treaty. This act has no influence on the character and on the contents of the convention as such. Since only obligations of State parties are mentioned in the Covenant, it appears doubtful that individuals may also be regarded as its addressees and that their position as subjects of international law is enforced.

The system of the European Convention on Human Rights has certainly influenced the interpretation of the Covenant on Civil and Political Rights. Here another solution has been found. The French version of Art. 1 indicates that not only State obligations are envisaged, but that every person shall possess rights: "Les Hautes Parties Contractantes reconnaissent à toute personne [singular!] . . . les droits et libertés . . . ." The English version – "shall secure to everyone . . . the rights" – is not so precise. It names "everyone", i.e. individuals, as addressees and not merely the States parties. With this formulation it satisfies the above-mentioned requirement that it should be expressed without doubt if rights are conferred upon individuals in a convention. Practice on the European and national level confirms this interpretation.

5. *Conclusions*

It is undeniable that during the last 30 or 40 years conventional law has manifested an increasing concern for the protection of human rights. Nevertheless, it is open to doubt whether this development has led to a transformation of the legal position of the individual. The threshold of an express recognition of the individual as a subject of international law has been crossed in few cases, and only reluctantly. When the Covenants were accepted in the General Assembly, the Soviet Union even made a statement to the contrary. The privileged treatment of treaties "of a humanitarian character" in Art. 60(5) of the Vienna Convention on the Law of Treaties reflects the great concern for humanitarian protection, but can hardly be regarded as confirmation that the individual is recognized as a subject of international law (→ Human Rights and Humanitarian Law).

Access to international bodies by individuals seeking to protect their own rights is still the exception. Such access may also be allowed in order to remind States of their obligations towards the beneficiaries of international rules. From a humanitarian point of view this limited scope for individuals to defend their own interests must be regarded as progress. In the present state of international law, it is still open to doubt whether the transformation achieved has had the effect of replacing international law in the sense of law between States by a transnational law of mankind.

P. HEILBORN, Die Stellung des Menschen im Völkerrecht (1927).

H. LAUTERPACHT, International Law and Human Rights (1950, repr. 1973) 27–29.

G. MANNER, The Object Theory of the Individual in International Law, AJIL, Vol. 46 (1952) 428–449.

P.E. CORBETT, The Individual and World Society (1953).

G. SPERDUTI, L'individu et le droit international, RdC, Vol. 90 (1956 II) 727–849.

H. MEYER-LINDENBERG, Die Menschenrechte im Völkerrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 4 (1961) 92–102.

H. WALDOCK, General Course on Principles of Public International Law, RdC, Vol. 106 (1962 II) 1–251, at 192–211.

E. SCHWELB, The Nature of the Obligations of the State Parties to the International Covenant on Civil and Political Rights, in: René Cassin amicorum discipulorumque liber, Vol. 1 (1969) 301–324.

G. ARANGIO-RUIZ, L'individuo e il diritto internazionale, RivDirInt, Vol. 54 (1971) 561–608.

H. MOSLER, The International Society as a Legal Community, RdC, Vol. 140 (1973 III) 70–81.

E. SCHWELB, The Law of Treaties and Human Rights, AVR, Vol. 16 (1973) 1–27.

R. HIGGINS, Conceptual Thinking about the Individual in International Law, British Journal of International Studies, Vol. 4 (1978) 1–19.

L. HENKIN, The International Bill of Rights, The Covenant on Civil and Political Rights (1981) 15.

KARL JOSEF PARTSCH

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

1. History

The establishment of the Inter-American Commission on Human Rights (IACHR) was foreshadowed in the Charter of the → Organization of American States (OAS), adopted in 1948, which proclaimed, albeit in the most general and unconstraining terms, the western hemisphere's shared humanitarian values. Specific rights were set forth in the 1948 American Declaration of the Rights and Duties of Man (→ Human Rights).

In 1959 the hemisphere's foreign ministers resolved in the Declaration of Santiago immediately to establish the Inter-American Commission and called for the drafting of an → American Convention on Human Rights. The interim Statute of the Commission, designed to govern its operations pending the adoption and widespread ratification of such a convention, was approved by the Council of the OAS on May 25, 1960.

The Commission's mandate, particularly its power to receive individual petitions, was confirmed and strengthened by a 1965 resolution and a 1966 amendment of the Statute. The Protocol of Buenos Aires amending the Charter of the OAS, adopted in 1967 and in effect since 1970, further enhanced the Commission's authority by establishing it as one of the "principal organs" of the OAS. Scholars have concluded that the Protocol incorporates the Statute of the Commission, and hence the American Declaration of the Rights and Duties of Man, into the positive law of the Charter, binding on all member States.

In 1969, the American Convention on Human Rights (Pact of San José), which also provided for the creation of the → Inter-American Court of Human Rights, was signed by 11 States at the Specialized Inter-American Conference on Human Rights held in San José, Costa Rica. It entered into force almost nine years later, on July 18, 1978, when the Government of Granada deposited the eleventh instrument of ratification. Jurisdiction over non-ratifying States continues to flow from the OAS Charter and resolutions of the political organs of the OAS. In October 1979, the OAS General Assembly approved the new Statute of the Commission.

2. Structure

Seven persons serving in their personal capacities, not as representatives of their respective governments, compose the Commission, which has its headquarters in Washington, D.C. Nominated by member States, they are elected to four-year terms by the General Assembly of the OAS. No more than one national of any one country may be elected. Members may be re-elected once. The chairman is elected by the vote of an absolute majority of the members. The Commission normally meets three times a year for sessions of approximately two weeks. In addition it periodically conducts on-site inspections lasting one to two weeks (→ Fact-Finding and Inquiry).

The members of the Commission are assisted by a full-time staff headed by the Executive Secretary, who is appointed by the OAS Secretary General in consultation with the Commission. In addition to working closely with the members when the Commission is in session, the permanent staff carries out the Commission's day-to-day work, processing complaints, soliciting information from governments and preparing drafts of special studies.

3. Principal Activities

The Commission performs three basic functions: (a) consideration of individual complaints regarding specific violations of human rights by a

given member State; (b) preparation and publication of reports on the general human rights situation in a given country; and (c) general promotion of human rights, including efforts to secure wider ratification of the American Convention on Human Rights, preparation of studies and reports on general themes related to human rights, preparation of the annual report, management of a modest fellowship programme, organization of seminars, and publication of the Inter-American Yearbook on Human Rights.

The examination of individual complaints and the preparation of country reports currently constitute the most important work of the IACHR. The two activities are intimately related, for the value and persuasive force of the country reports depend to a significant degree on information which is obtained through the processing of individual complaints received by the Commission.

Any person or group of persons or legally recognized non-governmental organizations may submit petitions to the Commission, in any of its official languages, on their own behalf or on behalf of third persons, with regard to alleged violations of human rights recognized in the American Convention on Human Rights or, in the case of non-ratifying States, in the American Declaration of the Rights and Duties of Man.

(*a*) *Individual complaints*

An individual complaint satisfies the preliminary requirements for admissibility if it alleges facts which, if true, would constitute a violation of human rights and it alleges the exhaustion of internal remedies or explains why the nominal remedies are ineffective (→ Local Remedies, Exhaustion of). The exhaustion of remedies requirement is not applicable when: (a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the alleged victim or other persons with standing have been denied access to the remedies under domestic law or have been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Where the preliminary requirements are satisfied, the Commission communicates to the government in question the pertinent parts of the petition, withholding the identity of the petitioner or petitioners, except when they expressly authorize disclosure, and request specific information. In serious cases, the Commission may request the government in question to allow the Commission to conduct an on-site investigation.

If the government fails to provide the requested information within 180 days, and if evidence otherwise obtained by the Commission does not lead to a different conclusion, the Commission adopts a decision declaring the facts alleged in the denunciation to be true and then formulate the suggestions and recommendations it deems appropriate. If the government provides information tending to disprove the complainant's charges, the latter is then informed of the State's response and given an opportunity to make observations and present evidence in rebuttal.

The pertinent parts of those observations and the evidence presented by the petitioner are then forwarded to the government in question for its final observations, which must be received by the Commission within 30 days. At any stage of the examination of a petition, and at the request of any of the parties or on its own initiative, the Commission may attempt to assist the parties in achieving a friendly settlement.

Once the enumerated steps have been taken or once the indicated time period has elapsed, and if no friendly settlement has been reached, the Commission proceeds to examine the case, taking into account the observations and evidence presented by the petitioner and the government in question, and any evidence the Commission obtains from witnesses, documents, records, official publications, or an on-site observation, if it has conducted one. On the basis of this data it then formulates conclusions and makes any suggestions or recommendations it considers appropriate. Conclusions and recommendations are then transmitted to the petitioner and to the State in question.

If the State fails to adopt the measures recommended by the Commission within a stipulated time period, the Commission may publish its conclusions, recommendations and suggestions, either by including them in its Annual Report to the OAS General Assembly or through such other means as the Commission considers appropriate.

The number of individual cases considered by the Commission has grown at an exponential rate in recent years. In 1968 the Commission opened 14 new cases and had 18 pending. By 1976, the corresponding figures were 139 and 145. In 1980, the number of new cases reached 2900, while approximately 4700 cases opened in prior years were being processed.

(*b*) *Country reports*

The Commission bases its country reports on the information obtained through the processing of individual complaints, as well as on other information available to the Commission from a variety of sources. Typically, a country report begins with a chapter on the legal provisions affecting human rights in the country concerned, and follows up with chapters dealing with the observance of the rights to personal security enumerated in Art. 9(a) of the Commission's Statute. Reports usually deal as well with civil, political, economic and social rights. While the practice of issuing reports on the general situation of human rights in particular countries dates back to the early 1960s, such reports were rare prior to 1974. Since then they have multiplied dramatically. The Commission has published three special reports on Chile, six on Cuba, two on Nicaragua (before and after the Revolution) and one each on Argentina, Bolivia, Colombia, El Salvador, Guatemala, Haiti, Panama, Paraguay and Uruguay. Special reports are periodically updated in chapters of the Commission's Annual Report to the OAS General Assembly.

(*c*) *Observations* in loco

No other intergovernmental organization for the protection of human rights has had the experience of the Commission with regard to on-the-spot investigations. Between 1976 and 1981, it carried out eight such visits. A major purpose of on-site investigation is to speak with persons – including detainees and their families and friends, former detainees, representatives of religious, social, labour, and professional organizations, lawyers, members of the judiciary and, of course, government officials – who are in a position to provide information concerning the protection of human rights in general or information concerning specific cases including those already before the Commission. Another important on-site activity is the reception of individual complaints.

4. *Conclusion*

By itself, the Commission can only be one modest element in the process of realizing the ideals of the various human rights texts. At best it can be an effective finder of the facts and propagator of the good news that such ideals exist. But it cannot by itself translate those ideals into the real world where vile crimes against elemental human rights are an everyday reality. The principal → sanctions and incentives remain in the hands of governments.

Inter-American Commission on Human Rights, Ten Years of Activities, 1971–1981 (1982).

J. DRIER, The Organization of American States and the Hemisphere Crisis (1962).

C. TOMUSCHAT, Die Interamerikanische Menschenrechtskommission, ZaöRV, Vol. 28 (1968) 531–560.

K. VASAK, La Commission interaméricaine des droits de l'homme (1968).

M.M. BALL, The OAS in Transition (1969).

A.P. SCHREIBER, The Inter-American Commission on Human Rights (1970).

J. DE PASSALACQUA, Regional Institutions Assuring the Development of Fundamental Liberties: The American Hemisphere, Catholic Lawyer, Vol. 20 (1974) 202–212.

T. BUERGENTHAL, The Revised OAS Charter and the Protection of Human Rights, AJIL, Vol. 69 (1975) 828–836.

C.S. WHITE, Practice and Pleadings Before the Inter-American Commission on Human Rights, Human Rights, Vol. 4 (1975) 413–431.

L.J. LEBLANC, The OAS and the Promotion and Protection of Human Rights (1977).

A. ORFILA, At the Turning Point: Freedom and Justice in the Transformation of the Inter-American System, ProcASIL, Vol. 72 (1978) 293–298.

Regional Approaches to Human Rights: The Inter-American Experience, ProcASIL, Vol. 72 (1978) 197–223.

R. NORRIS, Bringing Human Rights Petitions before the Inter-American Commission, Santa Clara Law Review, Vol. 20 (1980) 733–772.

Organization of American States, The Inter-American Commission On Human Rights: What It Is and How It Functions (1980).

F. VOLIO, Inter-American Commission on Human Rights, American University Law Review, Vol. 30 (1980) 65–78.

T. BUERGENTHAL, R. NORRIS and D. SHELTON, Protecting Human Rights in the Americas (1982).

J. KOKOTT, Der Interamerikanische Gerichtshof für Menschenrechte und seine bisherige Praxis, ZaöRV, Vol. 44 (1984) 806–839.

TOM J. FARER

INTER-AMERICAN COURT OF HUMAN RIGHTS

1. Institutional Framework

The Inter-American Court of Human Rights is one of two supervisory organs established by the → American Convention on Human Rights, which entered into force on July 18, 1978. The other organ is the → Inter-American Commission on Human Rights. Within the framework of the → Organization of American States under whose auspices the Convention was drafted, the Court is "an autonomous judicial institution whose purpose is the application and interpretation" of the Convention (Statute of the Inter-American Court of Human Rights, Art. 1). The formal inauguration of the Court took place on September 3, 1979, in San José, Costa Rica, which is the seat of the tribunal (→ International Courts and Tribunals).

The Court is composed of seven judges who are elected to six-year terms; they are eligible to be re-elected to one additional term. Besides having to be nationals of OAS member States, the judges must possess the qualifications for the highest judicial office in either the State of their nationality or the State which nominates them. They must also be individuals of the highest moral authority with recognized competence in the → human rights field. Only States parties to the Convention have the right to nominate the judicial candidates and to participate in their election.

Art. 60 of the Convention provides that: "The Court shall draw up its Statute which it shall submit to the [OAS] General Assembly for approval. It shall adopt its own Rules of Procedure." A draft Statute prepared by the Court was approved, with various changes, by the Assembly at its ninth regular session on October 30, 1979. The Statute entered into force on January 1, 1980. The Court's Rules of Procedure were adopted by it on August 9, 1980. (These and other relevant texts are reproduced in the official Handbook of the Existing Rules Pertaining to Human Rights in the Inter-American System [hereinafter cited as Handbook], OEA/SER.L/VII.60, Doc. 28 (1983), which is updated periodically.)

The work of the Court is directed by its President who, together with the Vice-President, are elected by it for a term of two years. The President, the Vice-President, and one additional judge designated by the President comprise the Permanent Commission, which acts as the Court's bureau between sessions. The Court is required to hold two regular sessions each year; it may be convened in special sessions by the President or a majority of the judges whenever circumstances so require. Since the Court is not a full-time tribunal, the duration of its regular and special sessions depends on the business before the Court at any given time. The Secretariat of the Court is headed by the Secretary who is elected by the Court to a five-year term. The official languages of the Court are those of the OAS, that is, Spanish, English, Portuguese, and French. But its working languages may at any given time be one or more of these, depending upon the nationality of the judges and of the parties to a specific case.

The Court operates under a five-judge quorum requirement established by the Convention. In addition to the seven elected judges who comprise it, the Court may from time to time also include *ad hoc* judges and interim judges. The Convention in Art. 55 gives the States parties the right to appoint *ad hoc* judges in cases to which they are parties and in which no judge of their nationality is sitting. Art. 6(3) of the Court's Statute provides, furthermore, for the designation of interim judges to ensure that the death, incapacity, or disqualification of elected judges does not deprive the Court of the quorum it requires to perform its functions. Interim judges are appointed by the States parties to the Convention at a meeting of the OAS Permanent Council.

2. Jurisdiction

The Court has contentious and advisory jurisdiction. The former is governed by Art. 62 of the Convention, the latter by Art. 64.

(a) Contentious jurisdiction. Art. 62 of the Convention, reads as follows:

"1. A State Party may, upon depositing its instrument of ratification or adherence to this

Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

The Court thus lacks the power to decide a contentious case unless the States parties to it have accepted the tribunal's jurisdiction in general or for purposes of the case before it. To date Argentina, Costa Rica, Ecuador, Honduras, Peru, and Venezuela have filed a general → declaration accepting the Court's jurisdiction.

Contentious cases may be referred to the Court only by the States parties and by the Commission; individuals have no standing to do so (→ Standing before International Courts and Tribunals). As a general rule, moreover, the tribunal may only hear a case after it has been dealt with by the Commission. (See Government of Costa Rica – In the Matter of Viviana Gallardo, et al., No. G 101/81, Inter-American Court of Human Rights, Decision of November 13, 1981, ILM, Vol. 20 (1981) p. 1424.) The Convention is silent on the question whether only the States parties which have participated in the proceedings before the Commission are entitled to refer the case to the Court or whether all States parties have that right provided only that they have accepted the tribunal's jurisdiction. This issue remains to be decided by the Court.

The Court's judgments in contentious cases are final and binding on the States parties to the case. Besides deciding whether there has been a violation of the Convention, the Court has the power to award damages and to indicate what measures a State party must take to remedy the breach. Art. 68(2) of the Convention provides, moreover, that: "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." The full import of this provision remains to be tested. It should be noted, however, that under Art. 27 of the Agreement between the Government of Costa Rica and the Court of September 10, 1981, its decisions have the same force and effect in Costa Rica as comparable domestic judicial and administrative rulings. (This Agreement is reproduced in the Handbook, at p. 181; → International Law in Municipal Law: Law and Decisions of International Organizations and Courts.)

Art. 63(2) of the Convention confers on the Court the power to grant so-called "provisional measures", that is, temporary injunctive relief, "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons" (→ Interim Measures of Protection). This remedy may be granted in cases pending before the Court as well as in proceedings that are still under consideration by the Commission. In the latter situation, the desired relief must be requested by the Commission.

(b) Advisory jurisdiction. Art. 64 of the Convention spells out the Court's advisory jurisdiction, which is more extensive than that of any other existing international tribunal (→ Advisory Opinions of International Courts). Art. 64(1) provides that all OAS member States, whether or not they have ratified the Convention, and all OAS organs acting "[w]ithin their spheres of competence", have standing to request an advisory opinion interpreting the Convention as well as any "other treaties concerning the protection of human rights in the American states". Art. 64(2) permits any OAS member State to seek an advisory opinion on the compatibility of any of its domestic laws with the Convention or the other human rights treaties mentioned above.

In its first three advisory opinions, the Court has been able to interpret and clarify the meaning and scope of Art. 64(1). Thus, in "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Advisory Opinion OC-1/82 of September 24, 1982, Inter-American Court of

Human Rights, Series A: Judgments and Opinions, No. 1 (1982)), the Court held that the phrase "other treaties concerning the protection of human rights in the American states" found in Art. 64(1) referred, in principle, to all human rights treaties to which OAS member States are parties, be they bilateral or multilateral, regional or international in character (e.g. → Human Rights Covenants). The Court made quite clear, however, that the power to interpret these treaties was discretionary and that it would decline to exercise it for a variety of reasons inherent in the protective system established by the Convention.

The question regarding the circumstances under which OAS organs may request the Court to render advisory opinions has been clarified in two other opinions. In The Effect of Reservations on the Entry into Force of the American Convention (Advisory Opinion OC-2/82 of September 24, 1982, Inter-American Court of Human Rights, Series A: Judgments and Opinions No. 2 (1982)), the Court dealt with the requirement that OAS organs may only seek advisory opinions "within their spheres of competence" and held that these organs must show that they have a legitimate institutional interest in the subject-matter of the opinion. Applying this principle to the Commission, the Court noted that "unlike some other OAS organs, the Commission enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention" (ibid., para. 16). In Restrictions to the Death Penalty (Advisory Opinion OC-3/83 of September 8, 1983, Inter-American Court of Human Rights, Series A: Judgments and Opinions No. 3 (1983)) the Court rejected the argument of Guatemala that it decline the Commission's request for an advisory opinion dealing with an issue that was in dispute in proceedings before the Commission involving Guatemala. That government argued that it had not accepted the compulsory jurisdiction of the Court and that the Commission's request was a disguised attempt to obtain the actual adjudication of a dispute. In rejecting this argument, the Court emphasized the Commission's strong institutional interest in the clarification of disputed provisions of the Convention.

3. Conclusion

Although it has been in existence for only a few years, the Court has already made some important contributions to the jurisprudence of international human rights law. Particularly noteworthy are its advisory opinions on The Effect of Reservations and on The Restrictions to the Death Penalty, which deal with issues bearing on the interpretation of human rights treaties. The contentious jurisdiction of the Court remains to be resorted to by the Commission and the States parties. It is difficult, therefore, to predict the Court's future. It does appear, however, that if the Court's advisory jurisdiction continues to be resorted to, the tribunal should be able to perform a useful function in helping to promote the protection of human rights in the Americas.

C.A. DUNSHEE DE ABRANCHES, The Inter-American Court of Human Rights, American University Law Review, Vol. 30 (1980) 79–125.

B. PENA, Human Rights: The Statute of the Inter-American Court of Human Rights, Harvard ILJ, Vol. 21 (1980) 735–742.

T. BUERGENTHAL, The Inter-American Court of Human Rights, AJIL, Vol. 76 (1982) 231–245.

T. BUERGENTHAL, R. NORRIS and D. SHELTON, Protecting Human Rights in the Americas (1982) 92–139.

THOMAS BUERGENTHAL

INTERNATIONAL COMMISSION OF JURISTS

The International Commission of Jurists is a → non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of → human rights throughout the world. Founded in 1952, with headquarters and secretariat in Geneva, the Commission consists of up to 40 eminent jurists representative of different legal systems and concerned with the service of the rule of law. The International Commission of Jurists has a network of national sections and affiliated organizations. Its main activities include organizing conferences and seminars, sending observer missions to trials, producing studies and publications, and carrying out promotional work in international organizations.

The concept of the rule of law underlying the Commission's work is defined to embrace the principles, institutions and procedures which the experience of lawyers in different countries of the world has shown to be important in protecting the individual from arbitrary government and enabling the individual to enjoy human dignity. The Commission's work focuses in particular on the legal promotion and protection of human rights and fundamental freedoms. The rule of law is viewed as a concept to be used to advance not only the individual's civil and political rights but also economic, social and cultural rights, and to promote development policies and social reform.

The Members of the Commission are elected in a personal capacity. They meet triennially and elect an Executive Committee which meets several times a year. Persons and organizations subscribing to the objectives of the International Commission of Jurists may become associates. The International Commission of Jurists is supported by financial contributions from lawyers, lawyers' organizations, private bodies, foundations and governments. Its Statutes are registered in accordance with Swiss civil law.

The International Secretariat comprises the Secretary-General, legal officers and administrative personnel. In 1978 the Centre for the Independence of Judges and Lawyers was created at the headquarters to organize support for jurists who are persecuted in the exercise of their profession. The National Sections of the International Commission of Jurists, which exist in over 60 countries, supply the secretariat with material on legal developments, undertake research, organize local and regional meetings, and serve as a channel for contacts between the Commission and the legal profession at the national level.

Having consultative status with the → United Nations Economic and Social Council, the → United Nations Educational, Scientific and Cultural Organization and the → Council of Europe, and being on the Special List of the → International Labour Organisation, the International Commission of Jurists is active within these and other governmental and non-governmental international organizations in sponsoring proposals for improving the protection of human rights, for example in connection with → apartheid, → asylum, → developing States, → minorities, → racial and religious discrimination, → refugees, → sex discrimination and → torture, and in connection with specific situations in various countries.

The publications of the International Commission of Jurists include the biannual Review, and a quarterly newsletter. The Review contains sections on human rights in the world and the judicial application of the rule of law, commentaries and articles. The Centre for the Independence of Judges and Lawyers issues a biannual bulletin with case reports and articles on the persecution and harassment of judges and lawyers, and on the promotion and protection of their independence. Special studies and reports are also published on matters warranting particular investigation.

Statutes of the International Commission of Jurists.
The Review, International Commission of Jurists.

PETER MACALISTER-SMITH

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, HUMAN RIGHTS COMMITTEE

The Human Rights Committee is provided for in Art. 28 of the International Covenant on Civil and Political Rights. Its general mandate consists of monitoring compliance by States parties with their obligation to respect and ensure the rights guaranteed under the Covenant (→ Human Rights Covenants).

1. Historical Background

After the Covenant had entered into force on March 23, 1976, the first elections for membership in the Committee were held in September of that year. The Committee met in its inaugural session on March 21, 1977, and it convened twice during its first year. Since 1978, the number of annual sessions has been increased by the addition of an autumn session. According to Art. 37(3) of the Covenant, meetings are normally to be held at the headquarters of the → United Nations in New York or at the United Nations office at Geneva. At the special invitation of a

government, the Committee may also hold sessions elsewhere.

2. *Structure*

Strictly speaking, the Committee would not qualify as a United Nations body since the circle of States parties to the Covenant does not coincide with the membership of the United Nations. Nonetheless, a close relationship exists between the Committee and the world organization. The Covenant was elaborated by the UN and is one of the instruments through which the objective of creating an International Bill of Rights has been carried out (→ Human Rights; → Human Rights, Universal Declaration (1948)). At the organizational level, the Committee is related to the office of the → United Nations Secretary-General. The Committee is duty-bound to submit an annual report on its activities to the → United Nations General Assembly.

Owing to these many interconnecting ties, it has been concluded by the UN Secretary-General that Committee members are entitled to the privileges and immunities afforded to experts on mission for the United Nations, irrespective of whether the host country concerned (Switzerland, United States) is a party to the Covenant itself (→ International Organizations, Privileges and Immunities).

Members of the Committee are elected from a list of candidates nominated by the governments of the States parties. The Covenant provides that candidates shall be "persons of high moral character and recognized competence in the field of human rights" (Art. 28(2)). Although each State party can nominate up to two candidates possessing its nationality, the Committee may not include more than one national of the same State. In a formulation which recalls Art. 9 of the Statute of the → International Court of Justice, the Covenant further prescribes that consideration shall be given "to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems" (Art. 31(2)).

Committee members are not diplomatic representatives of their respective countries, but "shall serve in their personal capacity" (Art. 28(3)). The fact that the Covenant expects them to act as independent experts is also underlined by the wording of the solemn declaration which each member is required to make before taking office. Thereby, he pledges to perform his duties "impartially and conscientiously" (Art. 38). It would appear that certain high offices within the executive framework of a State party can hardly be reconciled with the basic duty thus defined. However, during some periods of its existence the Committee counted among its members active holders of ministerial posts. To a minor degree, the membership of highly placed civil servants, in particular high-echelon diplomats, also raises difficult issues of compatibility. On the other hand, any person nominated by his government will have some kind of intimate link with that government. In the last resort, governments are the masters of the composition of the Committee. Any inappropriate candidature could eventually be blocked by the other States parties. There is no formal procedure to challenge the election results.

Each of the 18 members is elected for a period of four years. By providing that every two years the office of nine of its 18 members expires, the Covenant ensures a certain degree of personal and institutional continuity. In practice, during its first four terms (1977–1978; 1979–1980; 1981–1982; 1983–1984) the Committee was characterized by a reasonably well-balanced mixture of law professors, diplomats, judges and other legal professionals. Its first female member was elected in 1983 and took office in 1984.

As to privileges and immunities to be enjoyed by Committee members, the Covenant refers to Section 22 of the Convention on the Privileges and Immunities of the United Nations. Committee members enjoy immunity from personal arrest or detention, immunity with regard to any acts done or words spoken in the discharge of the office and inviolability for all papers and documents (see Art. 43 of the Covenant which refers to the Convention on the Privileges and Immunities of the United Nations). In addition, they are entitled to emoluments, to be paid by the United Nations, which are to be commensurate with the importance of the Committee's responsibilities (Art. 35).

3. *Functions*

The Committee's functions are circumscribed

by the Covenant by way of an exhaustive enumeration. Unlike the Commission on Human Rights established by the → United Nations Economic and Social Council, the Committee is not free to assign to itself new tasks in the field of human rights.

Under the Covenant, States parties undertake to submit reports on their performance with regard to all the rights recognized therein. An initial report is due within one year of the entry into force of the Covenant, and thereafter whenever the Committee so requests. In a decision of July 22, 1981 (Fifth Annual Report, UN GA Official Records, 36, Supp. No. 40, UN Doc. A/36/40, p. 104), the Committee determined that subsequent reports are to be submitted every five years. It is one of the main tasks of the Committee to study those reports and, on the basis of such study, to transmit "its reports, and such general comments as it may consider appropriate", to the States parties (Art. 40(4)).

In Art. 41 of the Covenant an inter-State complaint procedure is provided for. Accountability under this procedure becomes operative only on the condition that a State, by virtue of a special → declaration, has expressly accepted it. Although as of July 31, 1984 sixteen States had made the declaration under Art. 41, not a single case has yet been brought before the Committee.

Pursuant to the Optional Protocol to the Covenant (in force for 34 States as of July 31, 1984), the Committee is additionally entrusted with the task of considering communications from individuals who claim that their rights under the Covenant have been violated (→ Individuals in International Law). The Optional Protocol contains very few rules for the handling of such communications. Most of the provisions refer to the conditions of admissibility which a communication is required to fulfil before it may be examined as to its merits. In its Rule 90, the Committee has attempted to set out in a systematic fashion all those requirements which are somewhat scattered throughout the Optional Protocol. By and large, the relevant provisions resemble the analogous provisions of the → European Convention on Human Rights (1950). In particular, the Optional Protocol sets forth that domestic remedies have to be exhausted before a case can be brought to the attention of the Human Rights Committee (→ Local Remedies, Exhaustion of). In contrast to the European Convention, however, the Optional Protocol contains only an obstacle of litispendence: No communication may be considered as to its merits while it is "being examined" under another procedure of international investigation or settlement (Art. 5(2) (a)). Furthermore, unlike the European Convention, the Optional Protocol does not mention as a ground of inadmissibility the fact that a communication is manifestly ill-founded. In its jurisprudence, however, the Committee has not felt constrained from ruling a communication inadmissible when it appeared that the underlying claim was devoid of any foundation.

4. Decision-Making Process

In accordance with Art. 39 of the Covenant, the Committee drew up its Provisional Rules of Procedure during its first session in New York. The Rules were amended on two occasions (present version: UN Doc. CCPR/C/3/Rev. 1).

The Covenant itself determines that decisions of the Committee shall be made by a majority vote of the members present, twelve members constituting a quorum (Art. 39(2)). Nonetheless, in a footnote to Rule 51 which simply repeats the language of the Covenant itself, reference is made to a passage of the first annual report in which it says that "The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the rules of procedure were observed and that such attempts did not unduly delay the work of the Committee" (→ Consensus). This footnote has a far more limited scope than is occasionally attributed to it. It does not reflect a decision of the Committee itself, but points only to statements made by members. Moreover, recourse to formal voting can in no way be blocked *de jure*. *De facto*, however, the original intention to consider voting only as a device of last resort has had a considerable impact on the practical work of the Committee. To date, no formal vote has taken place, although the method of appending members' individual opinions to final views on individual communications filed under the Optional Protocol can be seen as a hardly disguised indicator that an

individual member or a group of members has been overruled by the majority.

Regarding individual communications, it has proved necessary to have them considered by working groups which normally consist of five persons, meeting one week before the start of any session. Normally, the working groups draft the text of the views to be adopted by the full Committee. In contrast to the situation in other international bodies, the role of the United Nations secretariat is here only a modest one. Not only because of the scarcity of manpower, but also because of the complexity and the political implications of many cases, the secretariat feels that the tasks of determining the working style underlying the Committee's jurisprudence, of suggesting specific interpretations of the Covenant and of making findings as to violations of the Covenant by States parties should be in the hands of Committee members themselves.

The composition of the Committee does not vary in accordance with the functions which it actually performs. Even members from those countries which have not ratified the Optional Protocol – and will probably never ratify it – participate in considering individual communications. Indeed, the substance of the Covenant is one and the same, irrespective of whether the Committee applies it to State reports or to individual communications. Therefore, interpretations adopted within the framework of the Optional Protocol will also be valid in respect of Art. 40, and vice versa.

5. Activities

(a) States' reports

During its first seven years, the Committee considered initial reports submitted by 60 States, a number of reports supplying additional information as well as the first one of second periodic reports. On the whole, compliance with the reporting obligation can be said to be satisfactory. Only with regard to a small number of States have delays of several years been observed.

In practice, the examination of State reports takes place in the presence of representatives of the States concerned. With regard to initial reports, a pattern has evolved pursuant to which members of the Committee put questions and formulate comments which the representatives then try to answer, normally after a period of two or three days needed for the preparation of such replies. More often than not, State representatives promise to provide additional information in writing. In respect of a number of countries which had honoured their promises to furnish supplementary information, the Committee entered into a dialogue during which the diplomatic delegates present answered questions immediately after a particular issue was broached by members of the Committee.

It is obvious that the picture gained in this way about the human rights situation in a country under review can be neither complete nor very precise. Despite the adoption by the Committee of detailed guidelines regarding the form and contents of reports (First Annual Report, UN GA Official Records 32, Supp. No. 44, UN Doc. A/32/44, p. 69; Fifth Annual Report, p. 105) many reports provide only scanty information, and the answers received after the first round of questioning often do not show a sufficient degree of precision and accuracy. For this reason, in a statement on its duties under Art. 40 of October 30, 1980 (Fifth Annual Report, p. 101) the Committee decided that prior to meetings with representatives of reporting States for the purpose of examining subsequent periodic reports, a working group of three members is to convene to identify those areas which need to be explored more fully. According to that scheme, which was tried for the first time with Yugoslavia in 1983, matters are discussed issue by issue, Government delegates being invited to respond on the spot to those questions and comments concerning which they feel sufficiently informed.

A reading of the Committee's summary records reveals that the intensity of the questioning to which the representatives of the reporting State are subjected has increased considerably over the years. Drawing on their experience acquired in examining other reports, Committee members are now able to detect rather easily eventual flaws in constitutional and other legislative documents with which they have been furnished. The danger that the interrogative method is overstressed and that, in particular, States with a relatively good human rights record receive the same treatment as a defaulting State should, however, not be overlooked.

(b) Individual communications

Most of the individual communications received during the period under review were directed against Uruguay; many cases were also brought against Canada and the Scandinavian countries (for a country breakdown see Fifth Annual Report, pp. 89–91). On the other hand, not a single communication from half of the countries having ratified the Optional Protocol has reached the Committee. The Committee concluded in numerous cases that Uruguay, by the way in which political prisoners and terrorists were denied basic safeguards of physical treatment and fair trial, was in breach of its obligations. Two findings against Colombia also had as their background the fight against → terrorism under a state of siege. In the case of the Mauritian women (April 9, 1981, Fifth Annual Report, p. 134), the Committee ruled that Mauritius was in breach of her commitments under Arts. 17(1) and 23(1) in conjunction with Arts. 2(1), 3 and 26 by denying to husbands of Mauritian women a stable right of residence which was granted to wives of male Mauritian nationals as a matter of routine (→ Sex Discrimination). Somewhat similar issues were dealt with in the Lovelace Case decided on July 30, 1981 (ibid., p. 166). The Committee concluded that Canada's Indian Act infringed rights of the petitioner under Art. 27 (protection of → minorities), by providing that a woman Indian who marries a non-Indian loses tribal membership and is required to leave her home reserve, while the non-Indian wife of a male Indian is integrated into the Community, since there was no other place where the woman, after her marriage had broken up, could enjoy her native culture.

6. Special Legal Problems

As far as the reporting procedure under Art. 40 is concerned, many issues still remain in a twilight zone. The Covenant abstains from specifying what additional material may be resorted to when studying the reports submitted by States parties. There seems to be agreement that official documents of the State concerned as well as official UN documents constitute additional sources of evidence whose use may not be objected to. In addition, members are free to inform themselves from whatever source they see fit and to ask the governmental representatives present whether the facts and data gained thereby are true. The definition of precise rules on admissible evidence would become urgent should the Committee as a collective body try to assess each individual State's report after having studied it. The interpretation of Art. 40(4), however, is still a subject of controversy among members. While the overwhelming majority believes that an individual appraisal is indeed required, members from Eastern European countries maintain that all the Committee can do is expound general conclusions which reflect the experiences gathered in studying reports ("general comments", sometimes called in jargon "general general comments" in order to underline that the real task under Art. 40(4) remains unfulfilled). The consensual statement of October 30, 1980 mentioned above is without prejudice to the conflicting views. In spite of that divergence, "general comments" on the implementation of the Covenant and the discharge of the reporting obligation as well as on the requirements deriving from a number of provisions of the Covenant (Arts. 3, 4, 6, 7, 9, 10, 19, 20, 1, 14) were adopted.

As far as individual communications are concerned, it has become clear that proceedings conducted entirely in writing are extremely cumbersome and difficult to handle. Although Art. 5(1) of the Optional Protocol alone does not seem to constitute an absolute legal obstacle against holding oral hearings, the ensuing technical and financial problems would be insurmountable. No solution is provided by the Optional Protocol for situations where the basic facts remain contested. In dealing with Uruguayan cases, the Committee ruled that in view of the duty of cooperation laid down in Art. 4(2) of the Optional Protocol, sheer passivity and blanket denials on the part of the government are not sufficient. States are required to supply concrete information and respond point by point to the petitioners' allegations; otherwise, they can be taken as the basis of final views on the pending case. However, once a State has complied with this procedural requirement, the Committee has no further device to determine what the actual situation is like.

Although the Committee's views are not binding, States are certainly obligated to consider them in → good faith. Therefore, it should be

learned what steps have been taken in response to the Committee's findings and recommendations. To date, however, there exists no formalized follow-up procedure.

Reports of the Human Rights Committee, UN GA Official Records, Supp. No. 40 (since 1978) [1977: Supp. No. 44].

M.J. BOSSUYT, Le règlement intérieur du Comité des droits de l'homme, RevBelge, Vol. 14 (1978–1979) 104–156.

T. OPSAHL, The Protection of Human Rights in the Council of Europe and in the United Nations, European Yearbook, Vol. 26 (1978) 92–118.

B. GRAEFRATH, Trends Emerging in the Practice of the Human Rights Committee, GDR Committee for Human Rights Bulletin (1980) No. 1, 3–23.

M. NOWAK, The Effectiveness of the International Covenant on Civil and Political Rights, Stocktaking after the First Eleven Sessions of the UN Human Rights Committee, Human Rights Law Journal, Vol. 1 (1980) 136–170.

E. MÖSE and T. OPSAHL, The Optional Protocol to the International Covenant on Civil and Political Rights, Santa Clara Law Review, Vol. 21 (1981) 271–331.

A.H. ROBERTSON, The Implementation System: International Measures, in: L. Henkin (ed.), The International Bill of Rights. The Covenant on Civil and Political Rights (1981) 332–370.

C. TOMUSCHAT, Der Ausschuß für Menschenrechte – Recht und Praxis, Vereinte Nationen, Vol. 29 (1981) 141–148.

D.D. FISHER, Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee, AJIL, Vol. 76 (1982) 142–153.

CHRISTIAN TOMUSCHAT

INTERNATIONAL CRIMES

1. History

The pattern of → international relations in the 19th century, which was reflected in the classical theory of the exclusive international personality of States (→ Subjects of International Law), rested on the principle of the equality of sovereign entities (→ States, Sovereign Equality). There was no instance superior to the States themselves that could have limited their autonomy. The responsibility of individuals under criminal law – including responsibility for violation of → treaties concluded under international law or for violations of → customary international law – was only imaginable in accordance with municipal law and could only be established by municipal courts (→ International Law and Municipal Law; → Individuals in International Law).

The idea of punishing aggressive → war and acts of war in contravention of international law originated during World War I and led to the inclusion in the → Versailles Peace Treaty (1919) of a provision for the arraignment of Kaiser Wilhelm II "for a supreme offence against international morality and the sanctity of treaties" (Art. 227) and for the trial of German military and civilian personnel accused of having committed acts in violation of the "laws and customs of war" (Art. 228). The idea of individual criminal responsibility in international law was developed in the literature of international law between the two world wars.

After World War II numerous leading German and Japanese figures were put on trial before inter-allied courts in Nuremberg and Tokyo for → crimes against peace, → war crimes and → crimes against humanity and were in some cases sentenced to severe penalties (→ Nuremberg Trials; → Tokyo Trial). All efforts to convert the penal provisions on which these judgments were based *en bloc* into generally binding norms of international law have thus far been unsuccessful. An → international criminal court as envisaged by the Genocide Convention of 1948 and the Apartheid Convention of 1973 has never been established (→ Genocide; → Apartheid). The Draft Statute for an International Commission of Criminal Inquiry and the Draft Statute for an International Criminal Court, prepared by the → International Law Association in 1980 and 1982 (ILA, Report of the 59th Conference, Belgrade, pp. 402 and 409; Report of the 60th Conference, Montreal, pp. 424 and 454), have failed to make any impact.

2. Definition

The notion of international crimes is difficult to define because the practice initiated by States at the end of World War II of calling foreign State organs to account for international crimes has not been continued, and, moreover, no generally recognized criteria for determining the content and limits of the concept of international crimes are

perceptible in the field of existing international criminal law.

In these circumstances the narrowest conceptual definition imaginable would seem most appropriate; it should also establish a connection between the conception of international crimes and generally recognized basic principles of criminal law. The term "international crimes" would have to be replaced with the stricter notion of "crimes against international law". The recognition of such crimes would only be conceivable on the fulfilment of three conditions. First, the relevant criminal norm would have to emanate directly from a treaty concluded under international law or from customary international law, and it would have to enjoy direct binding force on individuals without intermediate provisions of municipal law. In this case liability to punishment for certain specified conduct would be established generally without any further need for a relevant penal provision in municipal law (→ Self-Executing Treaty Provisions). Not only does it seem self-evident in the eyes of Anglo-American lawyers that criminal liability for an act may emanate directly from international law; this view has also been acknowledged in various international → declarations and treaties, even though, for reasons of legal certainty, most continental criminal law systems make criminal liability for an act dependent on the pre-existence of a written legal provision in municipal law (e.g. Basic Law of the Federal Republic of Germany, Art. 103(2)). Second, provision would have to be made for the prosecution of acts penalized by international law in this manner before an international criminal court, or if before a municipal court, in accordance with the principle of universal jurisdiction so that the international character of the crime might also find expression in the mode of prosecution itself (→ Criminal Law, International). Third, a treaty establishing liability for an act as a crime against international law would have to be binding on the great majority of States, for only then would the international status of the relevant penal provision be assured.

On the other hand, a comprehensive definition of international crime, as frequently encountered, would include all violations of law affecting those legal interests in whose preservation humanity has a general interest and for which criminal law protection is provided in an international treaty or under customary international law. Such a broad definition would clearly have no significance for the theoretical system underlying international criminal law, since the description of an act declared criminal under international law would not need to correspond to the requirements of certainty in relation to criminal law norms and also because prosecution under State jurisdiction could take place in accordance with the principle of territorial jurisdiction (→ Jurisdiction of States). Thus a notion of this kind would have no specific legal relevance.

In any event, the concept of international crimes must be distinguished from that of international torts (→ Responsibility of States: General Principles; → Internationally Wrongful Acts). An international tort is an unlawful act by a subject of international law violating the international legal rights of another subject of international law and giving rise to a duty to make → reparation on the part of the State to which the individual perpetrator of the act belongs. An international tort does not of its own accord give rise to responsibility under the criminal law. Nevertheless, an international tort may at the same time constitute a crime against international law (e.g. war crimes).

3. *Crimes Against International Law*

In the light of the narrow definition of international crime preferred above, there are only a few acts that may be regarded as genuine crimes against international law.

(*a*) *Crimes against peace*

Criminal liability for crimes against peace was accepted for the first time following World War II. The relevant penal provision appeared in Art. 6(a) of the Charter of the Nuremberg International Military Tribunal of 1945 and in Art. 5(a) of the Charter of the International Military Tribunal for the Far East of 1946. However, these provisions were concerned only with the punishment of German and Japanese civilian and military leaders and did not make any further claim to validity. Certainly, → United Nations General Assembly Resolution 95(I) of December 11, 1946 affirmed the Charter and the Judgment of the Nuremberg Tribunal but it was not intended to (and the

General Assembly was not able to) create a generally valid penal provision in international law. Instead it merely gave expression to the understandable moral conviction of the world public that justice had been done to the defendants. The → Friendly Relations Resolution of October 24, 1970 (UN GA Res. 2625 (XXV)) declaring that "[a] war of aggression constitutes a crime against the peace, for which there is responsibility under international law" also failed to create a new crime under international law. For this reason the Resolution on International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity of December 3, 1973 (UN GA Res. 3074 (XXVIII)) is expressly restricted to these two types of crimes and does not refer to crimes against peace. The same applies to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of November 26, 1968 (UN GA Res. 2391 (XXIII)). Equally, Resolution 3314 (XXIX) of December 14, 1974 defining → aggression – upon which great hopes had been founded regarding continuation of the work of codifying the penal provisions of Nuremberg and Tokyo – only represented a non-obligatory recommendation to the → United Nations Security Council, which was intended to facilitate the determination of an act of aggression under Art. 39 of the → United Nations Charter. The Resolution does not constitute a penal norm, although Art. 5(2) declares that "[A] war of aggression is a crime against international peace. Aggression gives rise to international responsibility." Work on the Draft Code of Offences against the Peace and Security of Mankind, which had been suspended in 1957, was resumed by the Sixth Committee of the General Assembly in 1978. Little progress was made, however, particularly as the United States, the United Kingdom, Canada, Italy, the Federal Republic of Germany and Japan took the view that attempts to codify international criminal law should be abandoned altogether. Nevertheless, several States have introduced provisions in their national legislations penalizing the preparation and pursuance of a war of aggression. Provisions to this effect have been adopted in the Federal Republic of Germany in para. 80, in the German Democratic Republic in para. 85 and in Bulgaria in Art. 409 of their respective criminal codes.

(*b*) *War crimes*

The legal position in respect of → war crimes is of a different order. The four → Geneva Red Cross Conventions of August 12, 1949 contain penal provisions describing acts and omissions – denoted as "grave breaches" – which are considered to be war crimes punishable by the contracting States on the basis of the principle of universal jurisdiction. Protocol I of December 12, 1977 contains further instances of "grave breaches". That provisions of these "grave breaches" may be employed directly as penal norms is clear from the position in the United States where, unlike that in the United Kingdom, no additional penal provisions have been created in municipal law, with the result that this area of the law has been left as laid down in the treaties.

(*c*) *Crimes against humanity*

An important part of the law applied in Nuremberg and Tokyo in respect of crimes against humanity has found its way into general international law. Reference must be made here to the Genocide Convention of December 9, 1948 which has extended liability to punishment for acts committed in peace-time. The Genocide Convention defines genocide as a "crime under international law", outlines those acts punishable as genocide and imposes an obligation on States to punish offenders. Although provision is made for application of the territorial principle where State jurisdiction is exercised, the crime of genocide is nonetheless assured in its character as a genuine crime against international law in that the jurisdiction of an international penal tribunal is also contemplated. The International Convention on the Suppression and Punishment of the Crime of Apartheid of November 30, 1973 displays the same basic structure as the Genocide Convention. The various acts punishable as the crime of apartheid are outlined in Art. II. In addition to provision for State jurisdiction, under which municipal courts may proceed according to the principle of universal jurisdiction, Art. V of the Convention also makes provision for the jurisdiction of an international penal tribunal. However, with only twenty ratifications the Convention lacks the broad international support necessary for acts of apartheid – in so far as they do not simultaneously constitute genocide – to be considered as crimes against international law.

(*d*) *Piracy*

Customary international law has long recognized → piracy on the high seas as a crime against international law which may be prosecuted and punished by any State on the basis of universal jurisdiction. Acts of piracy committed by the crew or the passengers of a private ship or → aircraft against another ship or aircraft are dealt with in Arts. 15 to 22 of the Convention on the High Seas of April 29, 1958 (→ Law of the Sea). Acts constituting piracy are outlined in Art. 15, and punishment of offenders takes place in accordance with Art. 19 and on the basis of universal jurisdiction. Corresponding provisions are to be found in Arts. 101 and 105 of the Convention on the Law of the Sea of December 10, 1982 (→ Conferences on the Law of the Sea).

4. *International Crimes in the Broad Sense*

If international crimes are understood in a wider sense, i.e. so that the conception of an international crime is related to a legal interest of international legal significance, then the range of international treaties with penal provisions or provisions of a quasi-penal nature is very extensive and difficult to delimit.

The two draft Statutes prepared by the International Law Association (see section 1 *supra*) not only enumerate the above-mentioned crimes against international law as international crimes but also include the following offences: international → terrorism, certain offences committed on board aircraft and certain unlawful acts against air traffic security (→ Civil Aviation, Unlawful Interference with), slave-trading (→ Slavery), trading in women and children (→ Traffic in Persons), narcotic offences (→ Drug Control, International), excessive fishing (→ Fisheries, International Regulation), pollution of the seas with oil and other pollutants (→ International Watercourses Pollution), damaging submarine cables (→ Cables, Submarine), offences against persons protected by international law, serious apartheid offences, international hostage-taking (→ Hostages) and unlawful forwarding of explosives through the post.

In Internationales Strafrecht (p. 609, footnote 16) Oehler goes still further in his list of international crimes: He adds international trading in obscene publications, violating duties imposed for the protection of cultural property during the course of armed conflict (→ Cultural Property, Protection in Armed Conflict) and prohibited radio transmissions from outside sovereign territory (→ Pirate Broadcasting).

The Draft International Criminal Code prepared by Bassiouni and others also includes: aggression, unlawful use of weapons (→ Weapons, Prohibited), crimes against humanity, → torture, unlawful medical experimentation (as a special instance of a war crime), theft of national and archaeological treasures (→ Cultural Property) and bribery of foreign public officials. Prohibited radio transmissions from outside sovereign territory are not, however, included.

H.-H. JESCHECK, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht, Eine Studie zu den Nürnberger Prozessen (1952).

A. QUINTANO RIPOLLÉS, Tratado de Derecho Penal Internacional y Internacional Penal, 2 vols. (1955–1957).

G. DAHM, Zur Problematik des Völkerstrafrechts (1956).

S. GLASER, Infraction internationale (1957).

V. LIEBSCHER, Die Grundzüge eines Völkerstrafrechtes in der österreichischen Rechtsordnung, Juristische Blätter, Vol. 81 (1959) 385–396.

I. VON MÜNCH, Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft (1963).

G.O.W. MUELLER and E.M. WISE, International Criminal Law (1965).

S. GLASER, Droit international pénal conventionnel, Vol. 1 (1971) Vol. 2 (1978).

M.C. BASSIOUNI and V.P. NANDA, A Treatise on International Criminal Law, Vol. 1, Crimes and Punishment (1973).

M.C. BASSIOUNI, An Appraisal of the Growth and Developing Trends of International Criminal Law, Revue internationale de droit pénal, Vol. 45 (1974) 405–433.

G. GREBING, La création d'une Cour pénale internationale: Bilan et perspectives, Revue internationale de droit pénal, Vol. 45 (1974) 435–461.

M.C. BASSIOUNI, International Terrorism and Political Crimes (1975).

Y. DINSTEIN, International Criminal Law, Israel Yearbook of Human Rights, Vol. 5 (1975) 55–87.

J. LOMBOIS, Droit pénal international (2nd ed. 1979).

M.C. BASSIOUNI, International Criminal Law, A Draft International Criminal Code (1980).

B. FERENCZ, An International Criminal Court, Vol. 2, The Beginning of Wisdom (1980).

B. FERENCZ, The Draft Code of Offences Against the Peace and Security of Mankind, AJIL, Vol. 75 (1981) 674–679.

H.-H. JESCHECK, Development, Present State and Future Prospects of International Criminal Law, Revue internationale de droit pénal, Vol. 52 (1981) 337–363.
D. OEHLER, Perspectives on the Contents of the Special Part of the Draft International Criminal Code, Revue internationale de droit pénal, Vol. 52 (1981) 407–426.
B. FERENCZ, The Future of Human Rights in International Jurisprudence, Hofstra Law Review, Vol. 10 (1982) 379–400.
M.C. BASSIOUNI, International Crimes, in: Kadish (ed.), Encyclopedia of Crime and Justice, Vol. 3 (1983) 901–910.
B. FERENCZ, International Crimes against the Peace, in: Kadish (ed.), Encyclopedia of Crime and Justice, Vol. 3 (1983) 895–901.
D. OEHLER, Angriffshandlungen und andere internationale Delikte als Tatbestände eines besonderen Teils des internationalen Strafrechts, Festschrift für Ulrich Klug (1983) 293–301.
D. OEHLER, Internationales Strafrecht (2nd ed. 1983).

HANS-HEINRICH JESCHECK

INTERNATIONAL ECONOMIC ORDER

1. Notion

The international exchange of goods, services and capital requires an order that permits private and public economic actors to form reasonably correct expectations regarding future economic transactions and government interventions in the economy. "Spontaneous orders" grow out of practices without an initial overall design. The international monetary system of the gold standard before 1914, for instance, rested upon autonomous national regulations in the principal trading nations and – through free convertibility of currencies into gold and freedom of payments and capital transfers – provided for stable exchange rates and balance of payments adjustments. "Directed orders" are deliberately created by agreements, such as the agreements establishing the → International Monetary Fund (IMF) and the → International Bank for Reconstruction and Development (IBRD) of 1944 (→ Bretton Woods Conference), and the → General Agreement on Tariffs and Trade (GATT) of 1947. The distinction between "spontaneous" and "directed" economic orders is blurred due to the fact that even carefully negotiated multilateral treaty systems, like the IMF and the GATT, often evolve by pragmatic rule adaptations in response to changing circumstances and rely on spontaneous market coordination between autonomous specialized activities.

In each economy, regular interaction of individuals and organizations engenders legal or extra-legal principles and rules with three regulatory functions: to constitute and delimit autonomy, to coordinate autonomous specialized activities in a way which harmonizes private and social advantage, and to promote continuity and "relative stability". The rules may serve several functions at the same time. Property rights, and the markets arising from transactions in such rights, not only establish and delimit freedoms but, by assigning potential profits and the risks of loss, also permit and promote decentralized adjustment and coordination which, in a world of continuous change, is a condition of the overall "dynamic stability" of the international economy.

Attempts to direct the international economy deliberately may be made through long-term principles, rules and institutions ("framework policy") or short-term flexible steering instruments and discretionary decisions aimed at influencing prices and quantitative developments ("process policy"). They may be undertaken by private and public actors and may make use of a variety of legal and extra-legal instruments. These include → private international law, such as the old *lex mercatoria* within the Hanseatic League of cities in the 13th century, or the modern law merchant of Eurocurrency transactions; public national law and governmental measures, whose application to transnational economic activities may give rise to "conflicts of law" and "countervailing measures" by adversely affected States which make necessary rules on the limits of extraterritorial jurisdiction (→ Comity; → Extraterritorial Effects of Administrative, Judicial and Legislative Acts); international agreements, institutions or informal arrangements aimed at reconciling conflicting national interests and at enabling governments to pursue their economic and other self-interests in an interdependent world economy.

The "international economic order" (IEO) can thus be viewed as a three-tiered regulatory structure for the steering of international trade in goods and services, international movements of production factors (labour, "capital", transfer of

technology) and the exchange of national currencies. The chief economic policy instruments used for regulating these various international economic transactions may be subdivided into price mechanism devices (e.g. tariffs, import deposits, internal taxes, subsidies, multiple exchange rates, restrictive business practices) and direct controls (e.g. quantitative restrictions, prohibitions, directives). An important regulatory problem arises from the fact that the various policy instruments are often mutually interchangeable: The GATT, for instance, explicitly prescribes that "contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund" (Art. XV: 4); since international tariff concessions may be impaired by national non-tariff barriers or private restrictive business practices, the GATT also sets out detailed rules on "nullification or impairment" of benefits accruing under the GATT (Art. XXIII). Another regulatory problem stems from the fact that governments may use the various policy instruments not only for maximizing economic efficiency and thereby the wealth of their nationals but also for non-economic objectives such as income redistribution or national security. The extensive national regulation of international trade in goods and services, foreign direct or portfolio investments, labour movements and international monetary transactions is giving rise to an ever increasing number of international agreements, institutions and → codes of conduct aimed at liberalizing and coordinating governmental and private interventions in the economy. This public international economic law entails far-reaching changes on the level of national laws (e.g. increase in executive powers, decrease in parliamentary control over foreign trade policy) and serves also an important "domestic regulatory function" in compelling governments to use efficient regulatory instruments in their national self-interest (e.g. GATT, Arts. I to III, XI: use of non-discriminatory tariffs instead of discriminatory non-tariff trade barriers).

The term IEO may be used as a factual concept referring to the reality and interacting elements of the international economy, such as actual patterns of production, consumption and distribution. As a legal concept, the term IEO relates to the legal principles, rules and institutions which shape the factual IEO and which, by promoting legal security and reducing international transactions costs, contribute to an efficient allocation of resources. Since the factual IEO and its legal framework are never perfect, the term IEO is also used to denote ideal orders or theories of a satisfactorily functioning international economy, that may permit improvements in the factual and legal IEO so that it forms a coherent system capable of achieving agreed objectives in an orderly fashion.

2. *Legal Evolution*

Many rules and institutions of the IEO emerged in an evolutionary way. Private property became recognized before it was regulated by legislation, and contracts were concluded and enforced prior to any systematic regulation of contract law. Already in classical antiquity, the recognition of private property, freedom of contract and → *pacta sunt servanda* allowed goods to be traded and led to the emergence of an international exchange economy and of an essentially individualist private law. The exchange economy made possible increased specialization, efficiency, economic wealth and population growth – particularly in those parts of the world where, as in the Roman Empire and many sovereign European States since the end of the Middle Ages, economic freedoms and property rights, contract law, competition and trade were protected by relatively developed and continuously developing legal systems. The division of labour and decentralized economic decisions were coordinated by market prices resulting from free interplay of supply and demand. Individual profit and utility maximization ensured that "comparative advantages" would be exploited – all this long before the importance of these "economic laws" was discovered by economists.

International economic law likewise evolved spontaneously from decentralized law-creating processes in which the fittest norms survived (→ Economic Law, International). Its historical development may be subdivided into three stages. The first was characterized by the evolution of private international commercial law up to the period of the medieval law merchant. Already the ancient Greek and Roman trade had given rise to particular commercial usages and customs (*ubi*

commercium, *ibi jus*), and the Roman *jus gentium* was applicable also to foreigners and sometimes conceived of as an expression of *naturalis ratio* common to all people. The mercantile customs and trading institutions of the Middle Ages – such as the fair, the rise of banking, and joint-stock and regulated companies – contributed to the emergence of a uniform law merchant in Europe which was not only a *jus mercatorum* but often became customary law approved by governmental authorities and administered by special commercial courts. This old *lex mercatoria* was characterized by its emphasis on freedom of contract, freedom of alienability of movable property, abrogation of legal technicalities, and decision of cases *ex aequo et bono*. It evolved rules and concepts, some remaining of great importance to the present day (e.g. the bill of exchange, the principle of assignability and negotiability, the charterparty and the bill of lading), which often markedly differed from those of Roman law or of the ordinary local laws (→ Bills of Exchange and Cheques, Uniform Laws).

The second stage in the legal evolution of the IEO began with the development of public international economic law prompted by the coexistence and foreign trade of the newly emerging sovereign States in Europe since the end of the Middle Ages. Political nationalism and economic mercantilism led to the incorporation of the law merchant into national codifications of law. The State's prerogative over the regulation of money and of foreign trade were considered essential elements of → sovereignty. International commerce became subjected to governmental trade regulations such as customs duties, quantitative restrictions, State trading, shipping monopolies and preferential arrangements for trade with overseas colonies. The legal insecurity, economic costs and political frictions caused by mercantilist foreign trade interventions gave rise to the conclusion of bilateral → commercial treaties aimed at coordinating and liberalizing the respective national trade regulations on a reciprocal basis (→ Reciprocity).

The increasing use of → most-favoured-nation clauses contributed to the gradual coming into being of a more "rule-oriented" multilateral trading system. The numerous bilateral trade agreements concluded since the 1860 Cobden-Chevalier treaty of commerce between England and France were interlinked through unconditional most-favoured-nation clauses. They also often provided for "national treatment", "freedom of commerce" between the territories of the contracting parties, reciprocal protection of personal and property rights of their nationals, and the admission of → consuls who assisted in promoting international trade (→ Aliens; → Aliens, Property; → Treaties of Friendship, Commerce and Navigation; → Consular Treaties). With multilateralized trade liberalization, freedom of contract and of payments at stable exchange rates based on the gold standard, freedom of international → capital movements, protection of property rights and other widely accepted rules of international good behaviour, this non-discriminatory long-term "commercial treaty system" operated economically like a multilateral trading order. Hence it became more rational to negotiate further-reaching multilateral liberalization and integration measures, as well as to supplement bilateral trade agreements by multilateral agreements in the fields of international trade (e.g. the international sugar conventions of 1864 and 1902), monetary relations (e.g. the Latin Monetary Union of 1865), international transport (e.g. the Rhine Navigation Acts of 1831 and 1868; → Rhine) and → industrial property rights (e.g. the 1883 Paris Convention on the Protection of Industrial Property).

The outbreak of World War I in 1914 marked the end of the classical liberal era and, in many States, the coming into being of modern national public economic law, large governmental bureaucracies for the administration of economic policy and an ever increasing "politicization" of the economy. The centre of economic power shifted from England to the United States. However, notwithstanding President Wilson's pledge for "removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all nations" (point 3 of → Wilson's Fourteen Points), the United States was not prepared to follow the British tradition of free trade and to engage in multilateral trade → negotiations; this obstructed repayment of the international → loans in the only way they could be repaid (→ State Debts; cf. → Dawes Plan; → Young Plan). The → League

of Nations Covenant provided only for a general commitment to the objectives of freedom of communications and of transit as well as of equitable treatment of the commerce of all League members (Art. 23(e)). The five major international trade and monetary conferences convened during the 1920s produced only minor results and failed to restore the pre-war liberal trading order.

The Wall Street stock exchange crash of 1929 and the ensuing Great Depression led to the abandonment of the gold standard, a decline in world trade by more than 50 per cent between 1929 and 1939, widespread "beggar-thy-neighbour" policies characterized by protectionist tariff increases (Hawley-Smoot Tariff Act of 1930 in the United States), pervasive trade restrictions, exchange controls, competitive devaluations and widespread nationalization of foreign property (→ Expropriation and Nationalization). The United States reciprocal Trade Agreements Act of 1934, which led to the conclusion of thirty-two trade agreements with unconditional most-favoured-nation clauses between 1935 and 1945, aimed at re-establishing multilateral trade but could not reverse the widespread resort to discriminatory bilateral trade and payments agreements. The 1936 Tripartite Monetary Agreement between the United States, the United Kingdom and France was again a step in the right direction, but it was already overshadowed by the threat of war.

The third stage in the legal evolution of the IEO began with the → Atlantic Charter of 1941. It is characterized by the determination to avoid a recurrence of the experience of the 1930s through use of deliberate multilateral regulation and liberalization of international monetary, financial and trade relations in the framework of mutually supporting multilateral agreements and universal, intercontinental and regional economic organizations. The → United Nations Charter proceeds from the "principle of the sovereign equality of all its Members" (Art. 2(1)), but sets out rules and procedures for "international economic and social cooperation" (Chap. IX) based on general principles of cooperation (Art. 56) and "good neighbourliness" (Art. 74). Such cooperation is to be coordinated by the → United Nations General Assembly (Art. 60), the → United Nations Economic and Social Council (Chap. X) and "various specialized agencies established by intergovernmental agreement" (Arts. 57 and 63).

The 1944 Agreement establishing the IMF provides for stable exchange rates reflecting countries' competitiveness in international trade (Art. IV), avoidance of exchange restrictions on current payments for international trade in goods and services (Art. VIII), financial assistance to overcome temporary balance of payments difficulties (Art. V), national freedom to control international capital transfers (Art. VI) and a great deal of autonomy for national economic policies in pursuit of agreed "primary objectives of economic policy" (Art. I) such as full employment, economic growth and price stability. The IBRD was created for the purpose of supplementing private lending and capital flows by public long-term loans so as to meet the financing needs of the war-torn and underdeveloped countries.

The → Havana Charter for an International Trade Organization having failed to attract the necessary ratifications to bring it into force, the GATT has remained the only multilateral agreement setting out general rules and procedures for non-discriminatory trade liberalization between its 122 participating States (as of 1984). The mutually supporting monetary, financial and trade rules are supplemented by a large number of international agreements regulating other fields of economic cooperation such as international commodity trade, restrictive business practices, → free trade areas, → customs unions and other international → economic organizations and groups, → foreign investments, international → taxation and avoidance of → double taxation, → capital movements, → loans, → economic and technical aid and international financial cooperation (→ Antitrust Law, International; (→ Commodities, International Regulation of Production and Trade; → Financial Institutions, Inter-Governmental).

3. Regulatory Tasks

Each economy is at the same time a system of production, coordination and distribution. It serves the basic purpose of maximizing the satisfaction of human demand for goods and services, including politically determined "public goods" such as environmental protection or income redistribution, through continuous reallocation of

capital and labour toward uses and employments promising a higher social yield. The basic economic tasks of the IEO may be subdivided accordingly into: (a) promotion of an efficient allocation of the world's scarce resources of manpower, capital and natural resources so as to maximize the satisfaction of consumer preferences by minimizing costs; (b) coordination of decentralized economic activities without excessive price fluctuations and business cycles that may adversely affect the allocative efficiency of market prices; and (c) an equitable distribution of benefits and costs. The two value judgments underlying these three broad objectives – the need for economic efficiency and distributive equity – have been universally recognized in numerous legal instruments and UN resolutions. Given the decentralized legal structure of the IEO with its more than 170 sovereign States and millions of private economic actors, the central regulatory task consists in establishing incentives and disincentives to guide the self-interested conduct of individuals, enterprises and States in a way conducive to the achievement of these economic objectives.

(*a*) *Efficient allocation of resources*

According to economic theory, undistorted competition is the most efficient allocator of society's resources unless there are "market imperfections" (such as monopolies and "external effects") or a demand for "public goods" that cannot be produced on the open market. No country is rich enough to disregard economic efficiency or renounce the economic gains from liberal trade (→ World Trade, Principles). Whereas sovereign States have different perceptions as to their internal national economic regulations and policies, the external policy objective of expansion and gradual liberalization of international trade and payments has become universally recognized since 1944 (IMF Agreement, Art. I; GATT, Preamble). Its pursuit requires two sets of trade and monetary rules that must be carefully dovetailed, since trade and monetary restrictions are largely interchangeable (cf. GATT, Art. XV). The international trade and monetary rules must be non-discriminatory so as to prevent the allocation of resources pursuant to comparative advantages from being distorted for the benefit of less productive interest groups (GATT, Arts. I, III, XIII and XVII). From an economic point of view, an optimal exploitation of the gains from international division of labour would require free movement of goods, services, persons, freedom of payments and capital transfers, as well as guarantees of other "constitutive legal principles" of market competition such as antitrust rules, private property, freedom of contract, freedom of profession, personal liability, non-discrimination and monetary stability.

However, given the existence of more than 170 States with different national economic and legal systems, the international trade and monetary rules of the GATT and IMF Agreement preserve a large degree of national autonomy to maintain non-discriminatory tariff protection, to introduce safeguard measures for a variety of economic and political reasons, to enter into regional arrangements, to restrict capital transactions and to intervene in the domestic economy by means of non-discriminatory measures including State-trading and nationalization of foreign property. The major regulatory functions of the GATT and IMF rules are to enable each contracting party to pursue its national economic self-interest in an interdependent world economy by promoting multilateral trade liberalization, non-discriminatory international competition, legal security, transparency and the → peaceful settlement of disputes. By proscribing economically inefficient and harmful economic policy instruments such as discriminatory non-tariff barriers, the GATT rules legally define the national economic interest in the use of "optimal forms" of economic intervention and help protect governments not only from foreign abuses but also from the "rent-seeking" protectionist pressures of domestic interest groups.

(*b*) *Coordination and stability*

If economic order is equated with unobstructed adjustment to continuously changing economic conditions, the IEO cannot efficiently function unless it is based on essentially liberal principles. For only where the price system quickly transmits information about incipient scarcities or surpluses anywhere in the world and the economic actors dispose of economic freedoms and property rights enabling them to engage in a continuous process of innovation and adjustment, can the world eco-

nomy remain in a state of "dynamic stability". Liberal trade and currency convertibility connect national price systems into an international price system which is an information-processing mechanism and a coordination system indispensable for the economic efficiency and stability of the IEO. The history of "government failure", for instance in the steering of international agricultural markets, confirms that governmental bureaucracies and international economic coordination through political negotiations cannot process and disseminate the economic information from the millions of international economic actors as efficiently as decentralized markets continuously do.

While market competition cannot function without legal guarantees of economic freedoms, property rights and contract law as legal prerequisites of voluntary economic exchange, the existence of "market failures" and "government failures" also necessitates legal rules preventing the abuse of these rights and protecting competition against both private and governmental restraints. With regard to "framework" and "process" policies aimed at correcting market or government imperfections, it is useful to separate issues related to optimal government policies for maximizing national welfare from those issues that are concerned with the efficiency of the IEO as a whole. From the national perspective, there may be many economic and political reasons for a government to intervene in its economy. Economic theory teaches, however, that the corrective policies can almost always be carried out more efficiently and in a less costly way by internal corrective measures such as domestic taxes or subsidies rather than by interference with international trade, which reduces the potential national income and introduces additional market distortions.

From the perspective of the IEO, there is increasing awareness that neither macroeconomic theory nor "intergovernmental management without economic theory" offer satisfactory solutions for macroeconomic stabilization policies, and that microeconomic market coordination remains of decisive importance also for macroeconomic regulatory tasks. The system of floating rates of exchange, which emerged unplanned out of the breakdown in 1973 of the Bretton Woods system of agreed fixed rates of exchange, reflects the conviction that the millions of private and public participants in international money and capital markets are the best judges of their own interests and that, also in the monetary field, market prices, i.e. floating exchange rates and interest rates, can coordinate and "stabilize" the millions of decentralized decisions more efficiently than political negotiations among government bureaucracies. At the same time, the IMF continues to assist member countries in overcoming temporary balance of payments imbalances without resort to restrictions detrimental to their national welfare. The "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", which was recommended by the UN General Assembly on December 5, 1980, also reflects a focus on the regulatory task of "making the market work". The various international arrangements aimed at stabilizing commodity prices by means of export quotas (e.g. for cocoa, coffee, sugar and tin), buffer stocks (e.g. for cocoa, natural rubber, sugar and tin), multilateral contract systems (e.g. for wheat), or by the 1980 Agreement Establishing the Common Fund for Commodities, have met with only limited success up to now (→ Commodities, Common Fund).

(c) *Equitable distribution*

"Equitable commodity prices" and a "new international economic order" have become universally recognized objectives of international economic policy. Yet views about the appropriate policy instruments for achieving these objectives continue to differ. They are influenced by value judgments on "social justice" which, in the economic field, necessarily depend on conceptions of the equity of a market-oriented distribution of benefits (which rewards not only superior skills and comparative advantages but also the existing distribution of capital) and of governments' capacity to steer the world economy deliberately. Moreover, "social justice" is an attribute of relations between individuals but lacks a precise meaning in relations among governments. From an economic point of view, direct financial transfers are a more efficient instrument of income redistribution than interference with market prices or with non-discriminatory competition

rules. From a legal perspective, "conduct-oriented" rules – for instance on preferential and non-reciprocal treatment of → developing States (→ Lomé Conventions) – have proved more effective than "result-oriented" rules (e.g. GATT, Art. XXXVI(4) on "equitable commodity prices") or programmes such as the → United Nations Industrial Development Organization's plan for increasing the developing countries' share in world industrial production to 25 per cent by the year 2000. Rule-oriented market policies may also enable more economic growth and equally distributed welfare than many redistributive governmental policies in the name of "social justice" which inhibit economic growth and often entail arbitrary distributive effects. Modern international economic law is characterized by increasing recognition of legal principles of substantive equality for ensuring equal conditions of competition as well as of legal principles of solidarity aimed at preventing national measures with harmful extraterritorial effects and at assisting States in overcoming economic difficulties.

4. Evaluation

An efficient IEO and liberal trade are not gifts of nature but have to be created and continuously secured by coherent sets of legal rules and procedures. In an interdependent world economy composed of more than 170 sovereign States, a system of general international rules is the only device to make autonomous economic policies of States mutually compatible and to preserve national "economic sovereignty" in a normative sense (defined as a society's capacity to take collective decisions that have a reasonable chance of realizing their objectives). The international law principle of "sovereign equality" of States guarantees a decentralized legal structure of the IEO as well as economic and "legal competition" among the numerous public and private international economic actors (→ States, Sovereign Equality). Competition among national economic and legal policies promotes diversified processes of discovery, learning and adjustment. On the level of international law, the strengthening of the general GATT rules by additional multilateral agreements between interested contracting parties has also proven beneficial to third GATT contracting parties and has attracted an increasing number of accessions to the 1979 Tokyo Round Agreements on non-tariff trade barriers. The emergence of dissenting views on general legal principles such as the international → minimum standard for the protection of foreign property may prompt "legal competition" as well on the level of national public and private law (e.g. a reorientation of foreign private investment to host countries offering more legal security). This may also foster decentralized international law-creation processes, such as the conclusion of more than 200 bilateral investment protection agreements since 1945, which could also strengthen or redefine the general rules.

The central place of the legal principle of "sovereign equality of States", as well as of its economic implementation through the contractual principle of unconditional most-favoured-nation treatment, continues therefore to be justified. However, since the satisfactory working of the IEO depends on the mutual consistency of the rules composing it, private and public national and international economic law have to be mutually adjusted so that they complement and support each other, thereby increasing the efficiency and resiliency of the stratified legal structures of the world economy in accordance with the "plywood principle" (Tumlir). The legal evolution of the IEO shows, on the one hand, a surprising continuity: The classical principles and standards of international treaty practice – such as most-favoured-nation treatment, national treatment, preferential treatment, fair treatment, reciprocity and the minimum standard – continue to form part of many international economic treaties and organizations. Owing to their applicability to States with different economic systems, they reconcile the need for international cooperation with the diversity of national economic and legal systems. On the other hand, the various levels of private and public national and international economic law are slowly being integrated into a comprehensive "international economic law" with mutually interacting and complementary structures and developments, such as the distinct tendency in both national and international economic law to supplement the classical principles of freedom and formal equality by new principles of substantive equality and solidarity.

States are increasingly aware that a well func-

tioning IEO has become a prerequisite for the orderly functioning of their national economies and that many national economic policy objectives can no longer be achieved without participation in international economic agreements and organizations aimed at correcting "market imperfections" and at coordinating the external effects of national economic interventions. The quasi-universal membership in the IMF and the participation of more than 120 States in the GATT reflect a world-wide recognition that observance of liberal international trade rules is in the national economic self-interest because it permits the attainment of a higher real income not only in the world as a whole but also in each participating country.

The present legal framework of the IEO presents serious regulatory gaps, in particular as regards the lack of effective competition rules, insufficient rules for → transnational enterprises and deficiencies in the redistributive mechanisms for the benefit of poor people. The resort to trade protectionism in violation of GATT law and to discriminatory administrative "management" of prices, quantities and market shares in international trade with agricultural, textile and other products shows also an insufficient legal protection in national laws of the national economic self-interest in non-discriminatory liberal trade. Although States agree that trade protectionism reduces the potential national income and is essentially only a device for redistributing income between different sectors of the national economy in an often arbitrary way, governments do not pursue economic policies maximizing the national economic welfare of their constituents but give way to protectionist pressures from "rent-seeking" domestic interest groups by granting "protection rents" in exchange for political support. International economic rules under which governments commit themselves to maintaining freedom and non-discrimination in their citizens' international economic transactions offer additional legal protection for the proper exercise of the often excessively broad executive powers in the economic field as well as for the exercise of individual freedoms and property rights. The law of the → European Economic Community, the increasing number of international codes of conduct and the trend in national trade and investment legislation to permit individuals to invoke or even enforce international rules against governments (e.g. anti-dumping and countervailing duty legislation; section 301 of the United States Trade Act of 1974; EC Council Regulation No. 2641/84 of 1984 on the strengthening of the common commercial policy) offer promising examples for integrating the various levels of international economic law by securing a firmer grounding of liberal international rules in national law, and thereby establishing a "second line of constitutional entrenchment" (Tumlir) for the protection of freedoms and property rights of individuals.

W. RÖPKE, Economic Order and International Law, RdC, Vol. 86 (1954) 206–270.

G. ERLER, Grundprobleme des internationalen Wirtschaftsrechts (1956).

G. SCHWARZENBERGER, The Principles and Standards of International Economic Law, RdC, Vol. 117 (1966) 1–98.

G. SCHWARZENBERGER, Economic World Order? (1970).

R.B. LILLICH et al., A Symposium on the New International Economic Order, Virginia Journal of International Law, Vol. 16 (1976) 233–353.

J.H. JACKSON, Legal Problems of International Economic Relations (1977).

J. TUMLIR, Can the International Economic Order be Saved?, in: The World Economy, Vol. 1 (1977) 3–20.

H. GRÖNER and A. SCHÜLLER (eds.), Internationale Wirtschaftsordnung (1978).

W. ROESSLER, Law, de facto Agreements and Declarations of Principle in International Economic Relations, GYIL (1978) 27–59.

M. BEDJAOUI, Pour un Nouvel Ordre Economique International, UNESCO (1979).

D. CARREAU, T. FLORY and P. JUILLARD, Droit international économique (2nd ed. 1980).

J. GOLD, The Rule of Law in the International Monetary Fund (1980).

J. TUMLIR, International Economic Order: Rules, Cooperation and Sovereignty, in: P. Oppenheimer (ed.), Issues in International Economics (1980) 1–15.

C.M. SCHMITTHOFF, Commercial Law in a Changing Economic Climate (2nd ed. 1981).

J. TUMLIR, Evolution of the Concept of International Economic Order 1914–1980, in: A. Cairncross (ed.), Changing Perceptions of Economic Policy (1981) 152–187.

P. VERLOREN VAN THEMAAT, The Changing Structure of International Economic Law (1981).

Legal Aspects of a New International Economic Order, Report of the International Law Association, Vol. 60 (1982) 183–238.

W. FIKENTSCHER, Wirtschaftsrecht, Vol. I, Weltwirtschaftsrecht und Europäisches Wirtschaftsrecht (1983).

O. LONG, La place du droit et ses limites dans le système commercial multilatéral du GATT, RdC, Vol. 182 (1983) 9–142.

E.-U. PETERSMANN, International Economic Theory and International Economic Law: On the Need of a Legal Theory of International Economic Order, in: McDonald and Johnston (eds.), The Structure and Process of International Law (1983) 227–261.

J. TUMLIR, Strong and Weak Elements in the Concept of European Integration, in: F. Machlup (ed.), Reflections on a Troubled World Economy (1983) 29–55.

J. GOLD, Legal and Institutional Aspects of the International Monetary System, Vol. 2 (1984).

J.H. JACKSON, J.V. LOUIS and M. MATSUSHITA, Implementing the Tokyo Round, National Constitutions and International Economic Rules (1984).

E.-U. PETERSMANN, European Communities and GATT – On the Economic and Legal Functions of GATT Rules, in: Legal Issues of European Integration, Vol. X (1984) 37–48.

M. HILF, F.G. JACOBS and E.-U. PETERSMANN (eds.), GATT and European Communities (1985).

ERNST-U. PETERSMANN

INVESTMENT CODES

1. Concepts and Definitions: (a) Economic law and investment codes distinguished. (b) Regulation versus facilitation. (c) National versus multinational or international codes. (d) The substantive content of investment codes. – 2. History of Investment Codes. – 3. Substantive Detail: (a) General and hortatory provisions. (b) Substantive facilitation provisions. (c) Regulatory provisions: (i) Domestication or indigenization of ownership. (ii) Use of local resources. (iii) Local employment and training requirements. (iv) Mandatory transfer of technology and industrial property rights. (d) Industrialized country investment control codes. – 4. Current Problems: (a) National treatment. (b) Stabilization and renegotiation. (c) Protection against expropriation or excessive regulation. (d) Dispute resolution.

1. Concepts and Definitions

The growth of private → foreign investments during the second half of the 20th century has strained the capacity of national legal systems to absorb them. This stress is compounded when the private investor's home country and the investment host country are at widely disparate levels of economic development. The problems are even greater when, as is frequently the case, the investor is a transnational corporation that is capable of minimizing legal controls by either country, because of its multinational mobility (→ Transnational Enterprises).

At the same time, private investors often claim that, at least in the case of developing countries, the active invitation to invest, especially through fiscal inducements, is a necessary condition of the investment decision. While such claims are in part simply an element of the argument that a well-ordered legal system is a necessary condition of private foreign investment, they are also a demand for more favourable treatment than even such a legal system might otherwise provide.

In the following analysis, the concept of foreign investment is limited to direct, rather than portfolio investment, but includes the entire range of such investment from primary mining and agricultural sectors through manufacturing and commerce to services.

(a) Economic law and investment codes distinguished

A well-ordered set of laws governing private enterprise is a necessary condition for the development of a flourishing entrepreneurial sector. Chief among these laws are a commercial code, a company code, industrial property codes (establishing patent, trademark and copyright régimes), a tax code and the attendant codes of civil procedure and judicial administration necessary for resolving disputes. Together, these economic law codes can function as a legal régime sufficient to facilitate as well as to regulate investment. Countries that pursue a liberal economic policy, and that because of their size, wealth and markets automatically attract foreign as well as domestic private investment, generally provide no more than such a framework of legislation: The United States is an important example of that approach. While the foreign nature of some investment may require special legislation – such as tax provisions preventing → double taxation, or immigration laws governing work permits for foreign nationals – it is possible for many countries to absorb foreign investment using only their general legal superstructure.

This situation must be contrasted with that of a set of laws dealing specifically and solely with foreign direct investment. Such a code may be necessary because the host country neither has nor needs a well-ordered economic law régime for

its own subjects; a country, in short, in which the foreign investment sector, at least for the time being, is the modern sector *par excellence*. Alternatively, such a code may be necessary because the host country desires to facilitate or to regulate foreign private investment in ways not applicable to its own private sector. In the case of some countries or economic sectors, the former is the motivating factor: the maritime code of Liberia or Panama, the patent code of Sudan or the petroleum concession legislation of the Gambia are examples. More typical, however, at least in more recent times, is the coexistence of a specific investment code alongside functioning and generally applicable economic legislation.

An investment code need not be a separate and autonomous legal structure. It is possible, and not infrequent, to insert substantive provisions applicable only to foreign investment into general codes such as company laws or tax laws. Especially in the first stages of the development of substantive investment provisions this was a common practice.

(*b*) *Regulation versus facilitation*

The political posture of most countries shows a tendency to oscillate between fear of foreign private investment and the desire to attract it. At least in the case of countries of a size and wealth to make foreign private investment attractive, the fear of "alienation" of important economic sectors may be the only motivation for a foreign investment code, which in that case will be of a regulatory nature. In such a country, the oscillation is between neutrality and control. Other countries, especially resource-poor → developing States with small domestic markets, may require investment codes to attract foreign private investment. They would oscillate between control and facilitation. Even a country of that character can develop hostility towards a foreign private investment sector, especially if that sector serves as a pretext for modernization tendencies that unsettle prior political, social or cultural patterns.

This distinction between regulation and facilitation marks two types of investment codes, even if in practice no legal régime anywhere is wholly of either type. Nevertheless, it is possible to place a country like Canada, with its Foreign Investment Review Act, at one end of the spectrum, and one like Singapore, with its tax incentive legislation, at the other end. The distinction is most marked in the case of well-endowed and open but thinly populated societies like Canada and Australia. Developing countries, whether liberal, mercantilistic or socialist in their economic organization, tend to display elements of both types of code in their legislation.

Closely allied to the distinction between regulation and facilitation is a distinction between investment codes on the basis of the economic organization of the country. At one time it was possible to distinguish socialist foreign investment codes from others. Only in a very few cases, however, has the socialist nature of a country's economic organization been reflected in the absence of a legal superstructure for regulating foreign private investment, or in a blanket prohibition. The modern investment codes of Cuba, Romania or China may be marked by certain limitations on foreign investment, but no more than in at least some non-socialist countries. If anything in a country's economic organization can provide criteria for characterizing foreign investment codes, it might be rather the Myrdal "soft state" concept, as distinguished from a well-functioning State in the sense of public administrative and legal order.

(*c*) *National versus multinational or international codes*

In recent years a tendency has emerged towards creating uniform investment codes on a multinational basis. It is the result of efforts of developing countries to avoid "divide and rule" behaviour on the part of private investors, behaviour which has at times led to competition among host nations to provide the least restrictive or most facilitative legal régime as an inducement to investors. While a collective multinational "maximum" investment code among all or some developing countries is a possibility – and for a while was a reality in a few groupings such as the → Andean Common Market – the fear that such a "legal cartel" would not be honoured by some members has led to the effort to enlist the home countries in the development and more significantly in the enforcement of at least partial codes bearing on foreign private investment.

These are not → codes of conduct binding host

countries to a limited set of investment laws: rather, they are the codes of conduct – preeminently the draft Transfer of Technology and Restrictive Business Practices Codes – binding the foreign private investor in certain of its transacting capacities (→ Technology Transfer). By doing so they reduce the pressure on host countries to develop their own legal variations on those points, and in that way permit all host countries to maintain about the same level of regulatory and perhaps even of facilitative investment legislation.

Even more recently, another form of transnational code has developed: the bilateral investment treaty. Its main function is to set the framework for the encouragement and protection of foreign private investment in each party's territory. It is a door-opening approach, and to the extent that such a treaty includes substantive provisions of the type previously found in municipal investment codes, they are essentially facilitative provisions, with at most a reservation of national entry or operating regulations for specifically identified sensitive sectors.

(*d*) *The substantive content of investment codes*

The basic objectives of a country's investment code typically stem from its general economic policy and again can be assigned to basically facilitative or regulatory sets of objectives. As to the first set, a recent study by the United Nations Centre on Transnational Corporations has identified the following as the typical objectives: contribution of 'hard currency' risk capital; contribution of technology; access to production factors, especially equipment and supplies not freely available; provision of foreign entrepreneurial skills and development of local ones; and access to foreign markets.

Secondary objectives which are often used to distinguish between investment proposals include: absorption of labour supply; generation of foreign exchange earnings; improvement of the national industrial base; and regional development.

Larger goals, which may generate political support for foreign private investment, can also be indirectly relevant. The major aspirations are that foreign investment may be a catalyst for modernization and that growth fuelled by foreign investment may lead to a more equitable distribution of wealth. Typically, however, these are not the subject even of economic policy plans, let alone of specific investment codes.

2. *History of Investment Codes*

In the sense that foreign investment is subject to general commercial and economic legislation, "codes" bearing on such investment by definition have existed for almost two hundred years. The insertion of provisions specific to foreign investment in such statutes, however, seems to date from the Mexican Emergency Decree of 1944, enacted in reaction to the flood of foreign portfolio and direct-investment capital that was escaping from European countries as a result of World War II. It provided for preliminary approval by Mexican authorities, under a broad grant of discretion, before a company owned by a specified percentage of foreign investors could be organized: thus, it is also the first example of general legislation with regulatory rather than facilitative purposes.

The first autonomous, comprehensive investment code, purporting to cover all aspects of a foreign investor's relations with the host country, was that of Israel, enacted in 1950. It is also the first example of a basically facilitative investment régime, and it already displayed a particular concern with the fiscal incentives often thought essential to induce investment.

There was a rapid increase in investment codes during the following two decades, and by the mid-1970s a vast number of countries of various sizes and investment expectations had such a code in place. By the early 1980s this was true even of the socialist countries, with the exception of the Soviet Union and such idiosyncratic States as Albania and Burma. They often appear as families, with a Commonwealth type and a Francophone type clearly distinguishable. As of January 1984, over 60 countries had adopted some version of an autonomous foreign investment law.

3. *Substantive Detail*

(*a*) *General and hortatory provisions*

Many host country statutes provide a general, often qualified guarantee against arbitrary or uncompensated expropriation of property

(→ Expropriation and Nationalization). These are not couched as constraints against nationalization or other controls dictated by overriding public policy concerns and appropriately promulgated. Rather, they tend to be stated as assurances against arbitrary action not in compliance with the country's otherwise applicable constitutional or statutory norms.

A more interesting, because more specific, guarantee protects the right of remission of profits and capital. This guarantee also tends to be qualified by reference to otherwise overriding and generally applicable law, and thus becomes more a guarantee against arbitrary, selective action than a promise to refrain from adopting necessary exchange or capital controls in general.

Related to these is the concept, not found in general legislation so much as in specific project-related decrees or contracts (especially in long-term petroleum or hard mining projects), that the legal régime, and in particular the fiscal burden applicable to the investment at its commencement will not be changed to the detriment of the undertaking, while it is in progress. These stabilization or "freezing" clauses are almost by definition hostage to later legislative abrogation. It is the dispute resolution mechanism available to protest against such changes, not the original promise, that usually turns out to be critical.

(*b*) *Substantive facilitation provisions*

Most substantive facilitative provisions are of a fiscal nature. Thus the compilation of investment laws in the Anglophone and Francophone African, Caribbean and Pacific (ACP) countries which are parties to the second → Lomé Convention, together numbering 56 nations, displays a common preoccupation with fiscal relief and provides more or less substantial administrative procedures for the review of a proposed investment as a condition of the grant of various fiscal benefits.

A typical example is Law No. 1, 1967, of the Republic of Indonesia, which sets up a National Investment Coordination Board to review proposed investment by private foreign nationals, and which then provides the benefits of the fiscal relief provisions of the statute to approved enterprises. These provisions – as in most countries providing any fiscal incentives – include: a tax holiday (exemption from a business profits tax for a certain number of years, commencing either upon approval of the investment or upon commencement of production by a specified date); a high (accelerated) depreciation deduction on specified types of tangible investments, usually commencing upon expiration of the tax holiday since the deduction would be useless before then; a carry-forward provision allowing one period's losses to be deducted from a later period's profits, again to commence only upon expiration of the tax holiday; and exemption from customs duties on an agreed schedule of necessary raw materials, components or equipment needed in the approved production process, usually on a declining scale.

In some cases, temporary exemptions from local excise taxes, land taxes and fees, annual capital and stamp taxes and the like are also provided.

Related, but not technically fiscal, relief provisions include the furnishing of governmentally controlled supplies such as electricity or other utilities, freight services and related items. Guarantees of access to such items if locally scarce, though without an actual subsidy, are also not infrequent, and can in some circumstances qualify as a facilitative provision rather than as a simple assurance of national, non-discriminatory treatment.

Another common type of facilitative provision, particularly desirable in "soft state" developing countries (and for that very reason often unattainable despite the promise), is the availability of a special simplified or "one stop" administrative régime for the consideration and approval of a proposed foreign investment. Occasionally the placement of this agency under the wing of a powerful ministry (such as the central bank or the ministry of finance) may help to assure its practical functioning. This type of "caretaker administrative facility" can also be used to resolve operational problems of an already established foreign investment, such as labour relations, land disputes or tax and tariff collection issues – usually, however, subject to the same caveat.

(*c*) *Regulatory provisions*

Large developing countries and particularly newly industrializing ones tend to move towards investment codes which display more of a regula-

tory than a facilitative character. The subjects they treat in this area include the following.

(i) Domestication or indigenization of ownership

The best example of this control is the Nigerian Enterprises Promotion Decree promulgated by the Federal Military Government in 1977. This decree specifies three classes of enterprises, in which Nigerian citizens are in future to hold 100, 60 and 40 per cent ownership respectively. It also provides elaborate supplemental regulations for the transfer of share ownership by existing corporations to comply with these requirements, stringently defines company law concepts to prevent indirect avoidance of these requirements and sets up an elaborate bureaucratic apparatus to enforce and implement the legislation.

In some statutes the "reserved list" of investments is stated in sectoral or functional terms (e.g., financial services, public utilities, distribution channels, etc.); in others, as in Nigeria, it is stated by specific sectors or even industries.

Related to these concepts are more gradual disinvestment or "fade-out" provisions in some newer investment codes. Often these are tied, as conditions, to profit and capital remittance guarantees. They can call for sale to local governmental as well as private domestic investors, and may occur through individual or stock market transactions.

(ii) Use of local resources

An increasingly frequent and problematical "localization" condition is the requirement that a fixed or increasing proportion of factors going into the production of the foreign investor's plant be of local origin. The need for some control of this sort is apparent, if only to avoid the apparent investment becoming no more than a waystation for imports. The tariff mechanism may not be an adequate control because of the → General Agreement on Tariffs and Trade (1947) or bilateral constraints. The problem posed by such local supply requirements – Mexican and other Latin American rules in the auto assembly and capital goods sectors are well-known examples – lies in the possible unavailability of locally produced items at competitive prices and thus, indirectly, in the loss of some of the allocative efficiency which it was one of the functions of the investment to engender.

(iii) Local employment and training requirements

These are less problematical, provided an adequate supply of labour, especially skilled and managerial personnel, is available.

(iv) Mandatory transfer of technology and industrial property rights

These are relatively new developments, found particularly in the relatively powerful major Latin American States. They are not necessarily or exclusively a function of direct foreign investment but can attach to licencing transactions and even to some distributorship arrangements in import situations. Thus, a foreign manufacturer who has registered a trademark in consumer goods in the host country may be required to share title to the mark with its local joint venturer, licensee or distributor, and thus indirectly deliver the local goodwill to their control. International conventions such as the Paris Union Conventions may provide constraints against some exorbitant municipal legislation of this sort but not against all (→ Industrial Property, International Protection).

(d) Industrialized country investment control codes

Most foreign direct investment, however, occurs among industrialized countries rather than in developing ones. About 75 per cent of all foreign direct investment comes from and is placed in the countries of the → Organisation for Economic Co-operation and Development. In the United States alone, about two-thirds of all foreign direct investment stems from Western Europe. Nearly all of this transfer occurs within liberal legal régimes and is not subject to the described facilitation or regulation systems.

A few industrialized nations, however, even OECD members, have adopted substantial regulatory controls over new or existing foreign direct investment. These are countries which either fear the predominance of foreign control of major sectors, like Canada, or which, like France and Japan, generally follow at least some tenets of neomercantilism in their economic legislation. Over 50 per cent of private direct investment in Canada's manufacturing sectors is of foreign ori-

gin, and because of foreign dominance in petroleum, over 60 per cent of all direct investment was foreign until recently. Moreover, and understandably, approximately 80 per cent of all this foreign direct investment stems from the United States.

Under these circumstances, the strong localization tendency of Canada's Foreign Investment Review Act of 1973 is not surprising, and its administration is tempered only by occasional countervailing needs to stimulate the national economy through more private investment of various kinds. The Act is focused as much on foreign take overs of existing Canadian-owned (and even foreign-owned) enterprises as it is on new investment, since the former phenomenon is common in any industrialized economy. Even diversification by existing foreign-owned enterprises into unrelated fields is controlled.

Permission to invest is subject to the general requirement that the investment be of significant benefit to Canada. Relevant factors are the impact of the take over or new investment on economic activity generally, the extent of Canadian participation in the investment's ownership and management, the investment's effect on productivity, technological and product innovation, its competitive effects, and its compatibility with overall economic policies.

A decade of regulation has brought substantial relative declines in foreign ownership in various sectors, while in absolute terms foreign direct investment increased. The active repurchase of foreign holdings in the oil and hard minerals sector is a major cause, but some percentage decline occurred in every sector. Since a host of political and economic forces affect this kind of planned policy, substantial discretion in its implementation is essential. That in turn generates a sense of real or perceived arbitrariness, as well as substantial delays caused by the need to refer important individual applications to a political level for decision. As a result, a substantial loss of confidence in the legal system of the host country is possible. While this is a comparatively minor risk to a country like Canada, it can represent a significant side effect to such policies in the case of less organized bureaucracies.

The same problem arises in the case of generally mercantilist administrations which exercise significant control over wage and price policies, access to credit, governmental procurement, discretionary subsidization and the like. Administrations of this type, of which France and Japan are major industrialized examples, are not, however, the result of specific foreign investment codes but of generally more pervasive legal regulation of all economic activity in such countries.

4. *Current Problems*

(*a*) *National treatment*

In 1976, in its Declaration on International Investment and Multinational Enterprises and attached Guidelines and Decisions, the Council of the OECD addressed four major issues: guidelines for multinational enterprises; national treatment; international investment incentives and disincentives; and consultation procedures. The Decision of the Council, implementing the part of the Declaration devoted to International Investment Incentives and Disincentives, calls for more transparency in national practice and for inter-State consultation in case of problems with a country's disincentive policies. The OECD declaration made a general call for such procedures.

On the subject of national treatment, the Decision implementing the Declaration identified the major national policies which may give rise to discriminatory treatment of foreign direct investment. Although these laws and practices are not condemned *per se*, they are subject to reporting obligations and are indirectly identified as counterproductive of liberal economic policies. Again, while the focus is on OECD member States, the practices identified illustrate controversial policies in all host countries.

The six major categories are taxation (in particular the unitary tax system, the use of dividend withholding taxes solely for transnational dividend flows, and the non-deductibility of all or part of the interest paid by local subsidiaries on credit extensions by foreign parents), government aids and subsidies (selective and preferential access to credit and other State-controlled resources), access to local credit sectors by foreign financial institutions (including differential operating conditions on foreign institutions after entry), government purchasing and contracting, differential controls on additional investment in

established enterprises based on their domestic or foreign ownership, and general problems of discretionary regulation or implementation of general laws (particularly making entry conditional on the acceptance of onerous conditions, such as performance requirements as to local ingredients and local suppliers, that may not otherwise be established as direct requirements of entry).

(*b*) *Stabilization and renegotiation*

Host countries, in particular developing nations, often meet insistence by foreign private investors upon general or at least fiscal stabilization or "freezing" clauses. While concern with "change of ground rules" after an investment is committed is understandable, a solution that bargains away normal national → sovereignty over the legislative process is bound to be controversial and inherently unstable. The use of such provisions in traditional primary sector concession agreements predictably led to legal arguments that such pseudo-contractual arrangements were subject to a special form of the → *clausula rebus sic stantibus*, which would give the host State the right to insist upon renegotiation of provisions that over a period of time or because of unexpected events had become onerous to the State.

(*c*) *Protection against expropriation or excessive regulation*

Not only investment codes themselves may contain provisions relevant to this issue; specific investment agreements or authorizations granted pursuant to code provisions may include specific guarantees. Nevertheless, these clauses by themselves are no more useful in securing the investor's rights than are the general and hortatory provisions of the basic statutes already mentioned. At most, being more specific, these clauses provide a clearer basis for rights the investor may claim against later contradictory measures than do the more general statutory clauses. Neither, however, can protect against measures which themselves are found to be lawful under the municipal legal régime within which they are enacted and by whose institutions they are reviewed. As a result, the critical problem becomes the security of the choice of law and choice of forum provisions that may be negotiated as part of an investment agreement or placed directly in the investment code or related statutes.

(*d*) *Dispute resolution*

Both protective clauses and the municipal legal order's guarantee of their inviolability may have to be connected to an external legal order for complete protection. Otherwise, the abrogation of the statutory guarantee, which may be legitimate under the municipal constitutional legal order of the host State, could lead to the retroactive elimination of the protective provision itself, no matter how firmly expressed. If the State's guarantee either of the security of the investment or of these procedural protective clauses is the product of a treaty with the home State (as in the case of bilateral investment treaty commitments of this sort), the protection of the investment now rises to the level of public → international law as a treaty obligation. Alternatively, if the host State's statutory commitment to investment protection is not so protected, the expropriatory act may be challenged by the home State under → customary international law. Finally, the municipal legal system of the home State or of third States may provide some assistance to the investor because of the acceptance of restrictive doctrines regarding the choice of legal rules. Whether there is such relief depends upon the fortuitous circumstances of litigation opportunities outside the host State.

International Centre for the Settlement of Investment Disputes, Investment Laws of the World; The Developing Nations, 10 vols. to date (1972–).

EEC, ECSC, EURATOM, Investment Laws of ACP Countries, 2 vols. (1978–1979).

OECD, Investing in Developing Countries: OECD/DAC Member Countries' Policies with Regard to Private Direct Investment in Developing Countries (5th ed. 1983).

OECD, International Investment and Multinational Enterprises (1976; Supp. 1979, 1983).

OECD, Activities of OECD in 1976, Annex 4 (1977).

OAS, A Comparative Study of Latin American Legislation on the Regulation and Control of Private Foreign Investment (Department of Legal Affairs, CP/INF.680, 75 rev.1, 1975; with 1st Supp. 1977).

The Promotion of the International Flow of Private Capital, UN Doc. E/3325 (1960).

UN Centre on Transnational Corporations, Joint Ventures and Other Forms of Foreign Direct Investment (1981).

Canada, Regulations Respecting the Acquisition of Control of Canadian Business Enterprises and the Establishment of New Businesses in Canada, Canada Gazette, Part II, Vol. 117 (1983) 2411–2431.

R.M. HAMMER, G. SIMONETTI, JR. and C.T. CRAWFORD, Investment Regulation Around the World (1983) [looseleaf].

J. PUGH, Legal Aspects of Foreign Investment (1959).

H.S. LAUGHRAN and J.V. FOSTER, Foreign Investment in Mexico: The Emergency Decree of 1944, Tulane Law Review, Vol. 39 (1965) 538–557.

E.I. NWOGUGU, Legal Problems of Foreign Investment in Developing Countries (1965).

S.J. RUBIN, Private Foreign Investment (1965).

G. SCHWARZENBERGER, Foreign Investments and International Law (1969).

I. LITVAK and C. MAULE (eds.), Foreign Investment: The Experience of Host Countries (1970).

C.T. OLIVER, The Andean Foreign Investment Code. A New Phase in the Quest for Normative Order as to Direct Foreign Investment, AJIL, Vol. 66 (1972) 763–754.

I. DELUPIS, Finance and Protection of Investments in Developing Countries (1973).

T.M. FRANCK and K.S. GUDGEON, Canada's Foreign Investment Control Experiment: The Law, the Context and the Practice, New York University Law Review, Vol. 50 (1975) 76–146.

R. DAÑINO, The Andean Code After Five Years, Lawyer of the Americas, Vol. 8 (1976) 635–685.

E.I. NWOGUGU, Legal Problems of Foreign Investments, RdC, Vol. 153 (1976) 167–262.

D.F. VAGTS, Coercion and Foreign Investment Rearrangements, AJIL, Vol. 72 (1978) 17–36.

T.W. WALDE, Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development, Lawyer of the Americas, Vol. 10 (1978) 265–298.

S.K.B. ASANTE, Stability of Contractual Relations in the Transnational Investment Process, ICLQ, Vol. 28 (1979) 401–423.

A. ANDRADE, Guidelines to Brazil's Foreign Investment Law (1980).

N. HORN (ed.), Legal Problems of Codes of Conduct (1980).

D.A. IJALAYE, Indigenization Measures and Multinational Corporations in Africa, RdC, Vol. 171 (1981) 9–80.

J.E. PATTISON, China's Developing Legal Framework for Foreign Investment: Experience and Expectations, Law and Policy in International Business, Vol. 13 (1981) 89–175.

B. BALASSA, Development Strategies in Semi-Industrialized Countries (1982).

E. DAHL, Argentina's System of Foreign Investments, Fordham International Law Journal, Vol. 6 (1982) 33–71.

C.G.B. FONTHEIM and R.M. GADBAW, Trade-Related Performance Requirements Under the GATT-MTN System and U.S. Law, Law and Policy in International Business, Vol. 14 (1982) 129–180.

R. HIGGINS, The Taking of Property by the State: Recent Developments in International Law, RdC, Vol. 176 (1982) 259–392.

S.A. MEGWA, Foreign Direct Investment Climate in Nigeria: The Changing Law and Development Policies, ColJTransL, Vol. 21 (1983).

K.S. ROSENN, Regulation of Foreign Investment in Brazil: A Critical Analysis, Lawyer of the Americas, Vol. 15 (1983) 307–365.

J. TURNER, Canadian Regulation of Foreign Direct Investment, Harvard ILJ, Vol. 23 (1983) 333–356.

J.G. ZORN and H.A. MAYERSON, Cuba's Joint Venture Law: New Rules for Foreign Investment, ColJTransL, Vol. 21 (1983) 273–303.

D. GIRARD, Toward Lomé III: Perfecting the European Community's African Partnership, Case Western Reserve Journal of International Law, Vol. 16 (1984) 459–484.

RICHARD M. BUXBAUM
STEFAN A. RIESENFELD

INVESTMENT PROTECTION *see* Foreign Investments; Expropriation and Nationalization

IRAN-UNITED STATES CLAIMS *see* United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements); United States Diplomatic and Consular Staff in Tehran Case

IRREDENTISM

1. Notion

Irredentist State policy aims at the → annexation of contiguous foreign territory where a large number of persons reside who have close ethnic or religious links to or who speak the same language as the population of the irredentist State. National → liberation movements of → minorities, which ethnically identify themselves with the people of the adjacent State and therefore aspire to a merger with that State, are also referred to as irredentist.

2. Historical Evolution

The concept originated at the time of the Italian Risorgimento. *Italia irredenta* (unredeemed Italy) referred to those territories with an Italian-speaking population which after the national unification of the Italian peninsula in 1870 were still under foreign → sovereignty. Such areas were, for instance, the Trentino, → Trieste, Fiume and Dalmatia, which belonged to → Austria, the Swiss Ticino, and later also French regions such

as Nice and Corsica. The irredentist movement demanded the liberation of these regions by incorporation into the Italian mother State.

This classical Italian irredentism was a product of the awakening of European nationalism in the train of the French Revolution. The principle of → nationality in particular provided the ideological basis for irredentism. Developed by P.S. Mancini in 1851, it envisaged the nation-State encompassing a whole nation within its boundaries and a right of → self-determination for each nation. Against this background, redemption by annexation was valid only for those ethnically homogeneous areas where the politically separated Italians would welcome the merger with Italy. In the course of time, however, the idea of redemption became less and less important, as military, historical, economic and geographic reasons were advanced to legitimize more extensive territorial claims, including linguistically mixed zones, where the principle of nationality alone could not provide sufficient justification. For example, Italian claim to the predominantly German-speaking → South Tyrol and to certain Slavic regions relied mainly on the assertion that the mountainous barrier at the Brenner in the north and the Julian Alps in the east were the natural and military reasonable → boundaries of Italy. Eventually, irredentism became associated with the concept of → imperialism. The change in meaning of the irredentist notion thus reflects the ideological development from liberal 19th century Italian nationalism to Mussolini's expansionist foreign policy (→ Aggression). In the latter sense one also speaks of neo-irredentism.

With the extension of the idea of the nation-State in Europe, the irredentist concept started to be applied outside its specific Italian connotation. The slogan of *Europa irredenta* was born, especially in the Balkans, where political frontiers often cut across ethnic or linguistic zones and nationality questions were extremely complex. Numerous irredentist groups arose in the last quarter of the 19th and the beginning of the 20th century and led to serious political conflicts (→ Balkan Wars (1912/1913)). Examples are the Greater Serbian movement and the Romanian *irredenta*, which aimed at the incorporation of Siebenbürgen, the Bukowina and the Banat. On → Cyprus, the Greek-Cypriot liberation movement has aspired since the days of British rule to *enosis*, the unification of Cyprus with Greece.

Between World War I and II one spoke of a German *irredenta*, since the → Versailles Peace Treaty left over two million ethnic Germans as minorities in neighbour States, primarily in Poland, and the → Saint-Germain Peace Treaty (1919) left over five million ethnic Germans in Poland, Hungary, Italy, Yugoslavia, and Czechoslovakia, later accused of being Hitler's fifth column.

Today, one speaks of irredentism in the African context to describe the claims of young States, still engaged in the process of nation-building, that their artificially-drawn frontiers (→ Uti possidetis Doctrine) be revised in accordance with tribal and ethnic boundaries. Somalia, for instance, now comprises only about half the territory populated by the Somali people. Since its independence in 1960, it has therefore never stopped seeking the creation of a Greater Somalia, including the Ogaden region of Ethiopia, the southern half of Djibouti and the north-eastern area of Kenya.

3. Legal Problems

The legal relevance of irredentism derives from its inherent claim to the right of self-determination of peoples. Whether the principle of self-determination provides a legal basis for irredentist claims depends on the scope of the right of self-determination. Though the question is highly controversial, it is obvious that very few international lawyers go as far as to recognize a *jus secessionis* for ethnic groups or national minorities, provided that the State is not violating basic minority rights (→ Secession). Instead, these groups have to content themselves with a certain degree of cultural and political autonomy as a form of internal self-determination.

Therefore, an irredentist claim by a State against the territory of a neighbour is usually of a political, not a legal nature. Consequently, the claimant State violates the well established principle of → non-intervention in the → domestic jurisdiction of its neighbour if it actively supports or encourages secessionist movements. In spite of this lack of jurisdiction by positive law, the term *irredenta* suggests a certain natural legitimacy.

M. MAYR, Der italienische Irredentismus (2nd ed. 1917).
M.H. BOEHM, Europa irredenta (1923).
A. SANDONÀ, L'irredentismo nelle lotte politiche e nelle contese diplomatiche italo-austriache, 3 vols. (1932–1938).

GERLINDE RAUB

JOYCE v. DIRECTOR OF PUBLIC PROSECUTIONS

Following the surrender of Germany, William Joyce, better known by the nickname "Lord Haw Haw", was arrested on May 29, 1945 by British soldiers near Flensburg in northern Germany.

From September 18, 1939 onwards, he had been employed by the English Service of the Reichsrundfunk (Reich Broadcasting Company) as an English-language broadcaster. In 1942 he was formally appointed as the English Service's chief commentator. In addition, he was a major contributor of material to the "black" propaganda radio stations set up under the auspices of the Büro Concordia, the best known of these being the New British Broadcasting Station (→ War, Use of Propaganda in). He was brought back to England under police escort to stand trial under the Treason Act of 1351 (25 Edw. 3 stat 5, c.2).

At his trial before the Central Criminal Court (Mr. Justice Tucker presiding) it emerged that Joyce, who had been a leading figure in the British Union of Fascists in the 1930s (serving at one time as the Union's Director of Propaganda) was not, in fact, a British subject (→ British Commonwealth, Subjects and Nationality Rules). Joyce's father, Michael Joyce, had emigrated from Ireland to the United States and had become a naturalized United States citizen. William Joyce, having been born in the United States in 1906, was thus an American citizen. Although Michael Joyce returned with his family to Ireland in 1909, eventually settling in northern England after the Anglo-Irish Treaty of 1921, he had not taken the steps necessary to reacquire British → nationality. Thus, the most notorious English treason trial arising out of World War I, R. v. Casement ((1917) 1 K.B. 98), was paralleled nearly thirty years later by the case of Joyce v. Director of Public Prosecutions ((1945) 173 L.T. 377 (CCA); (1946) A.C. 347 (HL)) in having a specifically Irish dimension.

Up until his arrival in Germany, a week before the outbreak of World War II, Joyce had always represented himself as a British subject. He had stood for election – unsuccessfully – as a fascist candidate and had served in His Majesty's forces. In 1933 he had applied for and received a British → passport, falsely declaring himself "a British subject by birth", born in Galway, Ireland in 1906. In September 1938, and August 1939, Joyce applied for one-year renewals of his passport, again declaring "I am a British subject by birth, and I have not lost that national status".

Travelling on this passport, Joyce left Britain via boat-train for Berlin on the same day the Emergency Powers Act of 1939 entered into force. The motivation behind his departure was ideological; he also wished to avoid the fate which overtook many British fascists: under Defence Regulation 18B, in force until May 1945, the Home Secretary was empowered to imprison without trial anybody he believed likely to endanger the safety of the Realm (see Liversidge v. Anderson (1942) A.C. 206). Joyce became a naturalized citizen of Germany on September 26, 1940, some 15 months before a state of → war existed between the United States and Germany.

The indictment preferred against Joyce contained three counts under the Treason Act of 1351. Counts one and two were drafted under the assumption that Joyce was a British subject; the jury were formally instructed by the judge to acquit Joyce under these counts. The third count, under which Joyce was convicted, charged him with "High Treason by adhering to the King's enemies elsewhere than in the King's Realm, to wit, in the German Realm, contrary to the Treason Act 1351".

The Particulars of Offence in the Indictment charged Joyce with broadcasting propaganda on behalf of the enemy from within the realm of the enemy during the period between September 18, 1939 and July 2, 1940, "being a person owing allegiance to our Lord the King". The latter date was the day on which his British passport expired, a point of some importance since the Crown's contention was this: An → alien who obtains a British passport, however improperly, and then goes abroad using it, not only owes the "local

allegiance" to the Crown that every alien owes as long as he is resident within the realm, he also owes allegiance during the currency of the passport, while he is abroad. This is so because in applying for and using a British passport, the alien has "clothed himself with the status of a British subject" and "enveloped himself in the Union Jack". The alien thereby becomes entitled to the protection of the King's consular officials abroad (even if in wartime these may amount to the rather minimal services provided by the → protecting power). This contention, summarized by the maxim "protection draws allegiance", succeeded before the Judge and the Court of Criminal Appeal. The House of Lords also accepted the principle unanimously (although Lord Porter gave a dissenting judgment on the basis of procedural law concerning the respective roles of the judge and jury in such a case).

The decision has, however, been objected to on a number of grounds. The least compelling of these concerns the territorial limits of criminal law (→ Criminal Law, International). Lauterpacht (who also supports the basis of the decision in the House of Lords) points out that in modern → international law a State is not prevented from asserting its criminal jurisdiction over an alien for acts seriously threatening its security committed abroad, if the acts took effect within the jurisdiction of the State. The doctrine of the locality of the act, in the case of broadcasting, would be transferred from the place of its causation to the *situs* of its effect. Thus, in principle, there would be no objection to a State asserting criminal jurisdiction over an alien committing a serious crime directed against it from the safety of a foreign territory. The importance of the Joyce Case is that it illustrates the operation of the doctrine in the context of the enlarged possibilities that exist in the modern era for the commission of transfrontier crimes.

On the other hand, the application of the law of treason to an alien abroad, based on the fraudulent acquisition of a passport, and the application of the protection-drawing-allegiance doctrine has met with well-merited criticism.

The passport used in modern times (as opposed to the "passports" issued in former times by host States to foreign ambassadors to allow them to return home at the outbreak of war) is a nebulous, ill-defined document in international law (see Diplock), even if some can discern the existence of → customary international law rules which govern them (D.C. Turack, The Passport in International Law (1972) p. 18). D.P. O'Connell's definition would seem the most apposite: a passport "is fundamentally an identity document for travel purposes" (International Law, Vol. 2 (2nd ed. 1970) p. 691). It does not constitute proof of nationality status. The British practice of printing a request addressed to "all those whom it may concern" to provide the bearer with "such assistance and protection as may be necessary" has no significance in international law; many States do not follow this practice. One fault of the decision in the Joyce Case was that under British law it elaborated a whole range of legal consequences out of the bearer's possession of a passport, an essentially administrative document, issued to him under the "foreign affairs" prerogative powers of the Crown.

The main criticism, again under domestic law, of the case, however, has been that the protection-draws-allegiance doctrine was incorrectly applied in law. Although Britain maintains consular and diplomatic officials abroad for the protection of its nationals (→ Diplomatic Agents and Missions; → Diplomatic Protection), the fact of protection should not be confused with the duty of protection. The conduct of foreign affairs in British constitutional law is a prerogative of the Crown; neither a national nor an alien in wrongful possession of a passport abroad has a right in law to protection abroad. It is entirely within the discretion of the Crown how much, if any, protection is afforded outside the Realm (China Navigation Co. v. Att. Gen. (1932) 2 K.B. 197). British subjects must, of course, bear allegiance to the Crown wherever they happen to find themselves. The decision in Joyce met with immediate controversy because it placed this duty of allegiance onto an alien resident abroad solely on the basis of the protection Joyce might have called in aid (which in fact he did not) from the protecting power (Sweden) in wartime Germany.

The immediacy of the trial to the cessation of hostilities in World War II, Joyce's great notoriety, and the complex and inchoate nature of British nationality laws (which, in administrative practice, favoured a rather open-handed, indiscrimi-

nate approach in cases of doubtful nationality) no doubt all played a role in the case.

Lord Porter's dissenting judgment in the House of Lords, while accepting that the renewal and use of the passport was evidence that Joyce continued to owe allegiance, held that it was a matter for the jury to decide whether in fact he retained the passport for potential protection. Even granted that this had been the mode of trial adopted, it is to be doubted whether Joyce would have escaped his ultimate fate: On January 3, 1946, he was hanged at Wandsworth Jail in south London.

C.E. BECHHOFER ROBERTS, The Trial of William Joyce (1946).

K. DIPLOCK, Passports and Protection in International Law, Transactions of the Grotius Society, Vol. 32 (1946) 42–59.

H. LAUTERPACHT, Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens, Cambridge Law Journal, Vol. 9 (1947) 330–348.

G.L. WILLIAMS, The Correlation of Allegiance and Protection, Cambridge Law Journal, Vol. 10 (1948) 55–76.

R. WEST, The Meaning of Treason (1949).

H.K.J. RIDDER, Der Fall William Joyce, Zeitschrift für die gesamte Staatswissenschaft, Vol. 108 (1952) 690–702.

J.A. COLE, Lord Haw Haw (1964).

JONATHAN S. IGNARSKI

KIDNAPPING

1. Notion

Kidnapping is the unlawful forcible abduction or detention of an individual or group of individuals, usually accomplished for the purpose of extorting economic or political benefit from the victim of the kidnapping or from a third party. Though kidnapping is normally subject to the municipal criminal law of individual States, certain kidnappings have also fallen within the purview of international law since the days of the Roman Empire when Mediterranean seafaring nations concluded treaties affording mutual protection against → piracy.

As the concerns of the international community became increasingly diverse, international law regarding kidnapping was extended from the prohibition of unlawful piratical abduction on the high seas to include protection of → diplomatic agents and missions, protection of non-whites from slave trade abductions, and indirect protection of individuals outside their home State through the doctrine of State responsibility for injury to → aliens (→ Responsibility of States: General Principles). Legal protection emanated from international concern for these particular situations and classes of persons, rather than from any broad normative proscription directed at all kidnapping of an international character.

The list of protected persons and situations continued to grow incrementally through the 19th century and the early part of the 20th century. It has only been since World War II, however, that the reach of international law may be said to extend, to some degree, to the mass of humankind. The judgments handed down at the → Nuremberg Trials and the rapid growth of the international law of → human rights substantially expanded the reach of international law regarding kidnapping to such an extent that the import of what has developed is only beginning to strike home.

2. Specific Instances

(a) Piracy

Since ancient times, it has been the practice of nations to view pirates as *hostes humani generis*. By the Middle Ages, international law made pirates subject to universal jurisdiction, thus allowing their prosecution by any nation seizing them. Nevertheless, jurisprudential debate continues today as to whether → customary international law directly criminalized piracy or merely provided jurisdiction for prosecution of the crime under municipal law (→ Criminal Law, International). The current authoritative statements of the law of piracy are codified in the 1958 Convention on the High Seas (Arts. 14 to 22) and in the 1982 Convention on the Law of the Sea (Arts. 100 to 107; → Law of the Sea).

(b) Protection of diplomats

Although ambassadors and other diplomats have served as national representatives since ancient times, they have not always been protected by international law from injury, assault or death while they were within the territory of the

nation to which they had been posted. By the early part of the 18th century, however, Lord Talbot was able to write that England's Act of Anne (7 Anne, ch. 12 (1708)), which provided inviolability for diplomats, was merely "declaratory of ancient custom". The universally recognized principle of personal inviolability, long regarded as a necessary prerequisite for the maintenance of international communication and intercourse, requires that host nations ensure that diplomats within their territory remain free from assault, including abduction. This principle is now codified in the 1961 → Vienna Convention on Diplomatic Relations and in the 1963 → Vienna Convention on Consular Relations, and was relied upon by the → International Court of Justice in the 1980 → United States Diplomatic and Consular Staff in Tehran Case. (Cf. also the Inter-American Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance of February 2, 1971, ILM, Vol. 10 (1971) p. 255.)

(*c*) *Slavery and forced labour*

State practice condemnatory of → slavery emerged during the 19th century; a series of multilateral treaties prohibited the slave trade and the abduction of human beings for the purpose of enslavement. The 20th century saw the elaboration of several multilateral treaties aimed at protecting women from being abducted and forced into prostitution (→ Traffic in Persons). The 1930 Forced Labour Convention (No. 29) of the → International Labour Organisation substantially broadened international legal protection against coerced employment (→ Forced Labour). Today, the international law prohibition of slave trade offences is recognized as → *jus cogens*.

(*d*) *Protection of civilians in war*

Though ancient customary law permitted the taking of civilian → hostages during → war, the evolution of humanitarian law led to the total prohibition of such conduct in Art. 34 of the 1949 Geneva Red Cross Convention relative to the Protection of Civilian Persons during Time of War (→ Geneva Red Cross Conventions and Protocols; → Civilian Population, Protection). Even prior to this, however, the International Military Tribunal at Nuremberg had found Nazi leaders guilty of → war crimes and → crimes against humanity, including the war-time abduction and detention of civilians in Germany and occupied nations to extract forced labour or to facilitate extermination.

(*e*) *Injury to aliens*

In international law, States which, in violation of an international obligation, cause or allow injury to an alien within their territory cause injury to that alien's home State. Thus, kidnapping or unlawful detention of an alien by State agents, or failure to provide an effective remedy for the kidnapping or unlawful detention of an alien by private parties (→ Responsibility of States for Activities of Private Law Persons) obliges the delinquent State to make → reparation to the alien's home State if, as a matter of → diplomatic protection, it so demands. The International Court of Justice, in the → Barcelona Traction Case, held that obligations whose performance are the subject of diplomatic protection are not obligations *erga omnes*. This suggests the classical view that international law is concerned with the rights of States, not the rights of injured individuals (→ Individuals in International Law).

(*f*) *Human rights protection*

One of the most notable recent developments in international law has been the development of human rights law. The ways in which States mistreat their own citizens have now become the subject of regular international scrutiny before organs specially set up for this task by universal, regional and specialized treaties, and before organs of the → United Nations. The treatment by a State of its own nationals, kidnappings by State agents, as well as the apparently State-sponsored disappearances which occurred in some Latin American countries during the 1970s all now fall clearly within the ambit of international law. Many treaties set forth the right of individuals to security of the person and to be free from arbitrary detention (e.g. the → American Convention on Human Rights; Art. 7), thus establishing international legal protection against arbitrary arrests or State kidnappings.

(*g*) *Extraterritorial abductions*

Extraterritorial abduction of a suspect wanted for trial has not been uncommon as an alternative to → extradition. The courts of many nations, relying on the principle *male captus bene detentus*, hold that the impropriety of the means by which a defendant is brought before the court has no effect on the court's jurisdiction. No direct protection to the victims of extraterritorial abduction has been afforded in the light of the view of individuals as objects, not subjects, of international law. The only injury regarded as reparable has been that to the → sovereignty of the State in which the abduction occurred, or to the sovereignty of the home State of the victim, and then only if the State exercises its prerogative of diplomatic protection.

The extraterritorial abduction cases of Antoine Argoud and Adolf Eichmann, occurring during the 1960s, reflected *étatiste* international law.

In 1964 Antoine Argoud, facing life imprisonment as a consequence of his conviction by France's State Security Court for involvement with an insurrectionist movement, argued to the French Court of Cassation that his conviction should be quashed on the grounds that the trial court lacked jurisdiction because of the irregular way in which he had been brought to France (ILR, Vol. 45, p. 90). Argoud contended that he had been kidnapped from his hotel in Munich and forcibly returned to France where he was arrested and tried. The Court of Cassation held that even if Argoud had been brought to France as the result of a kidnapping, this would not interfere with the jurisdiction of the French courts, especially since France had received no note of → protest from the Federal Republic of Germany, the State from which Argoud had allegedly been kidnapped. Because no protest had been received, the Court did not address the question of what effect a diplomatic protest would have had upon Argoud's legal rights.

Adolf Eichmann was abducted from Argentina by Israeli nationals in May 1960; he was brought to Israel for trial, convicted of crimes against the Jewish people and hanged (ILR, Vol. 36, p. 5). Argentina protested the Israeli infringement upon its sovereignty, and Israel, claiming that Eichmann had been abducted by "volunteers", argued that the interest in bringing to justice one of the world's most infamous war criminals overrode the technical legal requirements of the international extradition process. The dispute was resolved in a compromise by way of a → United Nations Security Council resolution stating, "mindful . . . of the concern of people in all countries that Eichmann should be brought to appropriate justice" (UN SC Res. 138 (1960)). The Resolution did not call upon Israel to return Eichmann to Argentina, but instead requested Israel to "make appropriate reparation to Argentina". As a result, Israel and Argentina issued a joint statement acknowledging that "Israeli nationals . . . infringed fundamental rights of the State of Argentina", but which, in the name of friendly relations, also announced that the parties "regarded the incident closed".

As an alternative or supplement to diplomatic protection, emerging international human rights law has not yet provided relief for victims of extraterritorial abductions. Nevertheless, recent court decisions in the United States reveal the beginnings of judicial sympathy toward such claims. Furthermore, it is likely that the development of universal and regional human rights mechanisms will afford new international fora before which victims of extraterritorial abduction may invoke the violation of their own human rights to contest the actions of the abducting State.

(*h*) *Terrorism*

In response to the wave of → terrorism, aircraft hijacking and hostage-taking that has plagued the international community during the past several decades, a number of treaties on these subjects have been elaborated. Several are now in force and include kidnapping among the crimes they address. Major treaties were concluded in 1963 and 1970 to protect air travel (Convention on Offences and Certain Other Acts Committed on Board Aircraft, September 14, 1963, UNTS, Vol. 704, p. 219; Convention on the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, UNTS, Vol. 860, p. 105; → Civil Aviation, Unlawful Interference with), and in 1973 the Convention on the Prevention and Punishment of

Crimes Against Internationally Protected Persons, including Diplomatic Agents (UN GA Res. 3166 (XXVIII)) was concluded to enhance the protection provided by the 1961 and 1963 Vienna Conventions. These developments have essentially been based upon the international legal doctrines regarding piracy and internationally protected persons, and represent important steps in the development of an international criminal law (→ International Crimes). In 1979, the International Convention Against the Taking of Hostages was concluded (ILM, Vol. 18 (1979) p. 1456). Unlike other treaties dealing with kidnapping, it seeks to protect from hostage-taking a much broader class of persons than formerly fell within the embrace of international law.

(*i*) *Child abduction*

The problem of child abduction related to matrimonial disputes is viewed in most municipal legal systems as distinct from criminal kidnapping. Similarly, the international community has responded to transnational child abduction not as a criminal problem but as a concern of → private international law. A treaty to encourage respect and recognition for custody rights awarded by municipal legal systems was elaborated under the guidance of the Secretariat of the Hague Academy of Private International Law and opened for signature in 1980 (Convention on the Civil Aspects of Child Abduction (ILM, Vol. 19 (1980) p. 1501; → Hague Conventions on Private International Law; cf. also the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of May 20, 1980, ETS, No. 105).

3. Conclusion

Today, international law concerning kidnapping continues for the most part to protect only specified persons and situations of particular international concern. Yet, as the law of human rights develops, international law is moving toward the protection of all individuals from inter-State kidnapping, regardless of the nationality of the victim or the *situs* of the act.

P. PAPADATOS, Le procès Eichmann (1964).
R.S. BACH, Inter-American Convention on the Kidnapping of Diplomats, ColJTransL, Vol. 10 (1971) 392–412.
P. JUILLARD, Enlèvements de diplomates, AFDI, Vol. 17 (1971) 205–231.
T.H. SPONSLER, International Kidnapping, International Lawyer, Vol. 5 (1971) 27–52.
V. COUSSIRAT-COUSTÈRE and P.-M. EISEMANN, L'enlèvement de personnes privées et le droit international, RGDIP, Vol. 76 (1972) 346–400.
I. STECHEL, Terrorist Kidnapping of Diplomatic Personnel, Cornell Journal of International Law, Vol. 5 (1972) 189–217.
M.C. BASSIOUNI, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, Vanderbilt Journal of Transnational Law, Vol. 7 (1973) 1–23.
C.E. BAUMANN, The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism (1973).
Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, Michigan Law Review, Vol. 72 (1974) 1087–1113.
M.C. WOOD, Convention of the Prevention and Punishment of Crimes against Internationally Protected Persons, ICLQ, Vol. 23 (1974) 791–817.
M.C. BASSIOUNI (ed.), International Terrorism and Political Crimes (1975) 285–373.
Y. ALEXANDER, M.A. BROWNE and A.S. NANES, Control of Terrorism, International Documents (1979).
M. FEINRIDER, Extraterritorial Abductions, A Newly Developing International Standard, Akron Law Review, Vol. 14 (1980) 27–47.
G.R. WESTBROOK, Law and Treaty Responses to International Child Abductions, Virginia Journal of International Law, Vol. 20 (1980) 669–697.
P. REYMOND, Convention de La Haye et Convention de Strasbourg, Aspects comparatifs des conventions concernant l'enlèvement d'un enfant par l'un de ses parents, Zeitschrift für Schweizerisches Recht, Vol. 100 (1981) 329–345.
L. MARCOUX, JR., Protection from Arbitrary Arrest and Detention under International Law, Boston College International and Comparative Law Review, Vol. 5 (1982) 345–376.

MARTIN FEINRIDER

LIAMCO-LIBYA, PETROLEUM CONCESSIONS ARBITRATION (1977)

1. Context

The present case is one of three major international → arbitrations arising out of the nationalization (→ Expropriation and Nationalization) of the interests and properties in Libya belonging to four foreign companies: the British Exploration

Company (Libya) Limited (BP), a subsidiary of the British Petroleum Company Limited (→ British Petroleum v. Libya Arbitration); the Texaco Overseas Petroleum Company (TOPCO), a subsidiary of Texaco Inc.; the California Asiatic Oil Company (CALASIATIC), a subsidiary of Standard Oil Company of California (the latter two acting jointly in the arbitration; → Libya-Oil Companies Arbitration); and the Libyan American Oil Company (LIAMCO), a subsidiary of Atlantic Richfield Company. BP holdings were nationalized in 1971, as was 51 per cent of the other three companies' holdings in 1973, and the remaining 49 per cent in 1974. All three cases against the Government of the Libyan Arab Republic were based on very similar facts which, in turn, gave rise to almost identical legal issues. Proceedings were instituted before three different tribunals, whose awards (BP in 1973, TOPCO/CALASIATIC and LIAMCO in 1977) were all rendered in favour of the claimants. They led, in spite of divergent reasoning, to basically similar results. The following analysis of the LIAMCO Case should be viewed in connection with the BP and TOPCO/CALASIATIC arbitrations.

2. *Factual and Legal Background*

In order to develop her natural resources through foreign capital and technology, Libya enacted in 1955 the Petroleum Law (Law No. 25) which contained the general terms and conditions for the grant of petroleum → concessions. That law was intended to serve as a model for the individual concession agreement, termed Deed of Concession, to be concluded between the Petroleum Commission – therein established – and the foreign investor, and to be approved by the Minister of Petroleum (→ Contracts between States and Foreign Private Law Persons). On that basis, LIAMCO signed seven concession agreements on December 12, 1955 which, except for the description of the concession area, were identical in their terms. Four of these concessions were either surrendered (Concessions 21 and 22) or relinquished (Concessions 18 and 19) prior to 1973; LIAMCO owned a 25.5 per cent undivided interest in the remaining Concessions 16, 17 and 20 at the time of nationalization as it had partially assigned its original assets to two other US companies. Subsequent amendments to the Petroleum Law of 1955 and also to its annexed standard Deed of Concessions were made with the intention of increasing the government's share, but required the concessionaires' consent to such changes.

The agreements, basically following the Petroleum Law and the standard form of the "Deed" in their respective versions, contained, *inter alia*, the company's obligations to perform the necessary exploration work in the concession areas "with good oil field practice", to engage for that purpose in a minimum amount of investment, to fulfil the financial obligations (annual rent, royalties, taxes), to train Libyan personnel, to submit periodical reports to the Petroleum Commission, etc. On the other hand, Libya agreed to terminate the concession only on grounds stipulated in the instrument, such as non-performance of said obligations, non-payment of taxes, etc. (clause 27) and also guaranteed the re-export or the purchase, at a fair price, of the concessionaire's property after expiration or termination of the concession (clause 26). In addition, the Government agreed in clause 16 (final version) that "[t]he contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties" and, furthermore, that "[t]his Concession shall throughout the period of its validity be construed in accordance with the Petroleum law and the Regulations in force on the date of execution of the Agreement" and that "[a]ny amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent". Clause 28 (final version) set up machinery for the settlement of future disputes through international arbitration, and also contained a choice-of-law clause, according to which the concession "shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law, and in the absence of such common principles then by and in accordance with the general principles of law as may have been applied by international tribunals" (→ General Principles of Law; → Private International Law). These provisions contained in clauses 16 and 28 were stipulated in the Amendatory Agreement of January 20, 1966, after LIAMCO – along with all other concession holders in Libya – had agreed to accept the Government's demands for an increase

in its revenues, as proposed in the 1965 Amendment to the Petroleum Law.

In spite of assertions to the contrary made after the overthrow of King Idriss in 1969, the Libyan Revolutionary Command Council on September 1, 1973 issued Law No. 66, by which 51 per cent of the concession rights of a number of foreign companies, including LIAMCO, were nationalized. By decree effective February 11, 1974, the said Council issued Law No. 10, nationalizing and transferring to the State LIAMCO's remaining 49 per cent concession interest. Although compensation was envisaged in both nationalization laws, no such compensation was paid or offered to LIAMCO which, in turn, took steps to institute proceedings against the Government of Libya in pursuance of clause 28 of the Deeds of Concession. Following Libya's failure to participate in such proceedings, LIAMCO requested the President of the → International Court of Justice, Judge Manfred Lachs, to appoint a sole arbitrator, as provided for in the arbitration clause. On January 25, 1975, Dr. Sobhi Mahmassani, counsellor-at-law in Beirut, was so appointed. The LIAMCO tribunal rendered its award, *in absentia* of the respondent State, on April 12, 1977 in Geneva.

3. *Basic Issues of the Arbitration*

The claimant's demands, based on the alleged illegality of Libya's measures (→ Internationally Wrongful Acts), were directed primarily to restoration of its concession rights (*restitutio in integrum*) and, alternatively, to → damages amounting to US $207 652 667 – plus 12 per cent interest from January 1, 1974 (→ Reparation for Internationally Wrongful Acts). The award dealt with crucial issues of the law of international contracts which may be summarized as follows (quotations according to the pagination in ILM).

(*a*) *Nature of concessions and applicable law*

Concessions are of a contractual character, based on → reciprocity, and may only be modified and abrogated by mutual consent of the parties (p. 30). According to clause 28, para. 7 of the amended concession agreements, the proper law of the contract is in the first place Libyan law when consistent with international law, and subsidiarily the general principles of law. This clause is in accordance with the principle of contractual freedom, as contained in the Libyan Civil Code, and was not affected by the change of government in 1969 (see → German Interests in Polish Upper Silesia Cases; → German Settlers in Poland (Advisory Opinion); → Tinoco Concessions Arbitration). By comparing the Statute of the International Court of Justice (Art. 38) with Libyan principles of law, the sole arbitrator concluded that Libyan law in general and Islamic law in particular have common rules and principles with international law (p. 34 et seq.).

(*b*) *Legality of the arbitration*

After affirming the parties' capacity to enter into an arbitration agreement (pp. 38–39), as contained in the comprehensive clause 28 of the concession, and determining its survival even after the latter's termination (→ Losinger Dispute (Orders)), the sole arbitrator rejected the idea that arbitration was contrary to the heart of a State's → sovereignty and reached the conclusion that a State may always validly waive (→ Waiver) its so-called sovereign rights by resorting to arbitration; this method of settlement has also been used in the conflict between the Prophet Mohammed with the Tribe of Banu Qurayza (p. 41). In the absence of any agreement between the parties (→ Aramco Arbitration; → Sapphire Arbitration), the tribunal itself may determine its own rules of procedure; consequently, after exclusive jurisdiction over the dispute was established (pp. 41–43), the UNCITRAL Arbitration Rules (→ United Nations Commission on International Trade Law) were declared applicable. Geneva was selected as place of arbitration.

(*c*) *Sanctity of contracts versus sovereign interests*

The crucial question of this case was: can a State legally terminate a concession agreement through measures of nationalization, contrary to its solemn undertaking. After discussing at length (pp. 46–53) such measures in international and Islamic law, the arbitrator found that, contrary to the claimant's allegations, Libya's nationalization was not discriminatory (p. 60) and, therefore, as such lawful when accompanied by compensation. On the other hand, clause 16 of the LIAMCO

concession, widely termed the "stabilization" or "intangibility" clause (p. 31), was designed to expressly prevent such measures. By thoroughly comparing relevant international and Islamic law and practice (e.g. p. 57), the arbitrator concluded that the principle → *pacta sunt servanda* governs the contractual relations between States and private persons in both legal systems. The exception, however, to the binding force of concession agreements is to be found in "non-discriminatory nationalization coupled with the required compensation", among other grounds (p. 62). As regards remedies, *restitutio in integrum* would be "against the respect due for the sovereignty of the nationalizing State" and also be hindered by the impossibility of its performance (p. 63). The arbitrator held that such impossibility was implicitly admitted by the claimant's demands and, after lengthy considerations of damages, he awarded approximately 80 million US dollars compensation against the defaulting respondent (pp. 66–87). After attempts to seize Libyan assets in the United States, France, Switzerland and Sweden on the basis of that award, LIAMCO entered into a compensation Agreement with Libya in March 1981 for the final solution of their dispute.

4. *Evaluation*

This case is noteworthy for the successful functioning of an arbitral tribunal, in spite of default by the respondent State; for its international character, allowing the arbitrator to make use of rules of procedure set up by international bodies; and for the finding that private persons may have a *locus standi* equal to States before such tribunals (→ Standing before International Courts and Tribunals; → Individuals in International Law). Besides these procedural aspects, the LIAMCO Case is an important precedent for the confirmation of the principle of "sanctity of contracts" and for the applicability of this kind of choice-of-law clause. The deductions, drawn from a breach of such a "stabilized" contract, are not, however, conclusive: restitution (which would be the logical consequence) was refused owing to the impossibility of execution, which is not a legal but a factual argument. Nevertheless, considering that some kind of compensation was eventually paid and the dispute apparently settled, "stabilization" and arbitration clauses in concession agreements may show → transnational enterprises the way to legal sanctions against States and thus may prove to be of future practical value.

Award in Dispute between Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic relating to Petroleum Concessions (April 12, 1977), ILM, Vol. 20 (1981) 1–87.

G. DELAUME, State Contracts and Transnational Arbitration, AJIL, Vol. 75 (1981) 784–819.

R.B. VON MEHREN and P.N. KOURIDES, International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases, AJIL, Vol. 75 (1981) 476–552.

PETER FISCHER

LOANS, INTERNATIONAL

1. *Notion*

A loan is a contract, normally referring to a long-term credit, reached by an agreement between two or more parties. An "international loan" – an important factor in international economic relations – means a credit arranged by a loan agreement concluded by public or private persons of two or more countries.

In most cases, a loan is issued on the national or international bond markets. The denomination indicated on every bond represents a certain part of the credit sum. Loans are floated by banks or by issuing syndicates representing a number of banks as co-lenders, which offer the loans for subscription to private and public capital investors (also referred to as selling participations in foreign loans). Governments often issue loans at interest in order to balance or simply to finance their budgets (→ State Debts). The term "loan" is also used for a credit which is not represented on the money market. A loan, especially an internal loan, may appear in the form of a special kind of tax ("forced loan").

In international relations, many loan agreements are concluded which provide a certain credit line in favour of the debtor State. Such engagements are mainly concluded between industrial and → developing States and in the framework of international organizations.

Another current international economic prob-

lem of significance is the excessive indebtedness of many countries, particularly in Latin America and Eastern Europe. It will be the task not only of States but also of international financial institutions such as the → International Monetary Fund and the → International Bank for Reconstruction and Development to undertake effective measures in this regard. Debt rescheduling, coordinated by the Monetary Fund, will be a new instrument for it (cf. → Moratorium).

2. *Historical Evolution*

Since the Middle Ages international loan agreements have been concluded, mainly between States, in order to satisfy the international demand for capital. In the 19th century, the international stock market experienced significant growth, with London, Paris, and New York becoming the most important international money markets. During World War I, many States changed from being creditors to being debtors. The world economic crisis of the 1930s made it impossible for many countries to repay these → foreign debts. Since World War II, New York and London have become the most important places for international financial transactions.

In the past, a loan raised by a government was deemed to be based on national legislation, with the duty to repay the loan being only a matter of honour – a legal opinion which was abandoned long ago. The increasing State involvement in trading activities with foreign enterprises had legal consequences: Commercial activities of governments had to be considered as normal private law affairs. Government loans are thus regarded today not as *acta jure imperii* but rather as *acta jure gestionis* (→ Acts of State), which give foreign creditors the right to sue debtor States. This aspect of the doctrine of → State immunity, however, does not entail a right of compulsory execution against a State (→ Immunity Case (German Federal Constitutional Court, 1977); → Waiver). (For instances of this historical evolution, see the → Brazilian Loans Case; → Canevaro Claim Arbitration; → Drago-Porter Convention (1907); → French-Peruvian Claims Arbitration; → Norwegian Loans Case; → Serbian Loans Case; → Dawes Plan; → Young Plan; and → Young Plan Loans Arbitration.)

3. *Current Legal Situation*

Among the many legal problems in this field, the determination of the applicable law governing international loans is one of the most discussed questions. A loan agreement may be subject to a particular municipal law by an express choice of law (→ Private International Law) or it may be governed by principles of public international law.

Loans granted by private persons to private borrowers normally stipulate that the law of the lender country shall be applied because the lender wants to protect himself against foreign laws. If the borrower is an entity with international personality, a question arises if there is a presumption that a State does not submit to foreign law. The → Permanent Court of International Justice gave support to that view in the Brazilian Loans Case and the Serbian Loans Case, but the present rules of international law do not generally grant such a legal privilege to a State. Loan debts incurred by governments therefore have to be treated like any private loan obligation. Loan contracts concluded by the → European Investment Bank (EIB), for example, designate the law of the borrower's country as the applicable law.

Agreements concluded between States are in general governed by public international law. But States are also free to submit their agreements to a particular national law, especially their loan or debt agreements. An example are the loan contracts between the United States Agency for International Development (AID) and foreign governments, which stipulate the law of the District of Columbia as the applicable law.

Agreements between a State and a foreign private person without an express choice of law are now exceptional; their legal treatment remains controversial. According to one opinion, a customary "transnational economic law" which is neither public international law nor domestic State law is said to have come into being (Horn). A different view proposes a limited application of public international law to such agreements (Böckstiegel and Fischer). The classical rules of private international law (conflict of laws), however, determine that the law to be applied is that to which the facts are most closely connected (see also → Contracts between States and Foreign Private Law Persons).

For many years, attempts have been made to unify legal rules on international loans (e.g. under the auspices of the → League of Nations and within the Institut international pour l'unification du droit privé (Unidroit)). Today, the unification of legal rules seems even more necessary because of the complicated legal practice involved in the transnational Eurodollar market (→ Unification and Harmonization of Laws).

4. *Special Legal Aspects*

(*a*) *Nonpayment*

International loans issued on the bond markets generally provide, in case of nonpayment, for international → arbitration or for the right of any bondholder to bring an action against the debtor before the designated domestic court.

Private bondholders are often organized into private committees, such as the Protective Council Inc., New York, and the Association nationale des porteurs français de valeurs mobilières. Creditors thus keep their common interest in these committees, which sometimes have a semi-official character.

If a foreign State is unable to repay a loan, attempts are made to agree on debt settlements providing, for example, for reduction of certain repayments, raising of a conversion loan or debt rescheduling. States also try to solve economic problems arising from political events by concluding debt agreements, e.g. the → London Agreement on German External Debts (1953).

(*b*) *Currency denomination*

Every international loan is made out in a certain currency or "unit of account" (→ Monetary Law, International) and offered for subscription in more or less small denominations. The loan may be denominated in the currency of one of the contracting countries or of the country in which the loan is to be issued. Many loans are still denominated in United States Dollars even if the loan contract is governed by a European or other national law. In common law countries, the denominated currency of the loan must be identical to the local means of payment. In other countries, such as the Federal Republic of Germany, compulsory conversion is not part of the internal law and may therefore be excluded by a loan contract.

Some loan agreements contain a gold monetary or currency clause which offers the creditor protection against inflation. Although currency clauses tend to be an element of stability, most bonds are still denominated in one single currency, without any such clause.

A certain number of international loans have been denominated in an artificial currency, for example in "units of account" which were used by the European Payment Union until its dissolution in 1958 (→ European Monetary Cooperation). Since 1970, European Currency Units (ECU) have been used for loan denominations; they are reckoned in accordance with a monetary basket referring to the currencies of the member countries of the → European Communities.

L.M. DRAGO, State Loans in their Relation to International Policy, AJIL, Vol. 1 (1907) 692–726.

G. JÈZE, La garantie des emprunts publics d'Etat, RdC, Vol. 7 (1925 II) 155–236.

K. STRUPP, L'intervention en matière financière, RdC, Vol. 8 (1925 III) 5–124.

C. SCHWARZENBERGER, Die Kreuger-Anleihen, Ein Beitrag zur Auslegung der internationalen Anleihe- und Monopolverträge sowie zur Lehre vom Staatsbankrott (1931).

C. SCHMITTHOF, The International Government Loan, Journal of Comparative Legislation, Vol. 19 (1937) 179–196.

F.A. MANN, The Law Governing State Contracts, BYIL, Vol. 21 (1944) 11–33.

E. BORCHARD, State Insolvency and Foreign Bondholders (1951).

F.A. MANN, The Money in Public International Law, RdC, Vol. 96 (1959 I) 1–128.

G.R. DELAUME, Gold and Currency Clauses in Contemporary International Loans, AJCL, Vol. 9 (1960) 199–218.

G. VAN HECKE, Problèmes juridiques des emprunts internationaux (2nd ed. 1964).

A. VERDROSS, Quasi-International Agreements and International Economic Transactions, Year Book of World Affairs (1964) 230–247.

G.R. DELAUME, Legal Aspects of International Lending and Economic Development (1967).

H.J. ABS, Internationale Anleihen (1968).

S.J. RUBIN (ed.), Foreign Development Lending: Legal Aspects (1971).

K.-H. BÖCKSTIEGEL, Der Staat als Vertragspartner ausländischer Privatunternehmen (1972).

N. HORN, Das Recht der internationalen Anleihen (1972).

H.J. HAHN, Das Währungsrecht der Euro-Devisen (1973).

S.A. SILARD, Maintenance-of-Value Arrangements in In-

ternational Transactions, Law and Policy in International Business, Vol. 5 (1973) 398–439.
P. FISCHER, Die Internationale Konzession (1974).
F.-C. JEANTET, Emprunts français à l'étranger . . . , La Semaine juridique, Juris classeur périodique, Vol. 49 (1975) Doctrine, Section 2704.
Z.A. KRONFOL, The Proper Law of International Loans, Journal of World Trade Law, Vol. 10 (1976) 129–144.
F. ZEHETNER, Geldwertklauseln im grenzüberschreitenden Wirtschaftsverkehr (1976).
A.O. ADEDE, Approaches to Bilateral Loan Agreements between Developed and Developing States: Some Lessons from the Practice of Denmark, the United Kingdom and the United States, Dalhousie Law Journal, Vol. 5 (1979) 121–153.
R. SLATER, Syndicated Bank Loans, Journal of Business Law (1982) 173–199.
G. ZIEGER, Probleme der Verschuldung östlicher Staatshandelsländer, AVR, Vol. 21 (1983) 239–272.

HANS-ERNST FOLZ

LONDON AGREEMENT ON GERMAN EXTERNAL DEBTS (1953)

1. Background

In 1951 there existed German external debts arising out of the period between the wars upon which payments had not in general conformed to the applicable contractual terms. In addition, Germany was indebted to the three Western Allies for their economic assistance to her after World War II. Finally, the resumption of debt service for private loans made in the period after World War I, which had likewise not been fully serviced for some 20 years, also required clarification.

To bring about a normalization in the financial relations between the Federal Republic of Germany, private German debtors and foreign creditors, the Federal Government, in a note to the Western High Commissioners dated March 6, 1951, confirmed its preparedness to meet the debts arising out of the economic assistance and the earlier debts of the Reich. The Government also raised the idea of a regulation applicable to the private debts (Bundesgesetzblatt 1953 II, p. 473). Following extensive → negotiations and a conference in London from February 28 to August 6, 1952 between the parties concerned, the so-called London Agreement on German External Debts was signed (UNTS, Vol. 33, p. 3).

2. Contents

The import of the agreement was to provide support (comparable to a protection order) for the debts in question by means of a treaty under international law: in technical terms by means of regulations. The Treaty was concluded between the Federal Republic of Germany on the one hand and Belgium, Canada, Ceylon, Denmark, France, Great Britain, Greece, Ireland, Liechtenstein, Luxembourg, Norway, Pakistan, Sweden, Switzerland, Spain, the Union of South Africa, the United States and Yugoslavia on the other hand. Under Art. 36, it was possible for other States to accede to the Treaty. The Treaty formed the basis of the regulations; particular types of recommended regulations were contained in the Appendices.

The Treaty took account of the Federal Republic's limited → territorial sovereignty *vis-à-vis* the German Reich in so far as Art. 25 contained a review clause in case Germany should again become a unified entity. Also, the special status of → Berlin was taken into account in Art. 5(5) in that the regulation of the City of Berlin's debts was deferred to a time when this became practicable.

The debts which were to be regulated under the Treaty were those due before May 8, 1945 where the debtors resided in the Federal Republic of Germany and the creditors either resided in or were nationals of any of the contracting States (Art. 4). Marketable securities payable in a creditor country were also covered by the rules. Art. 8 prohibited any discrimination between individual categories of debts, currencies or creditors in the fulfilment of the agreement. However, under Art. 10, creditors falling outside the definition laid down under Art. 4 were not to be satisfied until all the debts covered by the agreement had been settled.

In technical terms, the regulations required an offer by the German debtor and an acceptance by the creditor. The interest of creditors in concluding such an agreement lay in the fact that creditors would only enjoy the advantage of the recommended and precisely formulated changes in the terms of payment if they accepted an offer of

settlement (Art. 15(1)). Moreover, under Art. 18(3), the acceptance of an offer of settlement had the effect of interrupting periods of prescription and limitation.

3. Types of Regulations

Although the recommended regulations for individual kinds of debts must be effected by way of agreements between the parties concerned, detailed contents of the regulations were laid down in advance. Appendix I of the Treaty contained the agreed recommendations for the settlement of the debts of the Reich and other public bodies. For the 7 per cent Dawes Loan of 1924, the Treaty provided for payment from March 31, 1953 at 5½ per cent on the American issue and at 5 per cent on the other issues (→ Dawes Plan). Arrears of interest outstanding were recalculated without compound interest at 5 per cent simple interest. The 5½ per cent Young Loan of 1930 was reduced to 5 per cent on the American issue and 4½ per cent on the other issues (→ Young Plan). Arrears of interest were recalculated without compound interest at 4½ per cent simple interest.

The interest on the 1930 Matching Loan was reduced from 6 per cent to 4 per cent and interest arrears were also reduced to 4 per cent without compound interest. Debt service on the bonds and scrip issued by the Konversionskasse was again to be resumed from March 31, 1953 at agreed rates of interest; two-thirds of the arrears of interest were waived.

For the Reichsmark debts of the Reich, the Reichsbahn (railway), the Reichspost (post) and the state of Prussia, foreign creditors were given the right to national treatment with respect to the changes consequent upon the reform of the German monetary system. Bonds issued by the states (Länder), local authorities and other public bodies (with the exception of Prussia) were to be again serviced from March 31, 1953 at 75 per cent of the original rate of interest. Payments on the Prussian external debt were taken over by the Federal Republic of Germany on behalf of the states which had succeeded to territory and assets formerly belonging to the state of Prussia: the 5½ per cent dollar bonds of 1926 and the 6 per cent dollar bonds of 1930 were reissued at the rate of 4 per cent. Outstanding coupons on the old issues bearing dates between 1933 and 1936 were to be paid between 1953 and 1956 at 50 per cent of the dollar amount.

The Federal Government also undertook to pass a Securities Validation Law for German foreign currency bonds to validate the position of bond holders and to carry out the necessary adjustments consequent upon the regulation (Bundesgesetzblatt 1952 I, p. 553). Additionally, the Federal Government assumed liability for full payment of sums due from debtors in the Saar and payment of 60 per cent of sums owed by debtors in Austria, Belgium, France and Luxembourg. In Annex A to Appendix I there was also an arrangement agreed between the Federal Republic of Germany and the → Bank for International Settlements on the arrears of interest on the Bank's investments in Germany. Annex B contained a special agreement on the annuities provided for in the German-Belgian Agreement of 1929.

Appendix II contained the agreed recommendations for private loans made before May 8, 1945. The basic design of the regulations was laid down in Art. V, which stipulated that there should be no reductions in the outstanding principal amounts. In so far as interest rates on loans were not altered before June 9, 1933 (the date the Konversionskasse was established) one-third of the arrears of interest up to January 1, 1953 was waived with the remaining two-thirds recapitalized as from that date at 75 per cent of the original rate of interest. From 1958 to 1962 the debt was to be amortized at the rate of 1 per cent and thereafter at 2 per cent. To facilitate settlements, Art. IX provided for the establishment of an Arbitration and Mediation Committee made up of four representatives appointed by the creditors and four by the debtors.

In Appendix III were contained the agreed recommendations for the German Suspended Debt (i.e. those debts which were governed by the Suspension Agreement of 1931) and the so-called German Credit Agreement which was concluded in 1952 between German and foreign banks. The Suspension Agreement of 1931 governed short-term banking credits to Germany which could no longer be serviced because of the severe economic crises prevailing at the time. The Suspension Agreement was renewed annually un-

til May 31, 1940 (until May 31, 1941 in the case of American creditors). The credits concerned were regulated in the following way: the rights of creditors were preserved in their entirety and the credits were recommercialized by the Bank Deutscher Länder (now the Bundesbank) in certain stated percentages. It was open to creditors to increase the rates of interest payable by granting new credits. Arrears of interest for the termination for the Suspension Agreement or from a later suspension of interest payments were to be repaid at 4 per cent interest. Disputes between creditors and debtors were to be referred to an Arbitration Committee. Art. 23 laid down that the rights of creditors of the German Gold-Diskontbank were not to be limited by the provisions of Appendix III.

Appendix IV contained recommendations for the regulation of claims arising out of the sale of goods and services as well as other claims from the period before May 8, 1945. In so far as such claims had no specifically foreign character, they were, like domestic claims, converted into German marks. Payments made by German debtors to the German Konversionskasse which had binding legal effect under German law, were again to be made to foreign creditors (Art. 9), to the extent that they had not in fact received the sums paid by the debtors to the Konversionskasse. The German Government was to compensate German debtors for this repeated payment. Agreement proved impossible to attain on payments made by German debtors to the German Verrechnungskasse (established by a law of October 16, 1934), so that no recommendations on this matter were included in Art. 10.

Apart from public and private debts on loans, the London Agreement also regulated the resumption of payments arising out of an Agreement between the German Reich and the United States of March 13, 1930 under which the German Reich was to compensate American citizens (Bundesgesetzblatt 1953 II, p. 487). Using 1917 as the bench mark, the sum of $97.5 million was to be paid in 26 equal yearly instalments. Furthermore, a Treaty concluded between the Federal Republic of Germany and the United States acknowledged the indebtedness of the Federal Republic in the sum of $1000 million for American economic assistance afforded before July 1, 1951, to be serviced at the rate of 2½ per cent interest (Bundesgesetzblatt 1953 II, p. 492). Another Treaty concluded on the same day between the parties specified a debt of $203 million to be paid by the Federal Republic for the supply of so-called surplus goods (Bundesgesetzblatt 1953 II, p. 497).

A payment of £150 million satisfaction for the United Kingdom's provision of economic assistance to Germany after May 8, 1945 was agreed on February 2, 1953 (Bundesgesetzblatt 1953 II, p. 504). An equivalent agreement with France provided for a payment of $11.84 million (Bundesgesetzblatt 1953 II, p. 509). Finally, Denmark received the sum of 160 million Danish kroner in compensation for expenses incurred in connection with the reception of German → refugees between 1945 and 1949 (Bundesgesetzblatt 1953 II, p. 513).

4. Arbitration

Disputes arising out of the Treaty between the contracting governments were to be referred to an Arbitral Tribunal (Art. 28) and disputes between private debtors and creditors to a Mixed Commission (→ London Agreement on German External Debts, Arbitral Tribunal and Mixed Commission). The statutes for these bodies were contained in Appendices IX and X respectively. The Treaty also provided for a number of other arbitral bodies to rule on individual questions. On May 16, 1980, an arbitral award was issued on the interpretation of the currency protection clause for payments made under the Young Plan (→ Young Plan Loans Arbitration; see also → German External Debts Arbitration (Greece v. Federal Republic of Germany)).

5. Implementation of the Agreement

Para. 12 of the German law implementing the London Agreement of August 24, 1953 (Bundesgesetzblatt 1953 I, p. 1003, as amended by Bundesgesetzblatt 1955 I, p. 57 and Bundesgesetzblatt 1956 I, pp. 99 and 758) prohibits German debtors from satisfying debts which are not in accordance with the recommended regulations until all the obligations under the Treaty have been satisfied. Compensation for German debtors subject to further claims from foreign creditors despite payment to the Konversionskasse was laid down in Paras. 31 to 51. Para. 52

provides that debts in Gold marks having a specifically foreign character are to be converted to German marks in the proportion of one to one. Where a debtor was thereby compelled to bear a heavier burden than would otherwise have been the case under the general German currency laws, the debtors could claim compensation under Paras. 63 to 74. A Franco-German agreement on the treatment of debts arising out of the activities of the Verrechnungskasse entered into force on May 7, 1954 (Bundesgesetzblatt 1954 II, p. 519). On March 5, 1955 a law was also passed to clear the bonds expressed in Reichsmarks issued by the German Konversionskasse.

In the intervening years, further creditor States have acceded to the London Agreement. The accessions are all to be found in the Bundesgesetzblatt, as are the notifications by the Bank Deutscher Länder and Bundesbank on the extent of the recommercialization of German Suspended Debts.

Deutsche Auslandsschulden, Dokumente zu den internationalen Verhandlungen vom Oktober 1950 bis Juli 1951. Herausgegeben vom Auswärtigen Amt, dem Bundesminister der Finanzen und anderen.

H. JANSEN and G. ERLER, Die Regelung der deutschen Auslandsschulden, Lehren aus der Vergangenheit und Vorschläge für die Zunkunft (1951).

H.J. ABS, Das Londoner Schuldenabkommen, Vorträge (1953).

W. KROOG and M. LUTHER, Zur Regelung der privaten Auslandsschulden nach dem Londoner Schuldenabkommen, Neue Juristische Wochenschrift, Vol. 6 (1953) 1652–1656, 1692–1695.

P. LEVERKUEHN, Die Stellung des Londoner Schuldenabkommens im Internationalen Recht, Monatsschrift für Deutsches Recht, Vol. 7 (1953) 521–523.

B. WOLFF, Grundsätze der Internationalen Regelung der deutschen äußeren Vorkriegsschulden, Neue Juristische Wochenschrift, Vol. 6 (1953) 1409–1412.

E. FÉAUX DE LA CROIX, Betrachtungen zum Londoner Schuldenabkommen, in: Völkerrechtliche und staatsrechtliche Abhandlungen, Festgabe für Carl Bilfinger (1954) 27–70.

E. WOLFF, Das Londoner Schuldenabkommen, Juristenzeitung, Vol. 9 (1954) 105–109.

G. HENN, Das Londoner Schuldenabkommen, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 20 (1955) 270–290.

H. GURSKI, Das Abkommen über deutsche Auslandsschulden (2nd ed. 1956).

E.J. COHN, Der spezifisch ausländische Charakter einer Forderung nach dem Londoner Schuldenabkommen, Neue Juristische Wochenschrift, Vol. 10 (1957) 329–330.

H.J. HALLIER, Die Entscheidung der Gemischten Kommission nach dem Londoner Schuldenabkommen zum spezifisch ausländischen Charakter einer Forderung, Neue Juristische Wochenschrift, Vol. 3 (1957) 86–87.

J.L. SIMPSON, The Agreement on German External Debts, ICLQ, Vol. 6 (1957) 472–486.

H.J. HALLIER, Die zwischenstaatlichen Schiedsgerichte des Abkommens über die deutschen Auslandsschulden, ZaöRV, Vol. 19 (1958) 708–727.

J. WOLANEY, Sieben Jahre Londoner Schuldenabkommen, Wertpapier-Mitteilungen, Vol. 14 (1960) 1106 et seq.

H. HAHN et al., Die Wertsicherung der Young-Anleihe: Das Urteil des Schiedsgerichtshofs für das Abkommen über deutsche Auslandsschulden vom 16. Mai 1980 (P. Behrens, ed.) (1984).

HELMUT COING

LUMP SUM AGREEMENTS

One of the most controversial areas of international law has been the law of international claims, which includes a set of substantive norms on the responsibility of States for injuries to → aliens, and a procedural side on → diplomatic protection of citizens abroad (→ Aliens, Property; → Foreign Investments). Traditional international law maintained that only States could be → subjects of international law and that private persons, not having such status, could not bring international claims against foreign States when injured by them (→ Individuals in International Law; → Standing before International Courts and Tribunals). Instead, under the "Vattelian fiction" that whoever wronged a person indirectly injured his State, an aggrieved claimant had to seek redress by convincing his government to adopt his private grievance and to espouse it as an international claim against the offending foreign State. In the absence of such espousal, the claimant had no direct access to the international legal order.

Diplomatic protection by the espousal process never has proved entirely satisfactory either to claimants or to foreign offices. The conditions precedent to espousal, such as the continuous → nationality of the claimant and the exhaustion of → local remedies in the respondent State, plus the very discretionary nature of espousal itself, have combined to preclude the presentation of many just claims. Moreover, as the number of

claims has increased over the years, so too have the problems surrounding their settlement. Indeed, at an early date States sought to avoid the unwieldy espousal concept whenever a sizeable number of claims arose against another State by resort to *ad hoc* international claims commissions.

1. *History*

Beginning with the → Jay Treaty of 1794, commonly regarded as the commencement of modern international → arbitration, Great Britain and the United States frequently resorted to → mixed claims commissions to adjudicate large batches of claims against foreign States. Soon other States followed suit, with the result that the decisions of these commissions increasingly influenced the development of the substantive norms in this area of international law. Indeed, despite the attempt by the → International Court of Justice in the → Barcelona Traction Case to undercut retroactively the jurisprudence of such commissions, it is primarily their decisions, from 1794 to World War II, which permitted P. Jessup to conclude in 1948 that "[t]he international law governing the responsibility of states for injuries to aliens is one of the most highly developed branches of that law" (A Modern Law of Nations, p. 94; → Responsibility of States: General Principles; → Reparation for Internationally Wrongful Acts).

While the substantive norms in this area of international law have continued to evolve since World War II, they have not developed exclusively, or even primarily, through the espousal process or the mixed claims commission route. The vast number of claims occasioned by the war, subsequent nationalization programmes and various revolutionary upheavals, coupled with the reluctance of communist countries and many Third World nations to have these claims submitted to third-party adjudication, in large measure has vitiated these traditional methods of settlement. From this perspective, the establishment in 1981 of the Iran-United States Arbitral Tribunal may be viewed as an aberration from the current approach to claims resolution (→ United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)). For, to a great extent during the postwar period, espousal and mixed claims commissions have been supplanted by the lump sum settlement national claims commission technique, a means of claims resolution which, although until recently often overlooked or ignored, actually dates back to the breakdown of one of the original Jay Treaty Commissions and the subsequent conclusion of a lump sum agreement by Great Britain and the United States.

2. *Definition*

Under a lump sum agreement, the respondent State pays the claimant State a fixed amount in settlement of certain claims, with the latter generally establishing a national claims commission to determine their validity and amount. As explained by Judge Re, the former Chairman of the Foreign Claims Settlement Commission, a United States national claims commission which has adjudicated claims under over a dozen lump sum agreements:

> "[A] 'lump sum', 'en bloc' or 'global' settlement involves an agreement, arrived at by diplomatic negotiation between governments, to settle outstanding international claims by the payment of a given sum without resorting to international adjudication. Such a settlement permits the state receiving the lump sum to distribute the fund thus acquired among claimants who may be entitled thereto pursuant to domestic procedure . . . . [T]he sum agreed upon may be paid over a given number of years" (p. 40).

This definition may be expanded usefully to cover agreements where payment has been made in kind, where there has been a mutual set-off of claims, and where, as part of an overall political accommodation embracing more than just claims, the claimant State itself actually provides all or a portion of the funds to be distributed.

3. *Advantages*

In assessing the significance – especially the juridical impact – of the nearly 200 lump sum agreements that have been concluded since World War II, one must start with the overriding factor in their favour, namely, their ability to "wipe the slate clean". By entering into such a settlement the States involved automatically remove the claims from the diplomatic realm and permit the prompt distribution of the fund to eligible

claimants. As one commentator has remarked, "the mere procedure of negotiating a settlement involves bargaining over the figure, and that in turn tends to create a climate of feeling on both sides of the table to settle the issue once and for all", Surrey, Problems of the Italian Peace Treaty: Analysis of Claims Provisions and Description of Enforcement, Law & Contemporary Problems, Vol. 16 (1951) p. 440. Of course, the very nature of the settlement process, involving a negotiated compromise, is one that assures that claimants rarely will be made whole, a fact that will be considered below in connection with the effect lump sum agreements have upon the standard of compensation for nationalized property (→ Expropriation and Nationalization).

Besides eliminating claims as a source of dispute, a lump sum agreement followed by a national claims commission distribution is a relatively speedy method of adjudicating claims. While the process is not as swift as it first appears if one considers the lengthy negotiating periods frequently preceding the lump sum agreements, the total elapsed time between wrong and redress certainly is less than that taken by mixed claims commissions. One reason for this comparative swiftness is the obvious fact that once a national claims commission renders a decision, it is not faced with the problem of collecting the award; awards are made from the lump sum already received or from instalments as they are paid. Furthermore, awards almost always are made in hard currencies, the most common being US dollars and British pounds.

4. *Jurisprudential Significance*

Turning from the practical advantages of lump sum agreements to their jurisprudential significance, the decisions of national claims commissions determining claims under such settlements constitute an important source of the law governing the responsibility of States for injuries to aliens, as a glance through the Moore, Hackworth and Whiteman digests of international law and similar compilations of State practice reveals. Their value as legal precedents, however, depends to a great extent upon the legal standards being applied.

When a national claims commission reaches a decision by directly applying the provisions of a lump sum agreement, or by indirectly applying them through resort to domestic legislation incorporating such provisions by reference, as occurs in the United States, its decisional process is similar to that of a mixed claims commission applying the terms of its underlying → *compromis*. Yet, because the application is unilateral and it cannot be assumed that the respondent State necessarily would agree with the national commission's construction, its decision cannot be accorded the weight given a mixed commission opinion, even though in both instances the rules being applied have been expressly recognized by both States.

When the decision of a national commission is based solely upon domestic legislation, which may or may not reflect the provisions of the lump sum agreement, as takes place in Great Britain, it of course has less international significance. Since here not only the application but also the creation of the legal standards takes place unilaterally, the weight to be accorded a particular decision depends entirely upon the extent to which the legislation establishes international standards as the bases of decision. When, as sometimes occurs, the lump sum settlement has been made *ex gratia*, without even implied reference to the relevant international legal norms, a national commission's jurisprudence has even less juridical significance.

Since the legal standards given national commissions generally purport to be statements or restatements of international law, however, their decisions under lump sum agreements should be accorded just as much weight as that given the pronouncements of any court or agency of a State having competence to pass upon such questions. Internationally their significance rests upon their persuasiveness. Falling under the general heading of "judicial decisions", as set out in Art. 38(1)(d) of the ICJ Statute, their decisions, if sufficiently persuasive, ultimately may influence State practice and thus contribute to the progressive development of → customary international law under Art. 38(1)(b). This view reflects the preponderant opinion of publicists like G. White, who over two decades ago concluded that lump sum agreements "constitute a valuable potential source of customary international law . . ." (Nationalisation of Foreign Property (1961) p. 183).

It must be noted here, however, that the ICJ in

the Barcelona Traction Case, in addition to dismissing "the general arbitral jurisprudence which has accumulated in the last half-century", also summarily rejected as *lex specialis* and hence irrelevant the practice developed since World War II under lump sum agreements. The rationale of such settlements, according to the Court,

> "derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case" (ICJ Reports (1970) p. 40).

This singularly negative attitude towards the jurisprudential significance of lump sum agreements is unfortunate. "To suggest . . . that internationally negotiated settlements which seek the fair adjustment and compromise of conflicting interests are but quasi-legal aberrations, not indicative of uniformity", F.G. Dawson and B.H. Weston warned two decades ago, "is to espouse a parochial view of international law" ("Prompt, Adequate and Effective": A Universal Standard of Compensation?, Fordham Law Review, Vol. 30 (1962) p. 727, at p. 750).

Even by traditional lights, the ICJ in the Barcelona Traction Case was guilty of parochialism in this regard. As one of several methods of claims resolution, lump sum agreements long have been part of the process of claim and counterclaim creating and clarifying the law of international claims. "A series or a recurrence of treaties laying down a similar rule", as J.G. Starke has said, "may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges" (Treaties as a "Source" of International Law, BYIL, Vol. 23 (1946) p. 341, at p. 344). Writers from the 19th century to the present day confirm that a consistent pattern of bilateral treaties may have considerable evidential importance in determining the existence and content of a customary international law standard. Yet the Court rejected this important evidence of international custom out of hand.

Criticism of the *sui generis – lex specialis* argument, which the Court advanced to justify its refusal even to consider the effect of lump sum agreements upon the customary international law norms governing stockholder claims, was immediate and widespread. Judge Gros, in a remarkably perceptive separate opinion, joined issue with the Court's judgment on this particular score. Citing "numerous agreements" which indemnified stockholders, he found it

> "impossible to dismiss these agreements with a stroke of the pen . . . ; it is not the habit of States to make each other free gifts, and the number of agreements for the compensation of shareholders considered apart from the limited company does imply the recognition of an obligation" (ICJ Reports (1970) pp. 277–278).

Judge Jessup also took note of a lump sum agreement in his discussion of diplomatic protection, while Judge Ammoun, refusing to infer "a rule of international law" from lump sum agreement/national claims commission practice, nevertheless acknowledged that such agreements might "contribute to the eventual formation of custom" (ibid., p. 306). Numerous commentators supported the views of these members of the Court in preference to the rationale contained in its judgment. Moreover, and perhaps more importantly, States have continued to enter into such settlements with undiminished regularity during the past decade. Thus, anyone surveying the present state of the law of international claims surely must take them into account.

5. Lump Sum Agreements and Traditional International Law

An examination of lump sum agreements, interestingly enough, reveals an extraordinary consistency between their provisions, on the one hand, and the decisions of mixed claims commissions and the results of diplomatic espousal, on the other. Consider, for instance, the problem of claimant eligibility. All claimants have had to prove, in addition to legal title, claimant State nationality to be eligible for compensation; and continuity of claimant State nationality, from the date of claim accrual to the date of agreement signature or entry into force, ordinarily has been required. Generally speaking, in short, lump sum agreement jurisprudence has been at one with traditional international law as regards the pre-

requisites of claimant eligibility. However, it emerges more liberal than traditional practice in the conditions it has set to meet the key requirement of nationality – as reflected, for example, in its reluctance to adhere rigidly to the place-of-incorporation test of corporate nationality and its inclination to "pierce the corporate veil" to protect a wide assortment of claimant State stockholders. Indeed, it is fair to say that post-war lump sum agreements have rewritten the law in these respects, the ICJ in Barcelona Traction to the contrary notwithstanding.

Turning to the substantive bases of the claims covered by lump sum agreements and the property, rights and interests compensated thereunder, the general uniformity between lump sum agreement practice and traditional international law is even more pronounced. In much the same manner as traditional international law, lump sum agreements have required successor régimes to assume responsibility for the acts and omissions of related predecessors, have refused to give effect to extraterritorial assertions of State competence, have imposed heavy liability upon States that have initiated → armed conflict (→ Aggression), have protected against *"de facto"* as well as *"de jure"* expropriations, have granted relief to all manner of wealth losses, and so forth. The point is not, of course, that lump sum agreements have followed traditional international law slavishly. For instance – demonstrating the sometimes liberating impact of lump sum agreement making – such settlements often have authorized creditor claims, a class of claims not widely favoured in the past. The point is, simply, that lump sum agreements, even though very much influenced by what some observers would call "extra-legal" expediences, have differed but little from traditional international law as regards both the substantive bases of international claims and the recognition that is given to the property, rights and interests to which they are addressed.

Finally, one comes to the controversial issue of the impact lump sum agreements have had upon the compensation issue. Regardless of one's leaning in the oft heated debate over whether international law requires "prompt, adequate and effective" compensation or less or even no compensation at all upon the major deprivation of foreign-owned wealth, few observers will find complete satisfaction here. The reason is that lump sum agreements undeniably have compromised all the policy preferences advanced in this connection. To say, however, that the agreements afford no complete satisfaction to this or that policy preference is not to say that they have been conspicuously inconsistent with traditional international law standards in this realm. To the contrary, except as regards the "prompt" compensation requirement (which would necessitate at least nominal interest when opting for payment by instalments), lump sum agreements have substantially adhered to general international law norms. Indeed, their very existence breathes new life into the customary principle of compensation, the more so because they are frequently concluded in the face of allegedly mitigating revolutionary upheaval and economic instability. In their common provision of less than "full" compensation for large-scale expropriations, they lend support to the position that "partial" compensation is permissible when "special circumstances" make anything more unreasonable. Moreover, in their nearly unanimous call for payment in hard currency, they press the cause of "effective" compensation to a degree that even traditional international law would be hard pressed to match. Thus, once again, a marked confluence between lump sum agreements and traditional international law emerges.

6. Evaluation

Summarizing now what has been argued above, lump sum agreements to which disputants are not parties can and should be received no differently than any other class of general international prescription when searching for guidance in the resolution of international claims controversies, i.e. no differently than any other practice leading to custom as under Art. 38(1)(b) of the ICJ Statute. To be sure, this conclusion departs sharply from the one reached in Barcelona Traction, that lump sum agreements should be accorded only *sui generis – lex specialis* status. It follows naturally, however, from the discovered uniformity of decision reported in the preceding section. When decisional outcomes (doctrines, principles, standards, rules) appear essentially unaffected by the processes that produce them – when, that is, decisions appear substantially the same regardless of how or by whom produced – there is no reason to treat them differently, as appears to have been

the case in Barcelona Traction, on the basis of those very modalities which seemingly make no difference.

On final analysis, however, no theoretical argument is needed to substantiate that lump sum agreements can have the general guidance or precedent value many publicists attach to them. As has been abundantly documented, lump sum agreement jurisprudence, derived from the text of the settlements themselves and the national claims commissions interpreting them, actually has been invoked in State practice time after time. In other words, *pace* the ICJ, lump sum agreements have been given and continue to be given precedential value in everyday life. To deny their general jurisprudential worth is, thus, not only to deny a growing edge of international law, but also to deny reality itself. To acknowledge their general guidance value, on the other hand, is to assist in the development of a law of international claims that is truly responsive to the contemporary demands of an increasingly interdependent world community.

R.R. WILSON, Some Aspects of the Jurisprudence of National Claims Commissions, AJIL, Vol. 36 (1942) 56–76.

M. LITMANS, The International Lump-Sum Settlements of the United States (1962).

E.D. RE, Domestic Adjudication and Lump-Sum Settlement as an Enforcement Technique ProcASIL, Vol. 58 (1964) 39–48.

R.B. LILLICH, International Claims: Postwar British Practice (1967).

B. WESTON, International Claims: Postwar French Practice (1971).

R.B. LILLICH and B. WESTON, International Claims: Their Settlement by Lump Sum Agreements, 2 vols. (1975).

R.B. LILLICH and B. WESTON (eds.), International Claims: Contemporary European Practice (1982).

RICHARD B. LILLICH

MARSHALL PLAN *see* European Recovery Program

MIGRANT WORKERS

A. Introduction

In existing instruments, the term "foreign migrant workers" is broadly understood to designate persons who wish to settle in another country for a considerable period of time with a view to being employed otherwise than on their own account (→ Aliens).

Mass labour migrations since the early 1960s have brought about major social problems which call for legal adjustments (→ Migration Movements). The initial reason for this migration was the disparity between demographic stabilization and employment opportunities in Western Europe, and population growth coupled with underdevelopment in the Third World. Similar disparities emerged in other regions, giving rise to comparable migrations, notably from Mexico and other Latin American countries to the United States and, after 1973, from various areas towards oil-rich countries such as Iran, Kuwait, Libya, Nigeria, Saudi Arabia, and Venezuela.

The world recession since the mid 1970s did not diminish → emigration pressures but it did lead to restrictive → immigration policies, sometimes to systematic deportations, by the host governments (→ Aliens, Admission; → Aliens, Expulsion and Deportation). The combined effect of those phenomena is the growing proportion of illegal migrant workers in the foreign population of industrialized areas and the increase in clandestine manpower trafficking across → boundaries. Thus, according to → International Labour Organisation and → United Nations sources, there were in 1972 approximately eleven million lawfully admitted foreign workers in Western Europe and some two million migrants in irregular status. The number of clandestine workers from Mexico deported from the United States rose from 42 000 in 1964 to 265 000 in 1970.

During the last decade, the number of bilateral treaties on migrant workers has greatly increased. Worthy of note are the adoption of instruments such as the Arab Labour Mobility Convention (1968), the African Mauritian Common Organization (OCAM) Convention on personal status and conditions for permanent residence (1971), the 1969 Cartagena Agreement and subsequent instruments under the aegis of the → Andean Common Market, certain directives of the → European Economic Community, and the European Convention on the Legal Status of Migrant Workers (1977; ETS, No. 93). In 1975, the ILO, which has primary competence in this field under its Constitution, supplemented its existing

instruments of 1949 by Convention No. 143 and Recommendation No. 151 on Migrant Workers. The → United Nations General Assembly in 1979 decided to prepare a new convention for the further protection of the human rights of all migrant workers – including unlawful migrants – and their families; consideration of this instrument is in progress.

B. Prevention of Manpower Trafficking

The international law in force bears essentially upon the status of foreign migrant workers during their stay in the host countries. Decisions to grant or refuse entry to aliens and decisions to expel aliens still largely fall within the → domestic jurisdiction of States.

Regarding the entry of foreign migrant workers, however, one set of problems has recently been regulated in treaties: the prevention and punishment of manpower trafficking across frontiers, i.e. the organizing of labour migrations in violation of international or national law. This subject was for the first time treated comprehensively in the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975.

This treaty obliges States parties to investigate "systematically" all practices of illegal migration. Regular exchange of information on this matter must be carried on between States concerned, in consultation with representative organs of employers and workers. States parties should take appropriate measures, alone and jointly with other ILO members, against not only the organizers of illicit trafficking but also "those who employ workers who have immigrated in illegal conditions". National law should provide administrative, civil and penal sanctions, "which include imprisonment in their range", against the illegal employment of migrant workers, the organization of illicit trafficking, and "knowing assistance to such movements, whether for profit or otherwise". There even emerges a measure of international penal law in a clause which proclaims as one of the purposes of inter-State contacts "that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities" (Art. 5; → Criminal Law, International).

C. The Status of Lawfully-Admitted Migrant Workers under International Law

1. Fundamental Civil Rights

Once they have lawfully entered the host countries, foreign workers appear to enjoy certain fundamental civil rights and liberties recognized by international law as inherent to the dignity of all human beings.

In one of its earliest forms, this concept was embodied in the → customary international law concerning the → minimum standards for the treatment of aliens, affirmed in several decisions of international courts and awards of arbitral tribunals. These minimum standards, concerning, in particular, protection against unlawful arrest, arbitrary confiscation of property and arbitrary expulsion, were clearly proclaimed as independent from national legislation. At any rate, the judicial doctrine of the minimum standard is largely superseded at present by human rights treaty law (→ Human Rights Covenants).

The International Covenant on Civil and Political Rights of 1966 – in force for 76 States – recognizes a number of rights and freedoms with respect to aliens as well as nationals under Art. 2 which prohibits distinctions "of any kind" including, implicitly, distinctions based on → nationality. The only stated exception is Art. 25 which restricts political rights to "citizens". The scope of this protection for foreign migrant workers may be further restricted, however, through the application of limitation clauses in certain articles, referring to such concepts as "national security", "public safety", "public order" and "public health and morals" (→ Ordre public (Public Order)). Invoking those clauses, and provided such measures do not amount to the "destruction" of the rights at stake (Art. 5), governments can suspend or limit the exercise by aliens of certain rights including freedom of movement (Art. 12), expression (Art. 19), assembly (Art. 21) or association (Art. 22), even in normal times. The scope of protection may be further drastically reduced "[i]n time of public emergency which threatens the life of the nation" (Art. 4), during which States may derogate from all but a few of the Covenant rights.

This non-derogable core of human rights, guaranteed in all circumstances to migrant work-

ers as human beings, includes the right to life (Art. 6), protection against → torture and other cruel, inhuman or degrading treatment or punishment (Art. 7), prohibition of → slavery and the slave-trade in all their forms (Art. 8(1)), prohibition of imprisonment for contractual debt (Art. 11), non-retroactivity of penal law (Art. 15), the right to recognition as a person before the law (Art. 16) and freedom of thought, conscience and religion (Art. 18). Similar rights are guaranteed in the → European Convention on Human Rights and the → American Convention on Human Rights.

While the 1975 ILO Convention (No. 143) reaffirms only in general terms the duty of States "to respect the basic human rights of all migrant workers", these entitlements are restated and elaborated upon in the Draft Convention currently before the UN General Assembly. This text would go further than the Covenant in spelling out a number of civil guarantees of special interest to aliens (e.g. Art. 23: right to communicate with consular authorities) and in adding some rights omitted from the Covenant (e.g. Art. 15: protection against arbitrary deprivation of property; → Aliens, Property).

2. Economic, Social and Cultural Rights

The legal situation as regards the economic, social and cultural rights of migrant workers is more complex. States which grant basic civil liberties to foreigners may be reluctant to let them compete freely with nationals on the labour market and to facilitate their integration in society.

On close study, the major human rights instruments of the United Nations system appear to secure few economic, social and cultural rights, free from open-ended restrictions, to foreigners. The International Covenant on Economic, Social and Cultural Rights (1966) recognizes certain rights to "everyone" in seemingly absolute terms. However, it implicitly allows distinctions between nationals and foreigners: this appears to be the effect of the non-discrimination clause of Art. 2 which is framed in restrictive terms and omits the word "nationality", as combined with Art. 4 which permits limitations "for the purpose of promoting the general welfare in a democratic society". One may also take into account the possibly restrictive impact of Art. 1(2) of the Covenant concerning the right of peoples to "freely dispose of their natural wealth and resources", and of Art. 2(3) whereby "[d]eveloping countries . . . may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals" (→ Developing States; → Natural Resources, Sovereignty over).

Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 – ratified by 121 States – contains far-reaching provisions, subject, however, to the right of States parties to make "distinctions, exclusions, restrictions or preferences . . . between citizens and non-citizens" (Art. 1(2)). The only residual duty of States would appear to be to avoid practising racial discrimination under the guise of restrictive immigration policies (→ Racial and Religious Discrimination).

ILO Convention No. 111 on Discrimination in Employment and Occupation (1958) and Convention No. 122 on Employment Policy (1964) do not seem to apply to distinctions between nationals and foreigners: their non-discrimination clauses, in exhaustive terms, refer to "national origin" or "national extraction" but not to "nationality". Convention No. 111 makes it optional for States parties to regard any other ground of distinction – including nationality – as discriminatory, after consultation with representative workers and employers' organizations.

Furthermore, that a migrant's right to employment is subject to some limitations is confirmed in ILO Convention No. 143. While assuring migrant workers the right to geographical mobility, each State party retains the power to make the migrant's free choice of employment subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years. In addition, after appropriate consultation with the representative organizations of employers and workers, each State may make regulations concerning recognition of occupational qualifications acquired outside its territory. Finally, States may restrict access to limited categories of employment or functions "where this is necessary in the interests of the State" (Art. 14(c)).

Some existing treaties mentioned below con-

tain, however, more positive articles which appear to secure various economic, social and cultural rights to lawfully-admitted migrant workers.

(a) *Rights granted to migrant workers without reference to the status of nationals*

Few existing treaties grant "absolute" rights. Noteworthy among them are various ILO treaties, including the two major ILO Conventions No. 87 (1948) on "Freedom of Association and Protection of the Right to Organise" and No. 98 (1949) on the "Right to Organise and Collective Bargaining". Convention No. 87 expressly applies "without distinction whatsoever", a principle which seems also to govern implicitly the other text.

The United Nations Draft Convention reaffirms the trade unions rights of migrant workers (Arts. 26 and 40) but would allow limitations thereto as prescribed by law and "necessary in a democratic society in the interests of national security or public order, or for the protection of the rights and freedoms of others".

A few other ILO Conventions, including Convention No. 110 on Conditions of Employment of Plantation Workers (1958), apply to all workers "without distinction of nationality". Convention No. 110 sets forth some minimum standards as to wages, duration of labour contracts and various conditions of work for plantation workers in tropical areas

At the regional level, the → European Social Charter of 1961, as provided in an appendix, might be applicable to lawfully resident foreigners who are nationals of other States parties (see also Art. 19 on the rights of migrant workers).

(b) *Rights with reference to the status of nationals*

The great majority of treaty provisions require only the application of a standard which refers to the status of nationals. Several variants of this approach are applied.

The most open approach consists in granting foreign workers a treatment no less favourable than that applied to nationals. This is the criterion of ILO Convention No. 97 of 1949 concerning remuneration, conditions of work, social security and legal proceedings in labour matters. Some similar provisions are contained in the European Convention of 1977.

A stricter formula is that of "equality with nationals", e.g. in the Convention against Discrimination in Education (1960) of the → United Nations Educational, Scientific and Cultural Organization, which binds States parties "to give foreign nationals resident within their territory the same access to education as that given to their own nationals" (Art. 3(e)).

Still other instruments, such as the ILO Equality of Treatment (Social Security) Convention No. 118 of 1962, add to the rule of equality with nationals a condition of → reciprocity.

3. *Provisions to meet the Specific Needs of Migrant Workers*

Some international protection is granted to migrants where recruitment, departure, transit and arrival arrangements are concerned in particular by ILO Convention No. 87 (1949), the 1977 European Convention and many bilateral agreements. The United Nations Draft Convention elaborates upon these provisions and strengthens the obligation to take measures against misleading information relating to labour migrations (Art. 66).

Family reunification for migrant workers has become one of the main issues of international concern. Part of the debate focuses on the international legal definition of "the family" for this purpose. While the European Social Charter (Art. 19(6)) and the European Convention on the Legal Status of Migrant Workers of 1977 (Art. XII) restrict the concept to the spouse and dependent children, Regulation 1612/68 on Freedom of Movement for Workers of the EEC Commission extends it, further, to dependent relatives in the direct line of ascent. ILO Convention No. 143 (1975) refers to "the spouse and dependent children, father and mother". Within the framework of the United Nations Draft Convention, far-reaching proposals have been made to include, for instance, "the companion who lives matrimonially with the worker if such a relationship is recognized by the law . . . of the State of employment or the State of origin".

The extent of State obligation for the unification of families varies from treaty to treaty. Parties to the European Social Charter are only

bound to "facilitate as far as possible" such reunification. ILO Convention No. 143 provides that States parties "may" take all necessary measures "to facilitate" it. EEC Regulation 1612/68 recognizes a right of families from one of the Community countries to join the migrants. Going further, the United Nations Draft Convention, in its present Art. 44, provides that spouses and minor dependent children "shall be authorized to accompany or join migrant workers [in lawful status] and to stay in the State of employment for a duration not less than that of the worker", and it also invites host countries to "[favourably] consider the admission of other [dependent] family members on humanitarian grounds". All texts allow receiving States to impose certain conditions, in particular available housing.

Increasing attention is also being paid to the adjustment of the children of migrants to the educational and social environment of the host countries, without reducing their educational entitlements or creating a "ghetto" mentality. ILO Convention No. 143 and the United Nations Draft encourage State policies in this direction. Another aspect is the encouragement of policies designed to preserve the national identity of migrants.

Freedom to transfer their earnings regularly to the home countries is a basic need of migrant workers, whose families left behind often depend upon such earnings for survival. This is taken into account by the ILO Convention No. 97 (1949) and the European Convention of 1977, but within the severe limits often imposed by national exchange control legislation.

The expulsion of migrant workers, while remaining in itself a State prerogative, is being progressively subjected to some international regulation. The Covenant on Civil and Political Rights already requires, in Art. 13, that the expulsion of a lawfully admitted alien be ordered only in accordance with law and be subject to the alien's right to submit his reasons against the measure and to have his case reviewed by, and to be represented for this purpose before, a competent authority. Such a procedure might be denied only for compelling reasons of national security. ILO Convention No. 143 further grants to the expelled migrant a right of appeal to a competent body for the settlement of sums due to him arising out of past employment, and exempts him from the payment of deportation costs.

It is in the field of expulsion that some of the most far-reaching proposals of the United Nations Draft Convention can be found. One proposal would be to restrict the grounds for expulsion of lawfully admitted migrants to (a) reasons of national security, public order, or morals; (b) refusal, after being duly informed, to comply with public health measures; and (c) non-fulfilment of a condition essential to the issue or validity of residence or work permits (Art. 56). Expulsion for failure to meet a contractual obligation would be forbidden.

Finally, the United Nations Draft stresses the need for the cooperation of States to ensure "the orderly return" of migrants to their home countries and to promote their durable reintegration.

D. The Rights in International Law of Migrant Workers in Unlawful Status

In view of the growing number of unlawful migrants who are often subject in host countries to difficult conditions, the protection of these persons is now a priority concern of international organizations.

One of the first approaches used is to exclude from the concept of "unlawful migrant" (or, as they are called at the United Nations, "non-documented migrants") those who fall into that category for reasons outside their control. Thus, an important provision of ILO Convention No. 143 is that "[o]n condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit" (Art. 8(1)). Para. 2 of the same article further stresses that migrants in such a situation "shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining".

The provisions of the International Covenant on Civil and Political Rights appear to be applicable to all persons, including unlawful migrants. Exceptions are Art. 13 on procedures for expulsion, applicable only to "lawfully" admitted

aliens, and Art. 25 on political rights addressed only to citizens. However, the limitations clauses on "national security" and "public order" may well be used against unlawful migrants in respect of several freedoms, and further curtailments may be ordered in times of emergency.

In the sphere of economic, social and cultural rights, the entitlements of unlawful migrants remain very slim indeed.

Art. 9 of ILO Convention No. 143 guarantees to unlawful migrants whose position cannot be regularized "equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits". As noted earlier, in case of dispute on such matters, he may present his grievance to a competent body, and, if he is subjected to expulsion, he should not be made to bear its costs.

It is the main characteristic of the United Nations Draft Convention to extend as much as possible economic, social and cultural rights to unlawful migrants. Promoted by some labour exporting countries such as Mexico and Algeria, accepted to a certain extent by States with mixed interests such as Italy, Greece, and Spain, this trend is resisted by some major immigration countries such as the United States and the Netherlands. By the close of the debates at the 1983 session of the UN General Assembly, an extensive catalogue of new rights had been proposed for all foreign workers, but no → consensus had been reached.

E. Concluding Remarks

Today legal migrant workers enjoy all civil liberties and many of the economic, social and cultural rights recognized with respect to nationals (see also→ Labour Law, International Aspects; → Social Security, International Aspects). More strikingly, there is a trend to increase the internationally recognized rights of unlawful migrants, from a small core of civil liberties to a growing set of economic, social and cultural rights. Fundamentally, this trend may be seen as one aspect of the over-all claim of developing, labour-exporting, countries for a new → international economic order. Furthermore, one can perceive trends – still quite controversial – to promote in certain circumstances a limited "right to immigration" in international law, for an equitable sharing of the world's resources.

Conventions and Recommendations of the International Labour Organisation, 1919–1981 (1982) 781–834.

European Convention on the Legal Status of Migrant Workers, November 24, 1977, ETS, No. 93.

Text of the Preamble and Articles of the International Convention on the Protection of the Rights of All Migrant Workers and their Families which the Working Group provisionally agreed during the first reading, UN Doc. A/C.3/38/WG.1/CRP.2/Rev.1, September 6, 1983.

Reports of the Open-Ended Working Group of the Third Committee on the Draft Convention, UN Docs. A/C.3/35/13, A/C.3/36/10, A/C.3/37/1, A/C.3/37/7 and Corr. 1 and 2, A/C.3/38/1, A/C.3/38.5.

H.E. WARZAZI, Exploitation of Labour Through Illicit and Clandestine Trafficking, ECOSOC Doc. E/CN./Sub.2/351, June 17, 1974.

G. LYON-CAEN, Les travailleurs étrangers, Etude comparative, Droit social (1975) 1–16.

F. RUSSO, Migrant Workers, Existing and Proposed International Action on Their Rights, International Commission of Jurists Review (1975) No. 15, 51–58.

T. ANSAY, Legal Problems of Migrant Workers, RdC, Vol. 156 (1977 III) 1–77.

J. CLAYDON, The International Protection of the Welfare of Migrant Workers, in: R.St.J. Macdonald, D.M. Johnston and G.L. Morris (eds.), International Law and Policy of Human Welfare (1978) 347–371.

Politics of Labour Migration, Journal of International Affairs, Vol. 33, No. 2 (1979).

Société française pour le droit international, Les travailleurs étrangers et le droit international, Colloque de Clermont-Ferrand, 25–27 mai 1978 (1979).

ILO, Migrant Workers, General Survey of the Reports relating to Conventions Nos. 97 and 143 and Recommendations 86 and 151, International Labour Conference, 66th session, 1980.

G. BERTINETTO, International Regulations on Illegal Migration, International Migration, Vol. 21 (1983) 189–203.

MAXIME TARDU

MIGRATION MOVEMENTS

The term "migration movements" is generally used to refer to the movement of persons who leave their country of origin, or the country of habitual residence, to establish themselves either permanently or temporarily in another country (→ Emigration; → Immigration). Many migra-

tion movements take the form of labour-oriented migration of persons seeking improvement of their economic or social condition. The notion of migration movements also encompasses the involuntary migration of → refugees in situations where persons or groups of persons flee countries for reasons of persecution on racial, ethnic, religious or political grounds or as a consequence of civil disturbances, natural disasters, famine or economic deprivation, or as the result of mass expulsions of populations (see also → Aliens, Expulsion and Deportation; → Forced Resettlement; → Population, Expulsion and Transfer; → Racial and Religious Discrimination; → Denationalization and Forced Exile).

In modern history there have been large migration movements from Europe, due to overpopulation (→ World Population) and to a great demand for manpower in rapidly developing overseas countries such as the United States, Canada and Australia, as well as certain areas of Africa and Latin America. There have also been large migration movements within Asia, mainly originating from China, and within Africa, where entire tribes have searched for better settlement areas.

The outbreak of World War I followed by the economic crisis and depression slowed the massive labour-oriented emigration from Europe to countries overseas during the post-war period. During World War II, tens of millions of human beings were forced to move as a result of hostilities, political and racial persecution, deportation and population transfers. After the war, labour-oriented overseas migration again gained significant momentum: Large-scale emigration from Europe to other continents during the first post-war decade totalled more than 6.6 million (International Labour Organisation, Governing Body, 188th session 1972, Doc. 188/5/9). These migration movements were directed essentially to North America (44 per cent), South America (27 per cent), Oceania (18 per cent) but also to Israel which received about a million immigrants.

During the same period intra-continental migration began to develop. In Europe, France received 700 000 European migrants, the United Kingdom 600 000, Switzerland 250 000 and Belgium and Sweden 200 000 each. In the Americas, the United States received nearly 800 000 migrants and Argentina 210 000 migrants from other countries of their respective continents. In Africa, the most important migration movement was directed to Ghana which alone received 400 000 immigrants from other West African countries.

Beginning with the early 1960s, there developed in Europe an increasing trend away from migration for permanent settlement towards migration of a temporary nature, and from overseas migration to intra-regional migration. It is estimated that up to the early 1970s about 13 million people, mainly from agrarian Southern European countries, moved to the more industrialized countries of North-West Europe.

While this trend slowed considerably during the 1970s due to a new economic recession in Europe, a new trend emerged, not only in Europe but also in other parts of the world. Large scale migration from → developing States to industrialized or middle-income countries can now be observed in Africa, Asia, the Americas, and the Middle East. In connection with these movements serious problems of illegal immigration have arisen. In some instances, immigrants have used asylum procedures (→ Asylum, Territorial) in order to obtain at least temporary admission to the country concerned and to bypass its normal immigration controls. Another problem connected with this new form of labour-oriented migration is the so-called "brain-drain" phenomenon under which the "sending" countries tend to lose the most skilled and accomplished of their populations.

In international law, no State is obliged to admit → aliens to its territory except under treaty obligations (→ Aliens, Admission). States therefore enjoy wide discretion in regard to the admission of aliens and the conditions imposed on an alien's stay in their territory. A great number of bilateral and multilateral treaties regulate the admission and treatment of aliens. There is also evidence in State practice of an emerging recognition of basic → human rights principles affecting the discretionary power of States, particularly with regard to the admission of aliens, such as the principle of *non-refoulement* of refugees or the right to family unity. Other limitations relating more specifically to the treatment of aliens once admitted may derive from the → minimum standards for the treatment of aliens originating in → customary international law. The majority of

treaties and other international instruments of relevance to migration movements do not relate to migration movements as such but rather to migration for employment or to rights of establishment (see e.g. → European Economic Community; → Migrant Workers). They are aimed at ensuring for migrant workers equality of opportunity and treatment with the nationals of the receiving State, protection of migrant workers against abusive working conditions, safeguards of residence and, in the field of social security, the maintenance of acquired rights and rights in the course of acquisition (→ Labour Law, International Aspects; → Social Security, International Aspects).

For institutional arrangements of relevance to migration movements see → Intergovernmental Committee for Migration; → International Labour Organisation; and → Refugees, United Nations High Commissioner.

R. PLENDER, International Migration Law (1972).
G.S. GOODWIN-GILL, International Law and the Movement of Persons between States (1978).
Les travailleurs étrangers et le droit international, Colloque de Clermont-Ferrand, Société française pour le droit international (1979).
M. KRITZ, C. KEELY and S. TOMASI, Global Trends in Migration: Theory and Research on International Population Movements (1981).
United Nations Department of International Economic and Social Affairs, International Migration Policies and Programmes (1982).
R.K. JENNY, The Changing Character of Contemporary Migration, Florence Round table on the Movements of People, Institute of International Humanitarian Law (1983).

EBERHARD JAHN

MILITARY AID

1. Notion

A great many international transfers of armaments today are effected within the framework of military aid programmes; the transfer of armaments, ranging from light weapons such as machineguns to heavy weaponry and equipment such as tanks, → aircraft, and ships, forms the essential part of military aid. However, military aid transcends the mere transfer of armaments in that it also encompasses other forms of military assistance, such as the supply of ammunitions and the training of the recipient States' military forces in the use of the weapons transferred. Furthermore, military aid includes the training of staff officers in strategy and tactics as well as the training of technical personnel in the necessary skills for the maintenance and repair of more sophisticated weaponry in particular. Because military aid is granted in many cases to → developing States, an important part of military aid is formed by the transfer of heavy engineering equipment for use in the infrastructural development of the recipient State, i.e. in building roads, bridges, and harbours. Together with the transfer of technological know-how (i.e. the granting of licences), such aid is conducive to the general economic development of the recipient State (→ Economic and Technical Aid; → Technology Transfer). Thus, although military aid partly coincides with non-military development aid, for political reasons States tend to keep both measures strictly separated.

Military aid should be understood as an integral part of the national security and foreign policies of the major political, military, and economic powers of today; it is a strictly government-to-government measure although at times it may be effected through non-governmental agencies or enterprises. Military aid in the form of transfers of armaments must therefore be distinguished from the traffic in arms in general (→ Arms, Traffic in), since the latter may also be undertaken by private enterprises for purely commercial reasons. By the same token, military aid is predominantly provided for on the basis of grants or on easy terms of credit, with the major reward of military aid programmes being the donor State's expectations of political and military advantages to be gained from a favourable attitude on the part of the recipient States towards the donor State. Economic advantages for the donor State lie only in the indirect way of strengthening its internal economy through increases in the production of weaponry and other technical equipment.

In sum, military aid according to general understanding of the notion may be defined as the transfer – as a rule by way of grants – of armaments, other technical equipment, and technological know-how as well as the provision of train-

ing programmes for military and technical personnel, aimed at achieving political, military and indirect economic advantages for both the donor and the recipient States.

2. *Types and Purposes*

The present international system is characterized on the one hand by the existence of a number of military → alliances most of which are dominated by the major political and military powers, particularly by the United States and the Soviet Union. On the other hand, there is also a large group of → non-aligned States participating in the international system. Thus → international relations may be divided into those existing within alliance systems and those existing outside. The two major types of military aid programmes are, correspondingly, military aid granted within alliances by one member to another, and aid provided outside such systems.

Other distinctions between types of military aid may be drawn according to the contents of military aid programmes. Four types may be identified here:

(a) Military aid by transfer of military equipment proper (weapons, tanks, aircraft, ships and so forth). In the first decades after World War II these transfers, as a rule, were made by means of grants and mainly comprised used *matériel* taken from the stockpiles of the major military powers. This was particularly true of arms transfers to developing countries, but also intra-alliance weapons transfers, such as from the United States to some members of the → North Atlantic Treaty Organization or from the Soviet Union to members of the → Warsaw Treaty Organization. Recently, however, the demand is for ever more sophisticated weaponry, particularly from those developing countries disposing of rich natural resources such as oil. Along with this change in the kinds of weapons transfers the modalities have also changed. Weapons transfers are increasingly effected on the basis of sales, even if the terms of payment remain generous;

(b) Aid by offering training programmes for military personnel. Such training programmes are carried out either by sending military advisors into the recipient State or by inviting military personnel from the recipient State to the donor State for participation in training programmes offered by military academies, or by training service personnel within the armed services of the donor State;

(c) Aid provided by transferring light weaponry for police purposes and advising or training police forces. Again, this type of aid programme may be carried out in the recipient or the donor State;

(d) Aid by transfers of engineer equipment for infrastructure projects such as road and bridge construction. This type of aid, though closely related to military purposes, may also serve the development of the recipient State's civilian sector.

In theory, the military and political purposes of military aid may be distinguished. In practice, however, they are closely interrelated and need not be discussed separately. The military and political purposes of intra-alliance military aid can be summarized as follows: To ensure a high standard of logistical effectiveness, military aid can help to bring about the standardization of weaponry and other equipment. The early period of military aid within NATO and the Warsaw Pact was clearly influenced by such considerations. A second intra-alliance purpose of military aid is to be found in the concept of burden-sharing or intra-alliance solidarity. The stronger members of the alliance help the weaker ones in building up their military potential. United States and German military aid to Turkey is a clear example in point. Thirdly, military aid may be given by the leading power of an alliance to the junior partners to maintain a certain level of dependence, thereby using military aid as a form of political leverage to maintain the alliance in line with the wishes of the leading or hegemonic power. The history of NATO, the Warsaw Pact, and the → South-East Asia Treaty Organization can be cited in support of this observation.

Similarly, with regard to military aid outside alliances the maintenance or development of political influence in a region or State is one of the obvious purposes behind the aid, but there are a number of others. Military aid may be granted to States in a particular region in order to achieve or maintain political and military stability, with the underlying philosophy aiming at a certain → balance of power. Military aid is conceived of as an instrument designed to enable regional

groups of States to maintain stability on their own without direct interference by the donor State(s). Political and military stability in a given region may be considered an end in itself by the donor State irrespective of the political or ideological outlook of the States concerned. But military aid may also be restricted to one State in a particular region with the aim of preserving its stability and role as a leading regional power which pursues a foreign policy favourable to the donor State. Finally, military aid may be granted to influence the internal political and economic system of the recipient State by using the dependence of the recipient State on continued aid as political leverage. Thus the granting or withholding of military aid may be linked, for instance, to the observation of → human rights standards by the recipient State. In such cases military aid may acquire an interventionist character, raising serious questions as to whether such linkages are admissible under international law (→ Intervention).

3. International Legal Foundations and Restraints

Military aid is usually granted on the basis of formal treaties or → executive agreements; it is thus subject, as the case may be, to either the → Vienna Convention on the Law of Treaties or the customary rules of law applicable to → treaties. In principle, the conclusion of treaties or agreements providing for military aid is a matter for the free sovereign will of States. Such treaties and agreements, however, may also be considered as based on the right of every State to individual or → collective self-defence (→ Self-Defence). Military aid granted to Great Britain during World War II by the United States is a classic example in point (see the Agreement between the United States and the United Kingdom on Mutual Aid of February 2, 1942, Documents on American Foreign Relations, Vol. 4 (1942), p. 235).

While military aid rests on clear legal bases in international law, legal restraints on military aid also exist. Of these, Art. 2(4) of the → United Nations Charter must be considered as the first legal barrier to the granting of military aid in cases where the aid is used for aggressive purposes (→ Aggression). Treaties or agreements serving such purposes are invalid under international law (Art. 53 of the Vienna Convention on the Law of Treaties). Although Art. 2(4) of the UN Charter may in theory be an indisputable legal restraint on military aid aimed at supporting aggression, the practice of States will certainly provide difficulties for the determination as to whether or not military aid in a particular case serves aggressive ends.

Another legal restraint on military aid may be seen in the principle of → non-intervention. As indicated above, military aid may be used with the implicit or explicit aim of influencing the internal political and social system of the recipient State. However, this does not render military aid illegal as an offence against the principle of non-intervention, since such aid, whatever its effect, is provided to the recipient State with that State's consent. Problems do, however, arise if the recipient State becomes so dependent on the donor State that the substance of its consent is no longer based on sovereign free will. State practice again may militate against a determination that the granting of military aid amounts to an illegal intervention into the internal affairs of the recipient State. For even if the recipient State's dependence on the donor State reduces its government to a mere puppet régime, international law continues to recognize that government as the lawful representative of the recipient State whose decisions must be respected, including decisions to consent to interventionist kinds of military aid. Thus, for all practical purposes, the formulation of a general rule that military aid must not be granted in a way that is contrary to the principle of non-intervention, must be considered of little importance in State practice.

A third legal restraint on grants of military aid possibly arises out of the international law of human rights. Just as military aid may not be granted in contravention of the prohibition of the → use of force (Art. 2(4) of the UN Charter), it might be postulated as a matter of law that military aid, particularly in the form of police training and transfers of police equipment, may not be granted if the recipient State is actively engaged or likely to become engaged in grave violations of human rights. While it goes without saying that military aid to such repressive régimes provokes strong moral objections which have been voiced repeatedly by the international community, to date it is difficult to identify a rule of international

law prohibiting military aid to States guilty of human rights violations. The international legal obligations to observe human rights, whether conventional or customary, bind States with the regard to their individual conduct within their respective domains. With the exception of cases where States agree to the international enforcement of human rights (i.e. on the initiative of individual States or international organizations), the international law of human rights does not yet provide for a general obligation on States to enforce human rights standards in third States. Such obligations are, however, contained in the national laws of some donor States.

4. National Legal Controls

Since military aid figures prominently in the defence and foreign policies of States, and also touches upon other vital national and moral interests, military aid programmes are usually subject to a variety of political and legal controls, particularly in democratic systems with parliamentary constitutions. Statutory and budgetary controls are used to ensure that military aid is granted only in conformity with the political, legal and moral convictions of the respective donor State. Thus national statutes regulating arms exports in general or military aid in particular usually require governments to conclude military aid treaties or agreements only if they ensure that such aid is not being used in ways contrary to either international or national laws and policies (see the United States Security Assistance and Arms Export Control Act of 1976, and the Gesetz über die Kontrolle von Kriegswaffen 1961, revised 1978, Bundesgesetzblatt (1961 I), p. 444 and Bundesgesetzblatt (1978 I), p. 641).

5. Jurisdiction over Personnel

Military aid includes the training of military personnel in either the recipient or the donor State. This raises problems as to the jurisdiction over training and advisory staff from the donor State in the territory of the recipient State on the one hand and over the trainees from the recipient State in the donor State on the other. As a rule, these jurisdictional questions are settled in the relevant treaties or agreements. These agreements usually provide that military personnel involved in military aid programmes – wherever they are stationed – remain under the jurisdiction of their home State as far as their status is concerned (e.g. the duration of the mission), but they fall under the jurisdiction of the host State as far as day-to-day issues as well as the observation of the local law is concerned. In this respect the jurisdiction over foreign military personnel in military aid programmes is regulated somewhat differently when compared with military units stationed on foreign territory, where the sending State retains exclusive jurisdiction over its forces in military matters (→ Military Forces Abroad; → Military Bases on Foreign Territory).

H. HAFTENDORN, Militärhilfe und Rüstungsexporte der Bundesrepublik Deutschland (1971).

P.J. FARLEY, S.S. KAPLAN and W.H. LEWIS, Arms Across the Sea (1978).

U. RA'ANAN, R.L. PFALTZGRAFF, JR. and G. KEMP (eds.), Arms Transfers to the Third World: The Military Buildup in Less Industrialized Countries (1978).

S.G. NEUMANN and R.E. HARKAVY (eds.), Arms Transfers in the Modern World (1979).

J. DELBRÜCK, International Traffic in Arms – Legal and Political Aspects of a Long Neglected Problem of Arms Control and Disarmament, GYIL, Vol. 24 (1981) 114–143.

JOST DELBRÜCK

MINIMUM STANDARD

1. Notion

The minimum standard concept (sometimes called the international standard of justice) affirms that there are rights created and defined by → international law that may be asserted against States by or on behalf of → aliens. It denies the tenets of the Calvo doctrine (→ Calvo Doctrine, Calvo Clause), according to which aliens have only those rights which are afforded to local nationals, i.e. national (or equal) treatment. Since it asserts only the rights of aliens, it diverges from the position that international law grants certain → human rights to all persons, even *vis-à-vis* their own States. The term is more generally used with respect to rights conferred by → customary international law than with respect to rights based on specific → treaties.

2. Historical Development

In its development the minimum standard grew intertwined with the overall idea of international → diplomatic protection, and thus can be traced back at least to the writings of Vattel in the 18th century (→ History of the Law of Nations). It had its greatest importance in the 19th and early 20th centuries in the interconnected masses of diplomatic → notes, arbitral awards and doctrinal writings. Among the topics developed were the rights of aliens to fair civil or criminal judicial proceedings (i.e. not to be subjected to → denial of justice), to decent treatment if imprisoned, and to protection against disorders, violence, and against deportation in abusive ways (→ Aliens, Expulsion and Deportation), and to the enjoyment of their property unless taken for a public purpose and with fair compensation (→ Aliens, Property; → Expropriation and Nationalization). Since Latin American States were the respondents in the majority of these cases – although there were arbitrations and other exchanges between European countries and between them and the United States – opposition to this development crystallized there. Such opposition took the form of either an attack upon procedure, by denying the right to diplomatic protection and seeking to cut it off through waiver by means of Calvo clauses, or an attack upon substance, by denying that aliens had any rights other than those of nationals (the Calvo doctrine).

The struggles between the Latin American group and the great Powers took place in several forums between the two World Wars. A Hague Conference in 1930 attempted, under → League of Nations auspices, to agree upon a convention on the "Responsibility of States for Damage done in their territories to the Persons and Properties of Foreigners" (→ Responsibility of States: General Principles). It foundered on a 21 : 17 division of States over the equality doctrine. In 1933 a conference of American States at Montevideo adopted a Convention on the Rights and Duties of States with a strong statement of the equality principle (→ States, Fundamental Rights and Duties); the United States interposed a reservation to that statement.

In a famous episode in 1938 the Mexican and American governments exchanged views about the minimum standard versus the equality principle as it applied to compensation for expropriation of alien property. Mexico took the position that there existed no obligation to grant compensation to American owners of land and oil properties taken under general social reform legislation beyond that granted her own citizens. Both parties denied that the ensuing settlement had prejudiced their positions.

3. Current Legal Situation

(a) General

Since World War II various trends in international law have influenced the minimum standard, largely in the direction of obscuring its clarity and diminishing its vitality and utility. As the number of States active on the international scene grew, most of the new States tended to share the Latin American view that the diplomatic protection/minimum standard complex worked to the disadvantage of → developing States (→ New States and International Law). At the same time there was a sharpening of the focus upon the status of → individuals in international law and upon the violations, often gross, of elementary rights inflicted by governments, mainly upon their own nationals.

The consequences of these developments were felt in various ways. The stream of international arbitration generating authority on aliens' rights slowed to a trickle. Aside from a few commissions established in the aftermath of World War II – such as those between the allies and Italy (→ Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947) – most adjudications were made by national claims commissions acting under lump sum settlement agreements (→ Lump Sum Agreements). Although national commissions elaborated upon the minimum standard, their opinions do not enjoy the prestige of truly international bodies. The opinions of the Hague tribunal established in 1981 to adjudicate claims between Iran and the United States may make an important contribution to the questions of the minimum standard (→ United States–Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)). At the same time academic input into the field

seemed to dwindle as publicists shifted to human rights work.

Codification efforts have made no major headway during this period (→ Codification of International Law). Although a project of the → International Law Commission to codify the law of State responsibility for injury to aliens led to valuable drafts by García-Amador and by Sohn and Baxter, the Commission ultimately turned to another, more general, view of the topic of State responsibility. That project seeks only to codify rules as to the linkage between a State and a wrong necessary to create liability rather than the rules involved in defining a wrong (→ Internationally Wrongful Acts). A Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they Live was prepared for the → United Nations by Baroness Elles in 1978 (E/CN.4/Sub.2/392/Rev.1) but has not been adopted. On a bilateral basis, however, there were quite a few agreements, including → treaties of friendship, commerce and navigation, assuring nationals of each signatory State basic rights in the territory of the other.

(*b*) *Personal rights*

It is probable that an international tribunal would now conclude that aliens still have claims to a minimum standard of personal protection. Despite the non-adherence of some States to that doctrine it has never been repudiated with as much formality and agreement as was represented in the field of aliens' property rights by a succession of → United Nations General Assembly resolutions. The arguments on the merits in its favour and against the national treatment standard retain their validity. States do not in fact practice the purported rule of full equality to aliens. They do not open all occupations to them, for example, or allow them full political rights or even complete equality before the courts. The argument that aliens know what sort of legal conditions (as well as climate) they will encounter when they enter a foreign country (→ Aliens, Admission) is based on doubtful assumptions as to the facts, and, considering the disparity of power between States and individuals, on a morally unattractive theory. In any event, this reasoning has little force as to laws enacted after the alien has entered the country. Arguments that protection of individuals' minimum rights was an exercise of overweening pride on the part of Europe and the United States in obtaining special, extraterritorial privileges for their nationals have lost much force with the changing balance of power and the renunciations of the → use of force for such ends.

In many cases a State can, in asserting rights for its nationals abroad, claim that they are human rights available irrespective of nationality and irrespective of local laws (→ International Law and Municipal Law). Those rights would include rights conferred by customary international law and, among States that are parties, those guaranteed by multilateral conventions, chiefly the covenants sponsored by the United Nations (→ Human Rights Covenants). In Western Europe an alien can take advantage of the → European Convention on Human Rights and in Latin America of the → American Convention on Human Rights. For all of those advances in the protection of human rights rules, however, there are still significant ways in which the traditional minimum standard demands more of State behaviour.

(*c*) *Property rights*

The question of property rights of aliens has become rather separated from that of the minimum standard as a whole, being involved in the economic stresses that run between the industrialized States and the developing countries (→ International Economic Order; → Foreign Investments). The case for the survival of the classical prompt, adequate and effective compensation rule on expropriation of foreign property has been eroded to a degree. However, the case for the proposition that there is still some minimum standard remains strong. Few States have asserted that they are not obliged to justify their compensation programmes as in keeping with international law, even though they have sought to broaden the list of factors to be taken into account in assessing the adequacy of that compensation.

E. BORCHARD, The Diplomatic Protection of Citizens Abroad (1915).

G. JAENICKE, Der Begriff der Diskriminierung im modernen Völkerrecht (1940).

A. ROTH, The Minimum Standard of International Law Applied to Aliens (1949).

I. FOIGHEL, Nationalization: A Study in the Protection of Alien Property in International Law (1957).

C.F. AMERASINGHE, State Responsibility for Injuries to Aliens (1967).

F. GARCÍA-AMADOR, L. SOHN and R. BAXTER, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974).

M.S. MCDOUGAL, H.D. LASSWELL and L.C. CHEN, Human Rights and World Public Order (1980) 737–778.

R.B. LILLICH, The Current Status of the Law of State Responsibility for Injuries to Aliens, in R.B. Lillich (ed.), International Law of State Responsibility for Injuries to Aliens (1983) 1–60.

DETLEV F. VAGTS

MINORITIES

1. Notion. – 2. Historical Evolution of International Rules. – 3. Implementation Measures and the League of Nations. – 4. The United Nations and New Developments. – 5. Art. 27 of the Covenant on Civil and Political Rights: (a) Determination of the minorities. (b) Meaning of ethnic minority. (c) Holders of the protected rights. (d) Nature of obligations corresponding to protected rights. – 6. Political Autonomy of Minority Groups. – 7. Other Human Rights Conventions and Minorities. – 8. Regional and Local Protection of Minorities. – 9. International Measures of Implementation. – 10. Recent Trends.

1. Notion

To clarify the value of the term "minorities" within the framework of contemporary international law, one necessary point of departure is recognition of the fact that the populations of many States are not uniform in terms of race, national origin, religion or language. On the contrary, they often include one or more groups whose ethnic, religious or linguistic characteristics distinguish them from the rest of the population. The protection of such characteristics and the prevention of discrimination against individuals belonging to the above-mentioned groups are the objectives of international rules which accordingly impose obligations for these purposes on the States in whose territories the minorities live.

The basic element of any definition of minorities is of course constituted by the distinctive features of minorities when compared with the majority of the inhabitants of a given State. Two further objective elements must also be pointed out: the numerical inferiority of minorities when compared with the rest of the population and their non-dominant position. These elements are important with regard to the function of the applicable international rules. Since a "non-dominant" majority is a phenomenon which actually conflicts with the principle of → self-determination of peoples, it goes beyond the limits of rules concerning minorities; on the other hand, a dominant minority requires no international protection against the dangers of oppression by the majority. Finally, the concept of a minority also implies a subjective element which could be called the common will of a group's members to preserve their distinctive characteristics. This element is generally implicit in cooperative efforts to conserve such characteristics or, more precisely, in the behaviour of group members to the extent that they agree amongst themselves to preserve and defend their ethnic, religious or linguistic identity and refuse to be assimilated by the majority.

On the basis of the foregoing observations, the following definition may be justified: a minority is a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language.

It must be mentioned, however, that no definition of the term has been generally accepted or authorized in official documents. Conflicting opinions have been expressed – by jurists and governments alike – on one or another of the above-mentioned elements: particularly with regard to the subjective element and the numerical element (e.g. whether a minimum limit can be established). Nor is there unanimity over whether to exclude from the concept of minority those groups formed by individuals of foreign → nationality (→ Aliens) or to include minorities only recently established in a State. Moreover, the historical origins of each minority have also been suggested as a factor which can have significant legal consequences.

Lastly, it must be remembered that the proposals

made in 1951 and 1952 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to define the concept of minority were never taken into consideration by the Human Rights Commission (→ Human Rights, Activities of Universal Organizations). On the other hand it has, quite rightly, been observed that the concept, in international law, need not be defined in abstract and general terms. It is enough to be in a position to establish its value by reference to determined rules.

2. *Historical Evolution of International Rules*

Clauses relating to religious minorities were already incorporated in some bilateral treaties concluded in the 17th century (the Peace of → Westphalia (1648) and the Treaties of Oliva (1660) and Nijmegen (1678)); the object of these clauses was to ensure non-dominant confessions the free exercise of their religion. This trend was confirmed in the next two centuries and, from the 18th century onwards, sporadically extended to include certain ethnic minorities – for example, the Poles inhabiting the States which were parties to the treaty of Vienna (→ Vienna Congress (1815)) and the Turkish, Greek and Romanian populations in Bulgaria under Art. IV of the Treaty of Berlin (→ Berlin Congress (1878)). However, the few fragmentary, vague rules incorporated in a rather restricted number of agreements certainly did not constitute a system of protection of minorities. They only revealed the fact that the problem was beginning to emerge at the international law level.

The first system of protection was created after World War I and assumed a certain degree of organic unity within the framework of the → League of Nations. Because of the territorial changes in Europe decided at the Peace Conferences (→ Peace Treaties after World War I), the problem of minorities became particularly acute in five States: the two new Republics of Poland and Czechoslovakia, Yugoslavia (born of the enlarged Serbian kingdom), Romania and Greece. Each of these States, therefore, between 1919 and 1920, in conformity with the peace treaties, concluded a treaty with the principal Allied and Associated Powers which provided for the protection of racial, linguistic and religious minorities inhabiting their territories. On the other hand, Austria, Bulgaria, Hungary and Turkey assumed similar obligations in the peace treaties concerning them, while the régime of the Polish minority in → Danzig was regulated by a convention between Poland and the Free City of Danzig. The new system was completed by the Agreement between Sweden and Finland concerning the → Aaland Islands (1921), the German–Polish Convention relating to Upper Silesia (1922), the Convention concerning the Territory of Memel between the Allied and Associated Powers and Lithuania (1924) and by five declarations on the protection of minorities which Albania, three Baltic States and Iraq made upon their admission to the League of Nations (between 1921 and 1932), note of which has taken by the Council of the League in *ad hoc* resolutions.

The two main objectives of the above-mentioned legal instruments were stressed by the → Permanent Court of International Justice in its advisory opinion of April 6, 1935 on the question of → minority schools in Albania. These were to ensure perfect equality between individuals belonging to minorities and the other nationals of the State and to give minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. The Court emphasized the close tie which links the two requirements in order to ensure a true equality between majority and minority.

This approach makes it possible to clarify the various aspects of the rules introduced between 1919 and 1932 which were largely influenced by the Treaty concerning Poland. First of all, the inhabitants of each of the States concerned were granted the right to full and complete protection of life and liberty, without discrimination, and to the free exercise, in public or in private, of any creed, religion or belief. Secondly, all the nationals of each of the countries in question were granted equality before the law, equality of civil and political rights, and equality of treatment and security in law and in fact as well as equal access to public employment and to the exercise of professions or industries. As regards special measures of protection, not only was the freedom to use any language in private relations, in commerce, in religion, in the press or at public meetings ensured, but adequate facilities were promised to make it possible for minority languages to be used before the courts; moreover,

the right to use such languages in the charitable, religious, social and educational institutions of the minority groups was guaranteed. These groups were also granted the parallel right to create, manage and control these types of institutions at their own expense, in areas inhabited by "a considerable proportion" of members of a minority group. Provision was made for primary school instruction in the language of the minority and for the allocation of a part of public funds destined to religious, educational or charitable purposes. Lastly, it should be recalled that part of the treaties and declarations in question included citizenship clauses aimed at protecting individuals against the danger of becoming → stateless persons if they became members of a minority group as a result of a territorial transfer.

3. *Implementation Measures and the League of Nations*

The system of protection resulting from the legal instruments created from 1919 to 1932 was strengthened by two important unifying factors: a guarantee under municipal law and a certain number of international guarantees (→ Guarantee; → Guarantee Treaties). In the first place, each of the States concerned undertook to recognize, within their respective legal orders, the provisions relating to minorities as fundamental laws in such a way that they could not be modified by any ordinary law. At the international level, only amendments formally approved by a majority in the Council of the League of Nations would be permitted. Moreover, any infraction of the régime established which might be brought to the attention of the Council by one of its members would be examined by the Council with a view to its taking "appropriate action". Finally, should a dispute arise between a State member of the Council and one of the States under obligation to the minorities régime, the one or the other of the parties could submit the case to the Permanent Court of International Justice which had compulsory jurisdiction in this field.

The practice of the Council in cases of infractions of the rules established for the benefit of minorities had significant developments. In 1920, the right to address a petition to the Council was granted to individuals or associations acting on behalf of a minority group (→ Individuals in International Law). Each case was to be examined by a committee composed of three Council members. In the following year the procedure was improved. All petitions were to be communicated immediately to the State concerned in order to permit it to make its comments before the petition was examined by a committee. In 1923 the Council established the conditions for the receivability of petitions with regard to form and content (excluding, among other things, any petitions aiming at → secession). If a petition were considered receivable and acceptable, the procedure in question could lead either to the commencement of informal negotiations between the competent committee and the State whose behaviour was being questioned (with a view to settling the problem raised in the petition amicably) or to the submission of the case to the Council which had the power to make recommendations to that State. In fact, the first situation occurred most often. The committees' main function was to play a conciliatory role, on behalf of the Council, in relation to the countries to which the minorities belonged.

The activity of the Minorities Section, set up within the ambit of the Secretariat, represented another important feature of the guarantee mechanism of the League. This Section maintained continuous contact with the States having obligations under the rules relating to minorities, not only by requesting information, but also by sending missions to visit the areas in which the minorities lived (→ Fact-Finding and Inquiry). In this way the tendency to guide the supervisory functions of the League towards the objective of cooperating with the above-mentioned States was emphasized, the preference being for compromise solutions likely to safeguard the essential aspects of the minorities régime without serious tensions.

The limited judicial activity carried out in this field by the Permanent Court of International Justice confirms this tendency: only one of the three cases brought before it was decided (→ Minorities in Upper Silesia Case (Minority Schools)) while the other two cases were dropped by the plaintiffs (→ Prince von Pless Administration (Orders); → Polish Agrarian Reform (Orders)). Nevertheless, in addition to its advisory opinion on minority schools in Albania (→ Minority Schools in Albania (Advisory Opinion)) the Court gave five advisory opinions on minorities questions from 1923 to 1931

(see → German Minorities in Poland, Cases concerning the; → Exchange of Greek and Turkish Populations (Advisory Opinion); → Greco–Bulgarian "Communities" (Advisory Opinion)).

4. *The United Nations and New Developments*

World War II led to the end of the system of protection of minorities which had its origins in the Treaties of 1919. Obviously, when the League of Nations ceased to exist (formally, in 1946), the organized structure upon which the international guarantees depended collapsed and an essential aspect of that system disappeared. This was not, however, sufficient to extinguish the obligations assumed by the States to which the protected minorities belonged; there were various other reasons for this result. The extinction of the contracting party explains why five declarations ceased to have any effect (the obligations stemming from the declarations had been assumed in respect of the defunct League of Nations) and why the agreement with the Free City of Danzig and the Convention with Lithuania concerning the territory of Memel had the same fate. It would seem correct to assume that the other treaties, with the exception of the agreement between Sweden and Finland, lapsed due to desuetude (→ Treaties, Termination). It is true that some authors preferred to refer to the mechanism of a fundamental change of circumstances (→ Clausula rebus sic stantibus), but this cause of termination of treaties does not have automatic effect. The agreement between Finland and Sweden concerning the Aaland Islands remained in force even after 1946.

The → United Nations Charter ushered in a new phase in the development of international rules on the treatment of minorities. Two points in particular merit emphasis in this respect. In the first place, the objective of promoting and encouraging respect for human rights set out in Art. 1(3) of the Charter and the increasingly far-reaching action undertaken by the Organization in this field together have shifted the minorities problem from the political to the humanitarian level and have placed it on a universal plane within the framework of the fundamental rights of human beings, whereas previous experiences had been linked to determined territorial situations. Secondly, the principle of non-discrimination clearly set out in Art. 1(3) of the UN Charter, and subsequently confirmed and clarified in Art. 2(1) of the Universal Declaration of Human Rights, has provided a positive solution to that preliminary aspect of the problem of minorities, namely, to guarantee equality of treatment to all individuals regardless of the ethnic, religious or linguistic group to which they belong (→ Human Rights, Universal Declaration (1948)). More recently, the Covenant on Civil and Political Rights has added to the non-discrimination clause (Art. 2(1)) a new rule concerning equality before the law and equal protection for all persons by the law (Art. 26; → Human Rights Covenants).

Nevertheless, from the outset, the → United Nations was faced with initiatives aiming at a global, specific regulation of the treatment of minorities. The possibility of including in the Declaration of Human Rights an article on "national minorities" was discussed and, despite the negative outcome of the debate, the → United Nations General Assembly stated that the United Nations could not remain indifferent to the fate of minorities. At the same time, it pointed out how difficult it was to adopt a uniform solution to this complex and delicate question, which has special aspects in each State in which it arises (Res. 217 C III of December 10, 1948). A short time before, during the negotiations which resulted in the Convention on the Prevention and Punishment of the Crime of Genocide, the *ad hoc* Committee had proposed that also those responsible for acts committed with the intent to destroy the language, religion or culture of a minority group (so-called cultural → genocide) be punished. However, the General Assembly eventually decided that questions of this sort be dealt within the framework of the protection of minorities.

Further proof of the fact that the United Nations was aware of the need for further measures aiming at the protection of minorities is to be found in the mandate of the Commission on Human Rights, which was established by the → United Nations Economic and Social Council in Resolutions 5(I) of February 16, 1946 and 9(II) of June 21, 1946. Indeed, the mandate authorized the Commission to make proposals, recommendations and reports on the protection of minorities. Moreover, Resolution 9(II) authorized the Commission to establish a Sub-commission on Prevention of Discrimination and Protection of Minorities, a body made up of

experts elected by the Commission. In the period 1947 to 1954, not only did the Sub-commission attempt to define the concept of minority (unsuccessfully, as already noted), but it also prepared the draft text of Art. 27 of the Covenant on Civil and Political Rights. In 1971, that same body undertook a study on the application of the principles set out in Art. 27. The result of this effort was a special report on the rights of persons belonging to ethnic, religious or linguistic minorities which was approved in 1977. It must be recognized, however, that the Sub-commission's activities are still mainly concentrated in the field of prevention of discrimination.

5. *Art. 27 of the Covenant on Civil and Political Rights*

In the context of the International Covenant on Civil and Political Rights (adopted by the General Assembly on December 16, 1966 and in force as of March 23, 1976), a rule specifically dedicated to the question of minorities was added to the general rules of non-discrimination and has, therefore, finally provided a basis on which the problem of the actual equality of minority groups and the rest of the population of a State can be tackled. Art. 27 provides that:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

The wording of this article gives rise to many problems of interpretation for which different solutions have been suggested.

(*a*) *Determination of the minorities*

The theoretical question of the definition of the term minority has been discussed in section 1 *supra*. Apart from the difficulties already mentioned, the phrase "in those States in which ethnic, religious or linguistic minorities exist" could imply – and this is an opinion rather widely held – that Art. 27 takes into consideration only those minorities which have long been established in the territory of a State. Nevertheless, a distinction between the treatment given to long-standing minorities and that given to newcomers can only be justified on political grounds in order to give governments seeking to assimilate recently created minorities a free hand in so doing. But this conflicts with the permanent nature of the human interests protected by the Covenant and neglects to consider that the existence or absence of a willingness to be assimilated by the majority is the decisive factor. Again with reference to the phrase mentioned above, it is certainly to be denied that the existence of a minority falling within the scope of Art. 27 could depend on its recognition by the State which has jurisdiction over it. If this were so, observance of the rule would be subordinate to the free choice of any given State.

(*b*) *Meaning of ethnic minority*

There is no doubt that the term ethnic has mainly cultural, historical connotations. However, as this term was used in the text of Art. 27 instead of national and racial, two words frequently used to indicate internationally protected minorities, it ought to be considered to cover the concept of national as well as racial origins.

(*c*) *Holders of the protected rights*

The rights embodied in Art. 27 are, without doubt, based upon the common interests of all members of each minority group. Nevertheless these rights are granted to individuals. The language used in the article is clear: it refers to "persons belonging to . . . minorities". The fact that all these persons have the same subjective rights in question makes it possible only to specify that they will enjoy those rights "in community with the other members of their group". Therefore it is not formally correct to speak of minorities' rights. In order for minorities to have subjective rights and to be able to exercise them, they should all be considered entities, indeed, organized entities; but the rule in question does not imply any recognition of this sort. In confirmation of this reasoning it may be worthwhile also to recall that the legal instruments created after World War I granted subjective rights to individuals: it was only later, when the right of petition was granted to individuals and groups, that the theory (widely criticized, and quite rightly so) of an international personality of minorities was suggested (→ Subjects of International Law). Today, in the context of human rights – which are essentially individual rights,

including of course the right to equality of treatment – the reasons for excluding the personification of groups are stronger. Moreover, from a political point of view, the need to leave each member of a minority free to decide for himself whether he wishes to remain faithful to the group or to be voluntary assimilated by the majority is better safeguarded if the rights deriving from Art. 27 – and the power of exercising them or not – are accorded to individuals and not groups.

(*d*) *Nature of obligations corresponding to protected rights*

It is obvious that Art. 27, while granting certain rights to members of minorities, imposes corresponding obligations on the States in which minorities live.

As regards the nature of such obligations, basically two theses have been proposed. According to one, States ought only to abstain from curtailing minorities' freedom in cultural, religious and linguistic matters; according to the other, Art. 27 requires positive measures which imply active intervention by each State. The literal interpretation of the phrase "persons belonging to such minorities *shall not be denied* the right..." (emphasis added) would seem to prove the validity of the first point of view. However, other factors lead to the opposite conclusion: in the first place, if it is true that the object and purposes of Art. 27 are to secure a real equality of treatment for minorities, it is impossible to consider that tolerance, pure and simple, on the part of the State is sufficient. Secondly, Art. 27 would be superfluous if it only granted members of minorities a number of liberties which can be deduced from other provisions in the two human rights Covenants which are recognized as being for the benefit of all individuals. Lastly, with particular reference to the cultural field, it should be recalled that the obligations imposed on States by Arts. 13 and 15 of the Covenant on Economic, Social and Cultural Rights (concerning every individual's rights to education and to take part in cultural life) have the features of positive obligations to be implemented through appropriate measures; it would be inconceivable that States should have less stringent obligations *vis-à-vis* members of minorities, with regard to the same matters.

Thus the conclusion that States are obliged, on the basis of Art. 27, to adopt concrete measures aiming at the conservation of the culture, religion and language of the respective minorities seems justified. It is hard to explain the scope of these measures; however, regard being had to the *ratio* of the rule in question, it may at least be held that the State must actively intervene in all cases in which the minority group's identity could not be preserved without the State's support.

6. *Political Autonomy of Minority Groups*

No international rules deriving from multilateral agreements on human rights make provision for granting political or administrative autonomy to minority groups, including those which amount to the entire population or to a majority of it in a given region. Each State is free to settle the problem of its internal structure and division of power as it sees fit, even where significant minorities live within its territory (→ Territorial Sovereignty). On the other hand, it is known that Art. 1 of both Covenants on human rights recognizes the right of all peoples to self-determination. By virtue of this rule, as it has been interpreted in the light of the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), any minority that can be identified as a "colonial people" would have a ground for claiming self-determination (→ Colonies and Colonial Régime). But it must also be remembered that the same Declaration of 1960 stated that: "Any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country" was incompatible with the principles established by the UN Charter. More generally speaking, the fact that a State has a government "representing the whole people belonging to the territory without distinction as to race, creed or colour" is considered to be "in compliance with the principle of equal rights and self-determination of peoples", according to the terms of the General Assembly's 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (→ Friendly Relations Resolution). Consequently, it is impossible to deduce from the common Art. 1 of the two Covenants on human rights that minorities living in States with a representative, non-discriminating system of gov-

ernment, have a right to secede or to attain political autonomy.

7. *Other Human Rights Conventions and Minorities*

In the framework of the legal instruments in force aiming at the universal protection of human rights, three conventions relevant to the problem of minorities are worth mentioning. In 1957 the → International Labour Organisation approved and submitted to its member States for ratification Convention No. 107 concerning Indigenous and Tribal Populations, many of whom amount to minorities (→ Indigenous Populations, Protection). This Convention has been in force since 1959, although the first ILO Convention on the topic was Convention No. 50 concerning the Recruiting of Indigenous Workers (1936). The main purpose of Convention No. 107 is the protection of the populations concerned and their progressive integration (Art. 2(1); provision is made for the conservation of the institutions and customs of the populations concerned, due account being taken of their cultural and religious values in the process of integration (Art. 4(a)). Moreover, it establishes that measures be taken, to the extent possible, for the preservation of the mother tongue or the language most commonly used by the group, especially in schools (Art. 23). On the other hand, no special measure may be used as an instrument of segregation (Art. 3(2)(a)). The Convention also addresses land rights (Arts. 11 to 14), recruitment and conditions of employment (Art. 15), vocational training, handicaps and rural industries (Arts. 16 to 18), among other matters, and calls upon the responsible governmental authority to create and develop agencies to administer the programmes involved (Art. 27).

Of greater interest is the Convention against Discrimination in Education adopted by the → United Nations Educational, Scientific and Cultural Organization in 1960 (entered into force in 1962). Indeed, the principle of equality of treatment in educational activities is accompanied, in that Convention, by the recognition of separate schools which can be created for religious or linguistic reasons. The Convention also accords members of national minorities the right to carry on their own educational activities, including the maintenance of schools as well as the use and the teaching of their own language. However, at the same time, it sets such broad and vague conditions (*inter alia*, conformity with the State's educational policy and the preservation of its → sovereignty) that any given government can easily hinder the exercise of the right granted to members of the minority.

Lastly, a very important contribution to the strengthening of the principle of non-discrimination has been made by the Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly in 1965. It interprets the term racial discrimination as meaning any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin (→ Racial and Religious Discrimination). Its rules apply therefore to all members of ethnic minorities. The contracting parties have undertaken, in particular, to pursue, by all appropriate means, a policy of eliminating all forms of racial discrimination, and to this end the Convention specifies in detail all the rights – civil, political, economic, social and cultural – in respect of which non-discrimination is to be guaranteed. It admits that "special measures" may be necessary to secure adequate advancement of certain racial or ethnic groups, to guarantee the "equal enjoyment or exercise of human rights"; consequently, these special measures are not considered to be of a discriminatory nature. Nevertheless, the Convention requires that such measures be discontinued once the objectives for which they were taken have been achieved. Since the optimum aimed at is the equal treatment of individuals, regardless of the group to which they belong, a desire to avoid maintaining separate rights for different racial groups is evident.

8. *Regional and Local Protection of Minorities*

No equivalent of Art. 27 has been established in the three regional conventions on human rights: the → European Convention on Human Rights of 1950, the → American Convention on Human Rights of 1969 and the → African Charter on Human and Peoples' Rights of 1981. Art. 14 of the European Convention speaks of "association with a national minority" only for the purposes of avoiding any discrimination on such grounds (within the framework of the general clause on

non-discrimination in the enjoyment of the rights and freedoms set forth in the Convention). In 1961 the Parliamentary Assembly of the → Council of Europe had made a recommendation that an article very similar to Art. 27 mentioned above be included in the Second Additional Protocol to the European Convention for the Protection of Human Rights. The Council of Ministers, however, on the basis of a report prepared by the committee of governmental experts, decided against so doing. In 1981 the Parliamentary Assembly proposed a series of measures to deal with the educational and cultural problems posed in Europe by minority languages and dialects (→ Parliamentary Assemblies, International). It also recommended that the Committee of Ministers examine the chances of those measures being applied in member States. At the same time, in the framework of the European Communities, the European Parliament invited governments and regional authorities to implement a policy which would encourage regional languages and culture (Resolution of October 16, 1981 known as the Community Charter of Regional Languages and Cultures and the Charter of the Rights of Ethnic Minorities).

The passage in the Final Act of the → Helsinki Conference on Security and Cooperation in Europe (1975) dealing with "national minorities" is of greater political significance. The provision is to be found within the framework of Principle VII of the Declaration of Principles guiding relations between participating States. The text, after proclaiming that participating States will respect the right of members of minorities to equality before the law, adds that "they will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere". This seems to imply the conviction that protection of members of minorities should, today, fall entirely within the scope of the rules on human rights.

In fact, the only provisions to fall outside this scope are those contained in a small number of mostly bilateral treaties governing the status of certain minorities at a purely local level. The most important of the post-World-War-II agreements of this nature are the agreement between Austria and Italy regarding the South Tyrol, the Agreement of 1955 between Denmark and the Federal Republic of Germany, the → Austrian State Treaty signed in the same year, and the Treaty of Osimo between Italy and Yugoslavia signed in 1975.

The purpose of the Agreement between Italy and Austria was to accord some special guarantees to the German-speaking inhabitants of the province of Bolzano-Bozen (also known as the → South Tyrol). The most important aspect of the Agreement was that legislative and administrative autonomy was provided for that province where the German-speaking element constitutes the majority of the population. Moreover German-speaking and Italian-speaking inhabitants were ensured equality of rights in the form of special measures for the protection of the ethnic character and for the cultural and economic development of the German-speaking element. Among such protective measures, the following stand out: elementary and secondary teaching in German, parity of the German and Italian languages in public offices and official documents as well as in geographical nomenclature. Lastly, with regard to access to public office, along with the equality of rights, the goal of a "more appropriate proportion of employment between the two ethnic groups" was also considered.

The status of the Danish and German minorities in the Federal Republic of Germany and Denmark, respectively, formed the subject of two partially parallel unilateral declarations (→ Unilateral Acts in International Law). Both declarations, however, specify that they are the result of negotiations with the Government of the other country. The special measures contemplated included, *inter alia*, freedom to use minority languages, the minorities' freedom to establish their own schools, the proportional participation on committees of local government and the recognition of the special interest of each group to maintain religious, cultural and professional relations with its neighbouring country.

The Austrian State Treaty contains, on the one hand, a clause concerning non-discrimination between persons under Austrian jurisdiction on grounds of race, language, religion, or sex (→ Sex Discrimination) which covers a number of areas (property, business, professional or financial interests, status, civil and political rights). On the other hand, the members of the Slovene and Croatian minorities in Carinthia, Burgenland and Styria were granted the right to elementary

instruction in their mother tongue and to a proportional number of their own secondary schools in the same language. The Slovene and Croatian languages were accepted as official languages in the administrative and judicial districts inhabited by members of the two minorities. The activity of organizations whose aim was to deprive the Croatian or Slovene population of their minority character or rights was prohibited.

Art. 8 of the Treaty of Osimo between Italy and Yugoslavia concerns the protection of the members of the respective ethnic groups formerly guaranteed by the Special Statute annexed to the 1954 Memorandum of London; it therefore refers to Yugoslav and Italian ethnic groups living in Zones A and B, respectively, of the former Free Territory of → Trieste. Even while declaring that the Special Statute ceases to have effect, Art. 8 provides for the maintenance of the domestic measures already adopted in order to implement the Special Statute and of the level of protection that its rules provided. In this way the content of the Special Statute cannot be said to be formally incorporated in the Treaty, but becomes the point of reference for determining the level of protection of the minorities in question. In the Special Statute particular breadth was given to the concept of "equality of rights and treatment with the other inhabitants of the two areas". This principle was to be applied not only to political and civil rights but also to professions, access to public offices, economic activities, taxation and social assistance. Special protective measures were provided for as regards education (primary and secondary teaching in the mother tongue in public schools), cultural, social and sports activities (the organizations set up by both minorities were to function freely in all these fields). Further measures were to be undertaken where linguistic matters were concerned: they included the right to a minority press in the respective mother tongues, the possibility of using minority languages in official relations with administrative and judicial authorities, the translation of official documents and judgments, and the adoption of bilingual street and place names. All this clearly reflected the will to preserve the ethnic character and to ensure the free cultural development of both minorities.

9. International Measures of Implementation

There is today no machinery for supervising the régime of minorities with the same specific role and global function as the system created under the aegis of the League of Nations after World War I. However, with regard to the rules for the protection of minorities contained in some multilateral conventions on human rights, the international measures for implementation provided for need to be taken into account.

There are three mechanisms having the nature of international means of implementation which are applicable to Art. 27 of the Covenant on Civil and Political Rights and to the non-discrimination clauses contained in its Arts. 2(1) and 26. These are: the system of periodic reports which the States parties to the Covenant are bound to submit to the Committee on Human Rights (active since 1977; cf. → International Covenant on Civil and Political Rights, Human Rights Committee); the optional system of settling disputes that may arise between these States in respect of the obligation deriving from the Covenant (a → good offices and conciliation procedure which gets underway when the dispute is submitted to the Committee); and, lastly, the system of considering communications submitted to the Committee by individuals who feel that the rights granted to them by the Covenant have been violated. This last system concerns only States parties to the Optional Protocol under the conditions specified therein.

In the framework of the Convention on the Elimination of All Forms of Racial Discrimination, a committee of experts (the Committee on the Elimination of Racial Discrimination) is competent to consider communications from States which report violations of the rights set forth in the Convention; moreover, on the basis of an optional declaration made by some of the States parties to the Convention, its competence extends to the consideration of communications submitted by individuals or groups claiming to be victims of violations. Apart from that, disputes on the application of the Convention may be submitted unilaterally to the → International Court of Justice by any State party.

Lastly, it should be recalled that the system of supervision set up under the Constitution of the International Labour Organisation applies to all the Conventions in force within the ambit of that organization, including the Convention concerning Indigenous and Tribal Populations. Detailed

information supplied by ratifying States concerning their implementation of the Convention is commented upon by the ILO Committee of Experts on the Application of Conventions and Recommendations which publishes an annual report. The UNESCO Convention against Discrimination in Education was completed in 1962 by a Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States parties to the Convention. However, the most advanced instruments for guaranteeing the actual respect of human rights are, without a doubt, those provided under the European Convention, which include the well-known system of petitions by individuals to the → European Commission of Human Rights. In the field of minorities, these instruments may be used only for the purpose of ensuring the observance of the non-discrimination clause contained in Art. 14.

10. Recent Trends

The wording of Art. 27 of the Convention on Civil and Political Rights is very succinct: the implications of rights conferred on members of minorities, in particular the right to preserve their culture and use their language, are in no way specified. This observation supports the usefulness of the suggestion that the United Nations, while keeping within the limits of the principles embodied in Art. 27, should, in a declaration by the General Assembly, further clarify the significance of those principles. The declaration proposed ought essentially to indicate the special measures of protection that full respect for the rule requires.

In conformity with the conclusions of the study carried out by its special Rapporteur, the Sub-commission on Prevention of Discrimination and Protection of Minorities recommended in 1977 that a declaration of this sort be prepared. In 1978 the Government of Yugoslavia submitted a draft declaration to the Commission on Human Rights which has begun discussing it in an *ad hoc* working group. The reactions of governments revealed a great deal of uncertainty even though the idea of a declaration on the subject of minorities did not arouse outright opposition. Furthermore, the draft, which was revised by the President of the working group in 1980, is too vague on the essential question since it does not adequately specify which measures for the protection of minorities ought to be undertaken by States in conformity with Art. 27.

Discussion by this working group continues; however, the eventual outcome remains difficult to predict. What can safely be said is that the importance of furthering the universal protection of minorities, on the basis of more advanced → human rights standards, should no longer be ignored.

T. MODEEN, The International Protection of National Minorities in Europe (1969).

J.W. BRUEGEL, A Neglected Field: The Protection of Minorities, Human Rights Journal, Vol. 4 (1971) 413–442.

J. ROBINSON, International Protection of Minorities, A Global View, Israel Yearbook on Human Rights, Vol. 1 (1971) 61–91.

J.W. BRUEGEL, Internationaler Minderheitenschutz nach dem Zweiten Weltkrieg, Europa-Archiv, Vol. 27 (1972) 421–430.

T. VEITER (ed.), System eines internationalen Volksgruppenrechts (1972).

E. DAES, Protection of Minorities under the International Bill of Human Rights and the Genocide Convention, in: Xenion, Festschrift für P.I. Zepos (1973) 35–86.

B. VUKAS, General International Law and the Protection of Minorities, Human Rights Journal, Vol. 8 (1975) 41–70.

F. CAPOTORTI, The Protection of Minorities under Multilateral Agreements on Human Rights, Italian Yearbook of International Law, Vol. 2 (1976) 3–32.

Y. DINSTEIN, Collective Human Rights of Peoples and Minorities, ICLQ, Vol. 25 (1976) 102–120.

F. CAPOTORTI, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979).

C. GUTERMANN, Das Minderheitenschutzverfahren des Völkerbundes (1979).

E.H. PIRCHER, Der vertragliche Schutz ethnischer, sprachlicher und religiöser Minderheiten im Völkerrecht (1979).

B. VUKAS, La proposition yougoslave d'une Déclaration sur les droits des minorités nationales, ethniques et religieuses, Annuaire français de droit international, Vol. 25 (1979) 281–294.

F. CAPOTORTI, Die Rechte der Angehörigen von Minderheiten, Kommt es zu einer Erklärung der Vereinten Nationen?, Vereinte Nationen, Vol. 28 (1980) 113–118.

D. GERDES, Minderheitenschutz: eine internationale Rechtsnorm auf der Suche nach ihrem Gegenstand, Vereinte Nationen, Vol. 28 (1980) 126–131.

O. KIMMINICH, The Function of the Law of Ethnic Groups in the International System, Law and State (1981) 37–51.

L.B. SOHN, The Rights of Minorities, in: L. Henkin (ed.), The International Bill of Rights (1981) 270–289.

P. THORNBERRY, Is there a Phoenix in the Ashes? – International Law and Minority Rights, Texas International Law Journal, Vol. 15 (1981) 421–458.

K.J. PARTSCH, Menschenrechte und Minderheitenschutz, Zu den Arbeiten des Institut de Droit International in der Zwischenkriegszeit, in: Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler (1983) 649–659.

G. SACERDOTI, New Developments in Group Consciousness and the International Protection of the Rights of Minorities, Israel Yearbook on Human Rights, Vol. 13 (1983) 116–146.

C. TOMUSCHAT, Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights, in: Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler (1983) 949–979.

FRANCESCO CAPOTORTI

MISSIONARIES

Legal rules on the status of missionaries came into existence mainly during the colonial period, and were stipulated in domestic laws of the colonial powers, in international → treaties and, in particular cases, by → concordats between individual States and the → Holy See. Such rules have been rejected by newly-independent States as relics of colonialism (see → Decolonization) and are now of principally historical interest. No rules of → customary international law have developed concerning the activities of missionaries.

Many rules on the status of missionaries were never the concern of international law: Such matters often fell purely within the → domestic jurisdiction of the colonial powers administering the territories in question. In French colonies, for example, it was the local governor or administrator who gave permission to the missionaries to found settlements.

In the 19th century, however, treaties between colonial powers sometimes referred to the status of missionaries within their territories. For example, Art. 10 of the treaty between Great Britain and Portugal of June 11, 1891 (CTS, Vol. 175, p. 197) provided: "In all territories in East and Central Africa belonging to or under the influence of either Power, missionaries of both countries shall have full protection. Religious toleration and freedom for all forms of divine worship and religious teachings are guaranteed."

An example of a multilateral treaty containing provisions on the status of missionaries is the General Act of the → Berlin West Africa Conference (1884/1885), at which the contracting parties gave specific assurances of protection to Christian missionaries (Art. 6). In Art. 11 of the Convention of September 10, 1919 revising the General Act, missionaries were granted "the right to enter into, and to travel and reside in African territory with a view to pursuing their religious work".

Where Christian minorities lived in independent States, the European powers concluded treaties with those States for protection of the Christians. A typical protection clause of that kind was Art. 13 of the Peace Treaty of January 26, 1699, between Austria-Hungary and Turkey. Turkey granted her Roman Catholic Christians religious freedom and the right to build churches. The ambassador of Austria-Hungary was enabled to watch over the interests of the Christians and to argue their cause with the Turkish Government. Treaties with Spain and Venice contained similar provisions. Turkey revoked all these treaties on October 1, 1914.

In 19th century China, the status of missionaries was settled in the → unequal treaties between China, the European powers and the United States. A typical example was the Peace Treaty of Tientsin of June 27, 1858, between China and France (CTS, Vol. 119, p. 189) which provided for → consular jurisdiction for French citizens and the extraterritoriality of their settlements. Furthermore in Art. 13 missionaries were granted the right to travel into the interior of China. Under Art. 6 of the Convention supplementary to that treaty, signed at Peking on October 25, 1860 (De Clercq, Recueil des traités de la France, Vol. 8, p. 135), French missionaries were again enabled to hold landed property in all Chinese provinces, following the confiscation of Christian religious establishments during a period of persecution. Missionaries had the status of extraterritorial persons. Since all China's treaties with the Western powers contained the → most-favoured-nation clause, nationals of the other powers were conferred the same status as that accorded to citizens of the signatory power.

In more recent practice, the only international agreements containing missionary provisions have been concordats between individual States and the Holy See. In a concordat with Portugal in 1940, it was laid down that alien missionaries could be appointed to work in Portuguese territories only if Portuguese nationals were not available. The missionaries had to declare their submission to the laws of Portugal. In a concordat with Bolivia in 1957, missionaries were granted State subsidies in fulfilling their religious functions and empowered to cooperate with civil authorities, while remaining exempt from civil service regulations.

International agreements no longer contain specific missionary clauses. The right to practise and teach a religion is guaranteed in universal and regional → human rights instruments (e.g. Art. 18 of the International Covenant on Civil and Political Rights (→ Human Rights Covenants), Art. 9 of the → European Convention on Human Rights). Otherwise regulation of the legal position of missionaries is subject to domestic legislation. In the Chinese constitution of 1982, for example, alien supervision of the churches in China is not permitted. In consequence, alien missionaries are not allowed to enter Chinese territory to practise their religious profession. In other States missionaries receive the status of ordinary → aliens who are wholly subject to the provisions of the law concerning aliens. The only limit is regard for human rights and fundamental freedoms and the prohibition of → racial and religious discrimination (e.g. Art. 1 of the → United Nations Charter, Art. 18 of the International Covenant on Civil and Political Rights and Art. 9 of the European Convention on Human Rights).

T. GRENTRUP, Die Missionsfreiheit nach den Bestimmungen des geltenden Völkerrechts (1928).
D. HUSEMANN, Die rechtliche Stellung Christlicher Missionen in China (1935).
T. KREPPEL, Die Trennung von Staat und Kirche in Portugal (1962).
J. SARTORIUS, Staat und Kirchen im francophonen Schwarzafrika und auf Madagaskar (1973).
A. HASTINGS, A History of African Christianity 1950 to 1975 (1979).

THEO ZIMMERMANN

MONETARY LAW, INTERNATIONAL

1. Definition

International monetary law comprises two entirely different aspects. Firstly, the term refers to the rules of → private international law, which each legal system has developed to deal with such problems of monetary law as, on the basis of municipal law, arise in private legal relationships of an international character. Thus it is international monetary law that defines the applicable legal system where a legal relationship is subject, for example, to German law, but involves the payment, whether in Germany or abroad, of a sum of foreign money or, conversely, where a payment of German currency has to be made under an obligation governed by foreign law. The permutations and, indeed, the complications are numerous. Protective clauses or exchange restrictions, to mention only two typical groups of problems, are liable to give rise to serious differences of reasoning or result. The international implications of the former produced a rich judicial practice, when in 1933 the United States of America abrogated the gold clause and many other States came to adopt the same policy. The latter continue to this day to lead to difficulties, many of which have not yet been solved. The rules applicable by national courts to such and similar problems are national in character and origin. Uniform rules laid down by treaty are almost wholly missing. The European Convention on Foreign Money Liabilities (ETS, No. 60) and the European Convention on the Place of Payment of Money Liabilities (ETS, No. 75) were prepared under the auspices of the → Council of Europe in 1967 and 1972 respectively, but failed to be ratified. Art. VIII(2)(b) of the Articles of Agreement of the → International Monetary Fund (IMF) renders exchange contracts which are contrary to the exchange restrictions of a member State unenforceable in all member States, but regulates only a small part of the total field.

Secondly, the term international monetary law indicates those rules of public international law which apply to monetary relations between States and other international persons (→ Subjects of

International Law). These rules, which by virtue of treaty provisions or constitutional provisions may influence relations between private persons, constitute a continuously growing aspect of public international law, as a whole. The following survey intends to state their principal implications.

2. Money as a Matter of International Organization

In the 19th century it was fashionable to believe that international monetary problems could be solved by devising a measure of unification for means of payment. Thus the Latin Monetary Union (Belgium, France, Italy, Switzerland and, later, Greece) came into being in 1865 (→ Monetary Unions and Monetary Zones). World War I and its repercussions, however, proved that an effective international monetary organization had to aim at the stability of rates of exchange, the convertibility of currencies and a sound balance of payments. It was only after World War II that institutions were created which pursue and to a very limited extent have achieved these important objects.

The most significant of these institutions is the IMF which was conceived at the → Bretton Woods Conference of 1944 and started operations on March 1, 1947. It now comprises more than 140 member States. Originally the IMF purported to operate an effective international monetary system based on the conception of par values from which member States were not allowed to deviate except to the extent of one per cent on either side. Although this system was exposed to many strains and stresses, it operated reasonably successfully for almost 25 years. It broke down in August 1971, when the United States abrogated the convertibility of the dollar into gold. Gold became "demonetized" and par values which were based upon it ceased to be in force, although for very limited and specific purposes they continued to be in use (see Lively Ltd. and Another v. City of Munich, [1976] 1 W.L.R. 1004) until the par value system was formally abolished by the Second Amendment of the Articles of Agreement. As from April 1, 1978 IMF exercises "surveillance" over its members' exchange arrangements (Art. IV(3) in its new version), but from a legal point of view this is a largely nominal function.

If the efficacy of the Fund in controlling the international monetary system is limited, its function as a provider of international credits (or "liquidity") is considerable (in law the two functions are wholly distinct, although those who as a matter of principle regard bank money (*Buchgeld, monnaie scripturale*) as money in the legal sense are inclined to treat credits obtainable through the Fund as money). In so far as the Fund's resources derive from the subscription of member States (quotas), the Fund may make loans to members (Art. V), although in respect of some of them the Articles speak of sales and purchases (Art. V(3)). In addition the Fund manages so-called Special Drawing Rights (SDRs) attributed to its members in its books since 1969. Their creation, administration and utilization is regulated by Arts. XV to XXV of the amended Articles of Agreement. They were originally defined in terms of gold, but after certain not altogether satisfactory experiments, an SDR now represents a "basket" made up by the five leading currencies: US dollar 42 per cent; Deutschmark 19 per cent; French franc, Japanese yen and pound sterling 13 per cent each. An SDR is, therefore, also a standard of value which can readily be expressed in terms of a currency and to which private persons anxious to maintain the "value" of their debts may have resort by agreeing upon a protective clause in terms of SDRs. As a result the IMF as it exists today has little in common with the international clearing union which Lord Keynes proposed in 1943 (British Command Paper, Cmd. 6437) and which initiated the movement that ended in Bretton Woods in 1944.

The → General Agreement on Tariffs and Trade, created on October 30, 1947 and amended from time to time, primarily pursues objects which are far removed from monetary law. Yet it fills a gap which the Articles of Agreement of the IMF left open, and may therefore be mentioned as a second monetary institution. The Articles of Agreement of the IMF do not deal with trade restrictions, although these often have the same economic effect and operate in the same manner as exchange restrictions. It is one of the principal tasks of GATT to cooperate closely with the IMF and to procure the coordination of exchange and

trade policies. In particular the member States of GATT are bound not to jeopardize the objects of the Agreement by currency measures or the objects of the IMF by trade measures (Art. XV).

While both the IMF and GATT are global in character, the → Organisation for Economic Co-operation and Development (OECD), since 1961 the successor to the Organisation for European Economic Co-operation, comprises a more restricted group of 24 member States. It had a great share in liberalizing monetary and trade transactions by promulgating its Codes of Liberalization. Its offspring were from 1947 to 1958 the European Payments Union and from 1959 the European Monetary Agreement, both of which established a system of multilateral payments (→ European Monetary Cooperation). Both contributed substantially to Europe's reconstruction after World War II (→ European Recovery Program).

The functions of the last-mentioned Agreement have since 1979 been exercised by the European Monetary System (EMS) which was created by the → European Economic Community (EEC) and to which most of the member States of the Community adhere, though the United Kingdom has so far refused to join. The basis is the European Currency Unit (ECU), which is the sum of the following amounts of the currency of the member States: 0.828 German mark, 0.0885 pound sterling, 1.15 French francs, 109 Italian lire, 0.286 Dutch guilders, 3.66 Belgian francs, 0.14 Luxembourg francs, 0.217 Danish krone, 0.00759 Irish punt. Each currency has a central rate related to the ECU. Fluctuations with a spread of altogether 4.50 or, in the case of presently floating currencies, 12 per cent are allowed, but when the margin is reached, intervention becomes compulsory. Adjustments, i.e. de- or revaluations, are allowed subject to mutual agreement, a provision which, if observed, involves a substantial curtailment of monetary sovereignty. The ECU is not only a standard of measurement, but also the unit of account of the EEC for Community purposes and, finally, may serve as a protective clause within the framework of agreements between private persons; in the last-mentioned capacity it does not thus far seem to have been used to any considerable extent.

The EMS is subject to the supervision of the Monetary Committee created in pursuance of Art. 105(2) of the EEC Treaty "[i]n order to promote coordination of the policies of Member States in the monetary field to the full extent needed for the functioning of the common market". The Committee now has a maximum of 22 members, the member States and the Commission each being entitled to appoint two members. It has no executive powers, but is expected to keep under review the monetary and financial situation of member States and to deliver opinions (presumably on monetary and financial matters) to the Council and the Commission. From the point of view of organization it is necessary, finally, to mention the Joint Committees created by the treaties of association which the EEC has concluded with a number of countries including Switzerland and Israel (→ European Economic Community, Association Agreements). These Committees, consisting of representatives of the Community and the associated country, are responsible for the administration and implementation of the Agreements. Since these have some effect upon international payments, as mentioned below, their existence has to be mentioned in the present connection, particularly since they have the power to make not only recommendations but also decisions in the cases provided for in the Agreements, though these do not have direct effect in the legal systems of the contracting parties.

3. International Payments as a Matter of International Regulation

It is due to exchange restrictions practised by most States over many years that international payments have become the subject-matter of treaty arrangements, whether on a bilateral or a multilateral, on a regional or a world-wide basis.

(a) Clearing and payment agreements

Before World War II the most usual type of bilateral agreement relating to international payments was the → clearing agreement such as it was practised by Switzerland in particular and also known to many other countries, including the United Kingdom. It is characterized by the fact that in each of the two countries debtors make to a central clearing office such payments as are due to creditors in the other country. The rules

according to which amounts so paid are made available to creditors are usually laid down in the treaty and are far from uniform. The clearing system is practicable only where the debtor is precluded from paying anyone other than the clearing office. To disregard this obligation may cause hardship and also difficult legal questions which particularly in Switzerland have given rise to a wealth of judicial material. The clearing system is frequently irreconcilable with elementary requirements of international payments, since the creditor cannot be certain when the payment made for his account to the clearing office is actually paid over to him. In macroeconomic terms the somewhat perverse consequence results that a strong political weapon becomes available to a debtor country.

In the course of the years immediately following World War II, treaties known as payment agreements became usual. They do not impose any specific obligations upon the importer or exporter; they expect him merely to observe such duties as municipal exchange control laws may prescribe. The respective central banks, however, sell to each other gold or sums of their own currency which are intended to be applied to the payment of debts arising from international trade between the two countries and which are allocated by the central bank in the debtor's country. Such treaties promote a bilateral system of trade and payment, but ensure a substantial measure of equilibrium between the two countries concerned. Moreover their elasticity is such that legal problems in applying or winding up such treaties have not become known and in fact are unlikely to have arisen.

(*b*) *Capital transfers and payments for current transactions*

For many years the law of international payments has been dominated by the distinction between capital transfers and payments for current transactions (→ Capital Movements, International Regulation). As a matter of legal terminology and technique the distinction has its origin in Arts. VI Section 3 and VIII Section 2 of the Articles of Agreement of the IMF agreed at Bretton Woods in 1944. The effect is that controls over international capital movements may freely be exercised, but that restrictions on the making of payments and transfers for current international transactions may be maintained "in the post-war transitional period", but may not be imposed without the consent of the Fund by those members (at present 54) who have accepted the obligations of Art. VIII Section 2. In this connection it must be remembered, however, that for the purposes of the Articles of Agreement of the IMF and probably of many other treaties the term "restrictions" has a special meaning: It covers, not the existence, but the administration of a municipal system of exchange control. Such a system may be freely maintained, but it must be so administered as to avoid in fact a restriction in respect of current transactions.

Since 1944 the privileged status of payments for current transactions has been recognized in many other treaties, so much so that it may have become part of the → customary international law of money. By way of example, reference is made to Art. 19 of the treaty of July 22, 1972 between the EEC and Switzerland which is representative of similar provisions in other treaties: "Payments relating to trade in goods and the transfer of such payments to the Member State of the Community in which the creditor is resident or to Switzerland shall be free from any restrictions."

In this connection it should be remembered that exchange restrictions are very likely to be measures having equivalent effect to quantitative restrictions on imports such as are forbidden, for instance, by Art. 30 of the EEC Treaty of Rome. This suggestion is probably inconsistent with the decision of the → International Court of Justice in the → United States Nationals in Morocco Case, a close analysis of which would seem to indicate an unduly artificial distinction between trade and exchange restrictions, but that case was argued on so narrow and superficial a basis that its value as a precedent is limited.

The problem of distinguishing capital transfers from payments for current transactions (on which see the decision of the Court of Justice of the European Communities of January 31, 1984, Recht der Internationalen Wirtschaft 1984, 383) has never been solved satisfactorily. It would seem to involve a strong subjective element and its solution may therefore depend upon the circumstances of each particular case.

(c) *Guarantees of freedom from restrictions*

In many cases, however, treaties go further and guarantee freedom from restrictions in respect of what would appear to be capital transfers. Thus Art. 19 of the EEC-Switzerland treaty continues as follows: "The Contracting Parties shall refrain from any exchange or administrative restrictions on the grant, repayment or acceptance of short- and medium-term credits covering commercial transactions in which a resident participates." The EEC Treaty itself deals in great detail with the movement of capital between member States (Arts. 67 to 73) and also with payments connected with the movement of goods, services or capital (Arts. 104 to 109); though the latter provisions are included in Part 3 of the Treaty which deals with the policy of the Community and prima facie does not, therefore, impose binding obligations and though the → Court of Justice of the European Communities has refused to construe the treaty as prohibiting floating currencies (decisions of October 24, 1973, Cases 5, 9 and 10/73, ECR (1973) p. 1091 et seq.), it remains to be seen whether directly binding duties will not be discovered as a result of the Court's preoccupation with the creation of a common market rather than treaty interpretation. Other far-reaching guarantees are contained in most of the 21 → Treaties of Friendship, Commerce and Navigation which the United States of America concluded since 1945. Thus Art. XII of the Treaty with the Federal Republic of Germany contains detailed provisions, one of which is to the effect that neither party may "impose exchange restrictions which are unnecessarily detrimental to or arbitrarily discriminate against the claims, investments, transportation, trade or other interests" of nationals of the other party.

(d) *Investment protection*

The same article, in conjunction with Art. V(4) contains provisions which have become a feature of many other treaties, particularly of the very numerous investment protection treaties which the United States of America and several European countries have concluded with → developing States and certain terms of which may also be said to have become enshrined in the body of customary international law. They are to the effect that (new) investments and the profits relating thereto may be withdrawn and transferred and that the same applies to compensation paid in the event of expropriation (→ Expropriation and Nationalization).

(e) *Prohibition of discrimination*

Irrespective of the nature of the payment, the IMF Articles of Agreement unequivocally prohibit discriminatory currency arrangements and multiple currency practices except as authorized by the Agreement or approved by the Fund (Art. VIII(3)). While the term "arrangements" gives rise to much uncertainty, this is a far-reaching protection of an international payment system, although an effective remedy against a breach of the obligation does not seem to be readily available (→ International Obligations, Means to Secure Performance).

4. *International Monetary Law and Warfare*

When one turns to the customary international law of money, it is in the first place necessary to devote a few words to the law of → war (→ War, Laws of).

It is a familiar but still open question whether the rules of legitimate warfare permit a belligerent to forge and distribute the enemy's currency and thus to undermine his economy; probably there does not exist any rule clearly establishing the illegality of such acts. On the other hand, the duties of a belligerent occupant who is responsible for the monetary conditions in the occupied territory are more clearly defined (→ Occupation, Belligerent). Three main problems may arise.

The occupying authorities may be compelled to introduce a new currency in the occupied territory. Art. 43 of the Hague Regulations on Land Warfare of 1907 permits a change of the occupied territory's law in the event of there being compelling necessity (→ Hague Peace Conferences of 1899 and 1907). This applies to legislation in currency affairs (Reichsgericht in Zivilsachen, Vol. 157, p. 360; Reichsgericht, Juristische Wochenschrift 1922, p. 1324). The more difficult question of whether and how the newly introduced currency is to be covered caused much difficulty in former times, when cover was thought to be necessary. During World War I

Germany was compelled to introduce a new currency in occupied Belgium and covered it by opening a credit in favour of the Belgian National Bank at the German Reichsbank in terms of marks. As a result of the German inflation this became valueless. Although neither event constituted an → internationally wrongful act, Belgium received compensation under the → Young Plan of 1929, and under the → London Agreement on German External Debts of 1953 the Federal Republic paid DM 40 million to Belgium (→ State Debts; → Foreign Debts).

Liability for currency introduced in the occupied territory should normally be imposed upon such territory's sovereign, for the occupant does not act in his own name or interest, but exercises the sovereign's administrative authority; it was therefore in line with the legal position when the Treaties of Peace with Italy, Romania and Hungary (→ Peace Treaties of 1947) and the → Austrian State Treaty (1955) rendered these countries responsible for currency issued by the Allies.

The question has frequently arisen whether the sovereign has to recognize currency introduced by the occupant as lawful means of payment with the result that such currency is capable of discharging debts expressed in terms of the lawful sovereign's currency. In the absence of legislation, courts in Burma answered in the negative, but a fundamental decision of the supreme tribunal of the Philippines rightly answered in the affirmative. Frequently the sovereign, on his return, will enact legislation, possibly with retrospective effect, but he does not commit an international wrong towards foreign creditors if he refrains from doing so.

5. *Monetary Sovereignty and its Limitations*

Few of the treaties cited effectively limit the monetary → sovereignty of States by subjecting them to enforceable duties; this is not surprising, since monetary sovereignty is a privilege which States deem it necessary to safeguard with jealousy. In many cases, therefore, customary international law may be able to supply a more useful remedy. The limits of a State's jurisdiction and the causes of State responsibility in monetary matters were fully discussed in the pleadings in the → Norwegian Loans Case (France v. Norway), and the → Barcelona Traction Case, but the judgments of the Court do not in any way reflect the arguments submitted to it (→ Responsibility of States: General Principles).

In the absence of authoritative guidance, it is difficult to define with precision the circumstances in which such measures as the devaluation of a currency, the abrogation of protective clauses or the introduction and, in particular, the administration of exchange restrictions may constitute an international tort. Illegal confiscation, discrimination or → abuse of rights are the principal causes of action that have to be considered. The analogy of municipal law is likely to make a substantial contribution to the development of international rules.

Thus, → international courts and tribunals may be expected to take note of the Swiss view according to which a State cannot lawfully prohibit by its exchange restrictions the assignment of a foreign debt to the prejudice of a foreign assignee (Entscheidungen des Schweizerischen Bundesgerichts, Vol. 61 II (1935) p. 242). Municipal law does not provide any support for the view that devaluation of a currency may be treated as confiscation. The German Supreme Court decided that public international law does not compel the promulgation of revalorization legislation (Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 121 (1928) p. 203). In England, Upjohn J. enumerated the circumstances in which exchange restrictions may have to be rejected (In re Claim of Helbert Wagg & Co Ltd. (1956) Ch. 323). If the rate of conversion of 1 mark = 1 Zloty introduced by Poland after World War I in the former German territories was in fact unjustifiable and only due to the intention to prejudice German creditors, the German courts were right in treating that rate as abusive and therefore inapplicable (Kammergericht, Juristische Wochenschrift, Vol. 51 (1922) p. 398; Vol. 52 (1923) p. 128; Vol. 57 (1928) p. 1462). Diplomatic practice supplies many additional examples of interventions and → protests by States relating to monetary measures, but although they are instructive, they are usually inconclusive.

6. *International Monetary Law and Inter-State Debts*

When international persons enter into arrange-

ments of a business character with each other, it is open to them to contract in terms of Special Drawing Rights. In such a case they agree to settle monetary liabilities by the transfer of SDRs, and they may do so, although the liability itself is expressed in terms of a national currency such as the dollar. Yet arrangements of this type seem to be infrequent. The much more normal practice is that international persons make use of a national currency when entering into contractual relations. This means that international law and national monetary law become inter-connected. The ensuing problems which remain largely unsolved are similar to those which arise when, in private law, *lex causae* and *lex monetae* differ and when, therefore, it becomes necessary to decide which problems are to be decided by the one or the other legal system. The analogy of private law is likely to be valuable for the development of an international rule.

The determination of the money of account is a matter of treaty interpretation, but in the case of delictual liability many, though by no means all, cases will be subject to the principle which the → Permanent Court of International Justice propounded in the → *Wimbledon* Case and according to which → damages have to be assessed and paid in the currency of the creditor State. The much discussed question of the currency in which compensation for expropriation has to be paid is probably of minor importance; even if it is payable in terms of the currency of the expropriating State, this may not necessarily be prejudicial to the creditor or objectionable from the point of view of international law, for the real problem relates to the transferability of the compensation paid.

In the present context too the most prominent problem, however, is caused by the principle of nominalism: If two States contract by treaty in terms of a national currency, whether it be the currency of one of them or that of a third State, and the agreed currency depreciates, can the debtor State discharge its liability by paying the nominal amount of the debt in depreciated currency? Private law teaches that in the last resort nominalism is derived from the presumed or typical intention of the parties who fail to provide for a protective clause. The same reasoning leads to the conclusion that debts created by treaty are subject to nominalism. This ought to be so even if it is the currency of the debtor which is *in obligatione* and depreciates. The creditor State which refrains from insisting upon the stipulation of a protective clause accepts the risks which, as experience shows, are far from remote. In conformity, again, with private law public international law has not developed a general practice of revalorization but it would seem likely that in the event of an extreme depreciation of currency the principles of equity and → good faith will require a debtor State to make good, either wholly or in part, the loss resulting from the depreciation of currency, particularly if it is the debtor State's currency that is at issue. Nominalism, as we know, does not prevade the law relating to unliquidated claims. In such cases, however, the creditor State's loss is almost invariably avoided by the firmly established practice of international tribunals, whether judicial or arbitral, to assess damages or compensation as at the date of the decision and thus to relieve the creditor of the burden of depreciation of currency (for one among many other examples see the 1976 decision of the arbitration tribunal in the French-Greek lighthouses dispute).

Protective clauses were at times by no means rare in treaty practice. Since gold clauses have become impracticable and a clause based on the SDR or the ECU are the only means of affording protection, protective clauses have become infrequent and it is remarkable how States prefer to contract in terms of a currency, particularly the dollar pure and simple. In any event, a protective clause presupposes an express agreement between the contracting parties. In public international law an implied protective clause is bound to be even rarer than in private law. In fact, it is almost impossible to think of circumstances in which it could be found to exist. What is a much more difficult question relates to the character of the clause. In private law a gold coin or a gold bullion clause will hardly ever be contemplated by the parties, because performance by the delivery of coins or bullion is either impossible or impracticable. This is not so in international relations where the presumption is likely to be to the opposite effect: A gold bullion clause may well be in conformity with the parties' real intentions. Finally, as regards the abrogation of protective

clauses this is unlikely to cause any difficulty in international law. Since international obligations created under international law are independent of municipal law except in so far as the latter has been adopted by or incorporated into the treaty, municipal legislation cannot affect the existence or extent of international obligations (→ International Law and Municipal Law). It is true that the *lex monetae* of the currency referred to in the treaty will have to be respected: A US dollar is a US dollar as defined from time to time by the law of the United States. But a protective clause is not governed by the *lex monetae*, but by the law applicable to the contract (in private law) or to the treaty (in international law). The distinction may at times appear artificial, but it is so well established and so generally practised that international law will have no alternative but to follow the example of private law.

For similar reasons exchange restrictions introduced in the debtor State cannot as a rule have any bearing upon such State's international obligations. This may be different only when a State undertakes to open a bank account in favour of another State and credit it with a certain amount of money – a type of transaction which in the course of the last few decades has occurred on innumerable occasions. The rights and duties arising out of the bank account will be subject to private law. Whether the account has to be exempt from any restriction which supervenient legislation may introduce depends, not on the law governing the bank account, but on the express or implied terms of the treaty and, in other words, is a matter of construction.

In private law the question of where and how international payments have to be made causes many difficulties and uncertainties. Public international law is likely to take a broad view. As a rule, payment will have to be made in the creditor State's capital or at its central bank (see the award of the arbitration tribunal under the London Agreement on German External Debts (1953), → Young Plan Loans Arbitration). Payment in cash, treated in all legal systems as the normal method of payment, will be outside the contracting States' contemplation. Payment by bank transfer will be the rule. In the award rendered by R. Cassin in the Case of the Diverted Cargoes, Greece v. Great Britain (ILR, Vol. 22 (1955) p. 820), it was held that the conversion of a monetary obligation into the currency of the place of payment had to be effected at the rate of exchange of the day of payment. This may be a perfectly acceptable principle in international relations, but the point was of little relevance in the case before Cassin, whose award is subject to such grave doubts and has been so convincingly criticized that while it may stimulate academic discussion, it cannot be regarded as affording solutions.

A. NUSSBAUM, Money in the Law, National and International (2nd ed. 1950).
F.A. MANN, Money in Public International Law, RdC, Vol. 96 (1959 I) 1-128.
G.R. DELAUME, Legal Aspects of International Lending and Economic Development Financing (1967).
D. CARREAU, Souveraineté et coopération monétaire internationale (1970).
D. CARREAU, Le système monétaire international, aspects juridiques (1972).
M.R. SHUSTER, The Public International Law of Money (1973).
L. FOCSANEANU, Droit international public monétaire, Jurisclasseur droit international, fascicule 136 (1980).
R.S. RENDELL (ed.), International Financial Law (1980).
K.W. DAM, The Rules of the Game, Reform and Evolution of the International Monetary System (1982).
J. GOLD, Developments in the International Monetary System, the International Monetary Fund, and International Monetary Law since 1971, RdC, Vol. 174 (1982 I) 107–366.
F.A. MANN, The Legal Aspect of Money (4th ed. 1982).

F.A. MANN

MONETARY UNIONS AND MONETARY ZONES

Monetary unions and monetary zones are among the arrangements by which two or more geographical entities that are not parts of a single State agree to follow a common approach to monetary policies or problems (see also → Monetary Law, International). The geographical entities are usually, but not necessarily, States. The arrangements are diverse, largely because of differences in economic conditions and historical developments.

1. Definitions

Numerous definitions of a monetary union have

been formulated, usually by economists, but there is no authoritative legal definition. For the purpose of this article, a monetary union is defined as an arrangement by which the members, in order to promote an economic objective, have agreed to establish and control a common central bank that issues a common currency as the only currency in circulation and that holds the pooled monetary reserves of members to support the currency. The definition implies, *inter alia*, that the issuing authority has a sufficient range of powers to be considered a central bank and therefore can establish a common monetary policy. The economic objective of the union may or may not be made explicit in the legal instruments of the union. Effective control of the bank and the currency by members does not preclude some participation in control by a non-member. This participation occurs when the union has strong ties with a non-member, but such a relationship is not an essential characteristic. A monetary union can be, but need not be, accompanied by arrangements for economic integration (that is, the removal of national barriers to the free flow of goods, capital, and labour among members of the union; → Economic Organizations and Groups, International; → Customs Union). Nevertheless, economic integration and development are probably always objectives even if not made explicit. Members of a monetary union can belong to an arrangement for economic integration with a wider membership, as is illustrated by the participation of the six members of the West African Monetary Union (see *infra*) in the → Economic Community of West African States (ECOWAS), to which sixteen countries belong.

No authoritative definition exists of monetary zones either. For the purpose of this article, they can be regarded as falling under the first sentence of this article without constituting a monetary union. This definition, however, could be considered too broad, because it could embrace, for example, the total membership of the → International Monetary Fund (IMF) as members of a single zone. Therefore, the caveat should be added that a monetary zone is limited in membership by reference to some criterion, such as geographical location, pooling of external reserves, preferences in specified monetary matters, fixed exchange rates among members' currencies, interconvertibility of their currencies, or some combination of these or other criteria. An agreement among members, however, would be an essential characteristic of a monetary zone. Some arrangements have been called partial monetary unions, because they approach the definition of a union.

2. *Some Current Examples*

Monetary unions and monetary zones have a long history. This article considers some examples that are now in existence.

Some monetary unions emerged as *de facto* arrangements. Usually, a *de facto* union has been replaced by a *de jure* union in time. Whatever may have been the origin of a union, the tendency has been for it to go through a number of legal stages, with the broad objective of extending the authority of the central institution and the control of it by its members. Another tendency has been that membership changes, as the result of withdrawals and entries.

The West African Monetary Union (WAMU) can be considered the archetype of one kind of monetary union. The WAMU was established on November 1, 1962 by a treaty among seven West African countries of approximately equal economic strength. Another country entered and two left, leaving at present six members (Benin, Ivory Coast, Niger, Senegal, Togo, and Burkina Faso (formerly Upper Volta)). The union has close links with France.

At the centre of the WAMU is the Banque Centrale des Etats de l'Afrique de l'Ouest (BCEAO), which, under the 1962 treaty, replaced the former Institut d'Emission. Members of the WAMU entered into a new treaty, which took effect on October 11, 1974, and which included new statutes for the BCEAO. Each member entered into a new bilateral agreement with France on cooperation and the operations account.

The highest political bodies of the Union are composed of the representatives of members: the Conference of the Heads of State and the Council of Ministers. Both bodies, but the Council in particular, are authorized to take decisions, by unanimity, on broad monetary issues and to exercise surveillance over banking coordination. The Governor and Board of Governors of the

BCEAO conduct the central banking operations. The Governor is a national of a member. The Board consists of two representatives appointed by each member and by France. Most decisions are taken with a simple majority, but unanimity is required for some decisions, in contrast to the pre-1974 position in which France had one-third of the representation and most decisions required a two-thirds majority.

The BCEAO issues a common currency, the CFA franc (Communauté Financière Africaine franc), which has a fixed exchange rate with the French franc (CFA 50 = FF 1). The treaty does not provide that this exchange rate is unchangeable, but only that there shall be a common currency, which implies common exchange rates for other currencies. The BCEAO holds external assets of the members in a common pool but maintains individual accounts for them. The common assets are held in an operations account denominated in French francs with the French Treasury. France guarantees the value of the assets by reference to the value of the French franc in terms of the Special Drawing Right (SDR), and undertakes the convertibility of CFA francs into French francs. The BCEAO is allowed to invest 35 per cent of its external assets (net of certain specified assets that also are held outside the operations account) in short-term liquid assets with a maturity of up to two years in international financial institutions in which the members participate. If holdings in the operations account are insufficient to cover drawings on it, members must mobilize public and private holdings outside the operations account. If these measures are insufficient, the French Treasury provides automatic overdrafts and levies charges according to an established schedule. Provision is made for other emergency measures if holdings in the operations account fall below a certain level.

The BCEAO has headquarters in Dakar and National Credit Committees in each member country. The authority of both the BCEAO and these agencies, and control of them by members, have been increased under the 1974 treaty. The BCEAO formulates policy and manages reserves for the union as a whole, and in doing so maintains principles of the uniformity of the chief policy instruments, such as the interest rate, and freedom for the transfer of funds throughout the union. Major changes in policy are subject to unanimous agreement among members. The 1974 treaty overhauled policy instruments, but rediscounts are still the main instrument of monetary management. The BCEAO sets annual targets of financing in each country, taking into account the interests of the union. The agencies conduct local operations, including the allocation of rediscounts among domestic uses, subject to a limit on credit to the government.

The WAMU belongs to the French franc zone. Therefore, members undertake to maintain a free exchange system for capital and current transactions in relation to all other members of the zone, including France. As a consequence, the BCEAO must take account of interest rates elsewhere in the zone. The exchange control regulations of members of the WAMU are consistent with those of France, subject to certain modifications.

The Central African Monetary Area (CAMA) is composed of Cameroon, the Central African Republic, Chad, the Congo, and Gabon. These countries are more diverse in economic strength than the members of the WAMU. The present common central bank, the Banque des Etats de l'Afrique Centrale (BEAC), which was established by a treaty of November 22, 1972, replaced an earlier common central bank, which itself had replaced a common Institut d'Emission in 1960. The BEAC issues a common currency, also called the CFA franc, that is distinct from the CFA franc of the BCEAO, although the two are interconvertible at par. The BEAC resembles the BCEAO in many respects, including relations with France. A number of the revisions introduced in 1972–1973 for the CAMA were followed in the revisions of 1974 for the WAMU.

3. Costs and Benefits

A monetary union involves costs and benefits for a member. Exchange risks are eliminated within the union, which is conducive to trade and capital flows among members (cf. → Capital Movements, International Regulation). The allocation of resources should be more efficient and economic growth enhanced. Members need to hold smaller external reserves to finance transactions within the union, or even outside the union, as a result of pooling reserves. Members give up a degree of autonomy, however, in the conduct of

domestic monetary policies. If there is a fixed exchange rate with the currency of a non-member, the exchange rate of that currency with other currencies is determined without reference to the balance of payments of members of the union. The economic issues raised by monetary unions go beyond the costs and benefits mentioned here, and unions have been one of the topics in the growing discussion of optimal currency areas.

Differences in the characteristics of monetary unions make generalizations about their success unsafe, even when there are also strong similarities, as, for example, between the WAMU and the CAMA. Although both have relied heavily on trade and financial flows with France, which enjoys certain preferences as a member of the franc zone, and although the volumes remain larger than for any other single country, the ratio of the flows with France to total flows have declined. The implication, therefore, is that ties to a strong outside power have not prevented an openness to trade and financial relations with other countries. Furthermore, membership in a union has not prevented substantial autonomy to follow national policies in the implementation of union-wide decisions on monetary policy and in other economic policies. Experience also shows that the common central banks have followed different kinds of policies, and that the banks have not always exercised all the powers that are available to them. For these and other reasons, economic performance has varied among unions and among members of a union, as well as in comparison with non-members in the same region.

4. *Some Other Current Examples: Monetary Zones*

The East Caribbean Currency Authority (ECCA) has gone through various stages. It now exercises some but not all the functions of a central bank. It is expected to become a monetary union under a draft that has been completed with the help of the IMF. The present ECCA was established in 1965, with a membership that has been modified over time and now consists of seven members: Antigua and Barbuda; Dominica; Grenada; Montserrat; St. Kitts-Nevis; St. Lucia; St. Vincent and the Grenadines. The purposes of the ECCA are to issue and manage the common currency, safeguard its external value, and promote monetary stability and a sound financial structure in member States. The ECCA issues the East Caribbean dollar (EC$) as the common currency, which formerly had a link with sterling. All external assets had to be held in sterling, in return for an exchange guarantee by the United Kingdom. The guarantee was terminated on December 31, 1974, the link with sterling was broken in July 1976, and the EC$ was pegged to the United States dollar (EC$2.7 = US$1), with authority to change this value if all members agree. In 1976 the compulsory foreign exchange cover of 70 per cent against currency in circulation and other demand liabilities was reduced to 60 per cent, which increased the margin for credit expansion because the remaining 40 per cent can be covered by local currency investments. A general reserve fund equivalent to 10 per cent of demand liabilities must be maintained from net profits.

The ECCA lacks instruments to implement monetary policy effectively. Moreover, it has not exercised, or has not exercised in full, all the powers that it does have. As the limited powers of the ECCA prevent it from being considered a monetary union, its members must be classified as a monetary zone.

The Regional Council of Ministers, consisting of representatives of all members, acting by → consensus, appoints the Managing Director, issues and manages the EC$, and exercises certain other powers. The Board of Governors, the main operating body, consists of the Managing Director and seven Directors appointed by the Regional Council on the nomination of a director by each member. Decisions are taken by a simple majority. There is no special tie with a non-member, and no common exchange control law.

The Rand Monetary Area (RMA), to which South Africa, Lesotho, and Swaziland belong, differs in a number of respects from the definition of a monetary union advanced above. The RMA was transformed from a *de facto* to a *de jure* arrangement, without substantive change, by a Monetary Agreement that became effective on December 5, 1974. The *de facto* arrangement emerged when Lesotho and Swaziland were British → protectorates but persisted after they became independent.

Under the Agreement, the South African rand issued by the South African Reserve Bank is legal tender throughout the tripartite area, but Lesotho and Swaziland are each entitled to issue a currency that will be legal tender within the territory of the issuer without replacing the rand as legal tender, subject to prior agreement with South Africa on the arrangements for such issue. Lesotho and Swaziland have established central banks, and currencies have been issued. The notes of the two currencies are convertible into rand notes, provided that full rand cover for the issue is maintained.

Under the Agreement, the parties may not restrict transfers of funds among themselves, with certain exceptions; access to South Africa's capital and money markets is assured; each party may control exchange transactions within its own territory, without prejudice to the policies adopted for managing the external reserves of the area as a whole, and without substantial departures from South Africa's exchange control regulations from time to time; and South Africa makes foreign exchange available to the other two parties for the transactions they authorize. Lesotho and Swaziland are not required to hold their external reserves in rand; they receive compensation from South Africa calculated on the basis of what they would have earned if the counterpart of the estimated rand circulation in their territories had been invested in long-term South African government securities. Each of the three central banks is managed separately, without representation of the other two parties, but a tripartite Commission is established for consultation on the monetary and foreign exchange policies of the area as a whole.

The role of South Africa in the RMA resembles to some extent the role of France in the WAMU and the CAMA, although South Africa is a member of the RMA and France is not a member of the WAMU and the CAMA. The RMA would be classified as a monetary zone but not a monetary union because: there are separate central banks, without common control of any one of them; three currencies are issued, even though one of them is legal tender throughout the area; the pooling of external reserves is not mandatory; major changes in policy are subject to consultation but not unanimous or other consent.

The term monetary zone, which is a looser concept than monetary union, can be applied to numerous, varied, and often unique, examples of monetary arrangements, of which the RMA is only one. A difference between monetary unions and monetary zones is that prima facie the members of unions will have no capacity to pursue an independent monetary policy while the members of zones will have this capacity. This distinction, however, is not firm, and the facts and law of each case must be examined before a conclusion can be reached. The lesser independence available to members of a monetary union suggests that it will be easier in the future to form monetary zones than monetary unions.

The European Monetary System (EMS), to which members of the → European Economic Community belong (→ European Monetary Cooperation), came into being on March 13, 1979 in the hope of achieving "a zone of monetary stability in Europe" in a world in which the former par value system no longer prevailed. At the heart of the EMS are exchange rate and intervention arrangements to which so far eight members belong. The arrangements are based on bilateral parities derived from fixed but adjustable central rates of members' currencies in terms of a new reserve asset, the European Currency Unit (ECU). The EMS goes beyond the milder obligations on external monetary policy under the Treaty of Rome.

The essential feature of a monetary zone may be an agreement by the parties to pool their foreign exchange assets with one of the parties, in return for special privileges, but coupled with other privileges of a reciprocal character. The French franc zone is an example of such an arrangement.

The → Belgium–Luxembourg Economic Union (BLEU), established by a convention that became effective May 1, 1922, and modified several times since then, would be considered a monetary union from time to time in its history according to some definitions that include separate currencies among the characteristics of a union provided the exchange rate between the currencies is unalterable. The agreement of 1921 authorized the circulation of Belgian francs in Luxembourg, but not as legal tender until 1935. Under an agreement of 1944, the two francs were to have the same par value.

They have had the same par values at all times except for a brief interval in 1935. Other features established a close association, but with more appearance of independence than is normal in a monetary union. Luxembourg, for example, undertook in 1944 to conduct its monetary policy in accordance with that of Belgium insofar as possible and with the reservation that different methods might be followed for this purpose; exchange control would be the same in the two countries but under separate laws applying only to the territory and residents of the legislator. An Exchange Institute was established with representation of the two countries, but with predominant control by Belgium.

A movement to give greater independence to Luxembourg has been hastened by the devaluation of the Belgian franc in February 1982 in circumstances in which Luxembourg alleged that it had not been informed of the action in advance. The Luxembourg Parliament in early 1983 ratified a new protocol that renews the association for another ten years, but the Parliament made separate provision for a central monetary authority in Luxembourg with some monetary functions. It would also be possible for Luxembourg to break the parity between the two currencies. There is no present intention to do so, and the creation of credit to meet the needs of the Luxembourg economy or State remains the task of the Belgian central bank.

5. Legal Tender; Clearing Arrangements

However the BLEU is classified, it must be distinguished from the decision of a country simply to give the quality of legal tender to the currency of another country. The result is neither a monetary union nor a monetary zone. Liberia and Panama are examples: Both treat the United States dollar as legal tender, with a prior understanding with the United States in the case of Panama but not Liberia. Each country has a currency of its own but only a minor circulation. The money supply and fiscal situation are closely linked to the balance of payments, with limited capacity for each country to have an independent monetary policy.

Countries that join in clearing arrangements can be regarded as members of a modest form of monetary zone (→ Clearing Agreements). The West African Clearing House was created by a treaty that took effect on May 1, 1980. Fifteen countries (Benin, The Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, Burkina Faso (formerly Upper Volta)) of the sixteen members of ECOWAS belong to the Clearing House. The declared objectives are promotion of the use of the members' currencies, economy in the use of foreign exchange, liberalization of trade, and promotion of monetary cooperation and consultation. Current account transactions, with stated exceptions, are eligible for clearing. Periodic exchange rates are established for this purpose by the declaration of a central rate for each member's currency in terms of its intervention currency and the exchange rate of the intervention currency in terms of the West African Unit of Account, which is equivalent to the IMF's SDR. A unit of account is necessary because there is no agreement among the parties to fix exchange rates. Net credits and net debits are settled in prescribed convertible currencies, at the end of each month, but at earlier dates if a central bank exceeds a defined maximum level of credit accorded to it, unless a higher maximum is agreed bilaterally with the creditor.

Other examples of international clearing arrangements include the Asian Clearing Union under an agreement adopted in April 1973 for the purpose of facilitating, within the ECAFE region (Economic Commission for Asia and the Far East; → Regional Commissions of the United Nations), settlements on a multilateral basis for current international transactions (with exceptions), as defined by the Articles of the IMF. The unit of account is the Asian Monetary Unit, which also is equivalent to the SDR. The unit of account of the Caribbean Community (CARICOM) Multilateral Clearing Facility and the Central American Clearing House is the United States dollar, to which the currencies of most participants are pegged. Credit arrangements on the lines of those described above for the West African Clearing House are a normal feature of clearing arrangements. A credit facility is sometimes established to facilitate settlements under clearing arrangements (*vide* the Multilateral Finan-

cial Assistance, or Santo Domingo, Agreement among twelve Latin American countries), but a regional balance of payments credit facility need not involve a multilateral clearing system (*vide* the Arab Monetary Fund and the Andean Reserve Fund).

6. *Membership in IMF*

A criterion for membership in the IMF is that an applicant is recognized as a State. The applicant is not disqualified because it belongs to a monetary union or monetary zone, but no matter how close the association among the countries of a union or zone may be, the IMF treats its members individually. Joint membership is not recognized. Another criterion for membership is that a country is willing and able to perform the obligations imposed by the IMF's Articles. It is in connection with this criterion that the IMF has had to evolve a special principle to meet the test of ability to perform the obligations when authority in monetary matters is shared with other countries. The principle has been a pragmatic one. For example, is there sufficient assurance, on the basis of the facts in a case, that a country will be able to perform the obligations because all countries in the union or zone are members of the IMF or because enough of them are members to control the activities of the collectivity?

H.G. JOHNSON and A.K. SWOBODA, The Economics of Common Currencies (1973).

J. GOLD, Membership and Nonmembership in the International Monetary Fund (1974).

Inter-American Institute of International Legal Studies, Instruments of Economic Integration in Latin America and in the Caribbean, Vol. 2 (1975).

T. ISHIYAMA, The Theory of Optimum Currency Areas: A Survey, IMF Staff Papers, Vol. 22 (1975) 344-383.

P.R. ALLEN, Organization and Administration of a Monetary Union (1976).

J.R. PRESLEY and G.E.J. DENNIS, Currency Areas (1976).

M.H. RYAN, The Treaty of Rome and Monetary Policy in the European Community, Ottawa Law Review, Vol. 10 (1978) 535–565.

F.A. SOUTHARD, Common Currencies: Precedents and Prospects, North Carolina Journal of International Law and Commercial Regulation, Vol. 4 (1978) 1–20.

M. HAAS, Basic Documents of Asian Regional Organizations, Vol. 6 (1979).

T. DE VRIES, On the Meaning and Future of the European Monetary System (1980).

S.J. ANJARIA et al., Payments Arrangements and the Expansion of Trade in Eastern and Southern Africa (1982).

J.-P. CHAUMETON, La réglementation des changes et la zone franc, Revue Juridique et Politique, Indépendance et Coopération, Vol. 36 (1982) 823–838.

C. COLLYNS, Alternatives to Central Banks in Small Developing Countries, Finance and Development, Vol. 19, No. 4 (1982) 42–44.

R.C. EFFROS, Emerging Financial Centers (1982).

J.B. MCLENAGHAN et al., Currency Convertibility in the Economic Community of West African States (1982).

SIR JOSEPH GOLD

MONOPOLIES *see* Antitrust Law, International

MORATORIUM

A moratorium may be defined as the deferment of an obligation to pay; it can extend to both private and public liabilities (→ State Debts; → Foreign Debts; → Loans, International).

The term moratorium originates in the Roman law and is derived from the *praescripta moratoria*, a deferment of payment granted by an imperial edict. The canon law of the middle ages also recognized a law of *indult*. These early attempts at regulation always applied within domestic law. After World War I and the world depression of the 1920s and 1930s, the moratorium became an important device for solving the problems arising out of public and private external indebtedness.

Different kinds of moratoria can be distinguished in international law; they can in particular be divided into those negotiated between States and those which are created by the unilateral decree of a given government.

Moratoria between States are negotiated when a State is unable to meet its public long-term external commitments. Thus, in 1931, the Hoover Moratorium (named after the United States President of the time) postponed payment for one year on all the external debts of States which arose out of World War I. A particular feature of the debt agreements negotiated after World War I on German → reparations, were the conditions laid down regulating the deferment of payments (→ Dawes Plan; → Young Plan). The → London

Agreement on German External Debts of 1953 also allowed for moratoria in the additional annexes. Short-term external liabilities moratoria were also negotiated between international bank consortia during the inter-war years. One example of these was an extension of payment for short-term German commercial debts which was granted under the "Basle Moratorium" of 1931 and succeeding agreements.

Moratoria created by the unilateral official decree of governments were and are of a different nature. In permitting a shortage of foreign exchange to develop, States made it impossible for domestic debtors to meet their outstanding external liabilities in the time allowed. For instance, in 1933 a law came into force in Germany providing for a moratorium on current private external liabilities (Reichsgesetzblatt (1933 I) p. 349). It is doubtful whether this kind of legislation is still permissible under current international law. Art. VIII(2)(a) of the Articles of Agreement of the → International Monetary Fund, provides that no restrictions on payments and transfer for current international transactions shall be imposed without the approval of the Fund. Art. XIV(2) lays down the only exception to this provision and supplies a special interim arrangement regulating those restrictions which were in effect on the day the State in question became a member. However, a number of countries continue to impose such regulations to the present day, thus creating what is sometimes called a "perpetual interim arrangement". This problem remains to be solved as a matter of law, although it is of no practical importance, since all contracts designed to protect investments guarantee an unrestricted transfer of money (→ Foreign Investments).

Moratoria mutually agreed on by States are only found infrequently for the simple reason that States try to avoid giving the impression of being unable to pay. They have been replaced by so-called debt rescheduling agreements or debt renegotiations which play an important part in dealing with the present world-wide debt crisis. Generally these agreements stipulate a new term for the debt service obligations. The payments are divided over several years, and the first instalment becomes due only after a grace period of one or more years. In contrast to a moratorium, the debt payment is not only postponed but is also newly regulated by means of an agreement. An agreement of the latter type, for example, was negotiated between the United States and Turkey in 1980 (Treaties and Other International Acts Series, No. 9909). Such multilateral and bilateral agreements have been entered into by a great number of → developing States in recent years (see → Organisation for Economic Co-operation and Development), Doc. DCD 82.25). Other important debt reschedulings have been arranged with Poland in 1981 and Mexico in 1983, within the framework of the informal association of creditor States known as the Club of Paris.

It should be noted that such debt renegotiations are also frequently arranged between international bank groups and States where commercial bank debts are concerned. These agreements are of great importance for the borrowing States, since private bank debt service represents an increasing share of the borrowing States' total debt service. Examples of agreements in such cases are those recently entered into with various States in Latin America, including Argentina and Brazil. A survey of the numbers of multilateral debt renegotiations is given in IMF, Occasional Paper 2 (1983). Recent developments include cases where debt renegotiations have been preceeded by moratorium agreements.

E.J. SCHUSTER, The Effect of War and Moratorium on Commercial Transactions (2nd ed. 1914).

A. MAYER, Zur Geschichte und Theorie des Moratoriums, Schmollers Jahrbuch, Vol. 39 (1915) 1789 et seq.

M. PIERRE, Le moratorium des effets de commerce, sa nature juridique et son application internationale (1918).

G. ERLER, Grundprobleme des internationalen Wirtschaftsrechts (1956).

G. LOHMEYER, Moratorium, in: Enzyklopädisches Lexikon für das Geld-, Bank- und Börsenwesen (3rd ed. 1967/1968) 1223 et seq.

G.G. MUNN and F.L. GARCIA, Moratorium, in: Encyclopedia of Banking and Finance (7th ed. 1973) 585.

Y. BERNARD and J.-C. COLLI, Moratoire, Dictionnaire économique et financier (1975) 813.

ALEXANDER RIEDEL

MOST-FAVOURED-NATION CLAUSE

1. Notion

A most-favoured-nation clause is a treaty provision under which a State (the granting State) undertakes the obligation towards another State (the beneficiary State) to accord to it or to persons or things in a determined relationship with it most-favoured-nation treatment in an agreed sphere of relations. Most-favoured-nation treatment in this context means treatment not less favourable than that extended by the granting State to any third State or to persons or things in the same relationship with that third State.

The most-favoured-nation pledge is an international, i.e. an inter-State undertaking. Only through the beneficiary State do the indirect beneficiaries – usually its nationals, ships, products and so forth – enjoy most-favoured-nation treatment.

Usually all States parties to a treaty accord each other most-favoured-nation treatment, thereby each becoming both a granting and a beneficiary State. A unilateral clause is a rather exceptional phenomenon today. A variety of more complex agreements of a similar structure where subjects other than States, e.g. international organizations or even companies where contracts on → concessions are involved, are not dealt with here.

The constitutive element of a most-favoured-nation clause is the undertaking of an obligation to accord most-favoured-nation treatment. The way in which this undertaking is expressed is irrelevant: it can absorb the whole content of the treaty or may be a small part of it. Whether a given provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. It has been rightly said that "speaking strictly, there is no such thing as the most-favoured-nation clause: every treaty requires independent examination" (A.D. McNair, quoted in Schwarzenberger, at p. 103).

2. Function

The → International Court of Justice has stated that the intention of the clause is to "establish and maintain at all times fundamental equality without discrimination among all of the countries concerned" (→ United States Nationals in Morocco Case, ICJ Reports (1952) p. 192; → States, Sovereign Equality). While it has been stated that the rule of non-discrimination "is a general rule which follows from the equality of States", this "general rule" does not have the same effect as a clause at least in the fields where most-favoured-nation clauses are commonly used. There, an explicit commitment of the granting State in the form of a conventional stipulation, i.e. a most-favoured-nation clause, is needed for a claim to accrue to a State that is placed in a favoured position. As soon as the "general rule of non-discrimination" develops to a degree which demands strict equality in the treatment of States and their nationals, the most-favoured-nation clause will lose its *raison d'être* in those areas.

3. Fields of Application

A tentative and non-exhaustive classification of the areas in which most-favoured-nation clauses are used can be given as follows:

(a) International regulation of trade and payments, e.g. exports, imports, customs tariffs (→ World Trade, Principles).

(b) Transport in general and treatment of foreign means of transport, e.g. → merchant ships, → aircraft, railways, and motor vehicles in particular (→ Traffic and Transport, International Regulation).

(c) Establishment of foreign physical and juridical persons, their personal rights and obligations.

(d) Establishment of diplomatic, consular and other missions, their privileges and immunities and treatment in general (→ Diplomatic Agents and Missions).

(e) Intellectual property, e.g. rights in industrial property, literary and artistic rights (→ Industrial Property, International Protection; → Literary and Artistic Works, International Protection).

(f) Administration of justice, e.g. access to courts and tribunals, → recognition and execution of foreign judgments, security for costs, *cautio judicatum solvi*, etc. (see articles on → Legal Assistance between States).

The clause has its origin in international trade and it is in this field where it has been most widely used.

4. *Early History*

The history of the clause has been traced back to the Middle Ages, and to the attempts of the merchants of Italian, French and Spanish trading cities to secure for themselves monopolies on African and Levantine markets; when such efforts failed they had to content themselves with assurances of opportunities equal to those given to some or all of their competitors. The use of such unilateral clauses became widespread in the capitulations elicited by European rulers from the Ottoman Empire, from South Asian powers and from China. Bilateral treaty clauses appeared in Europe in the 15th century but did not become common place before late in the 17th (e.g. → treaties between the Netherlands and Sweden (1679) and England and Portugal (1692)). The phrase "most-favoured-nation" found its way into the → commercial treaties of the 18th century (→ Treaties of Friendship, Commerce and Navigation).

5. *The Conditional Clause*

This type of clause made its first appearance in the treaty of amity and commerce concluded between France and the United States on February 6, 1778, in which the parties engaged mutually "not to grant any particular favour to other nations . . . which shall not immediately become common to the other Party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional". The phrase beginning with "freely" was the model for practically all commercial treaties of the United States until 1923 and this conditional form of the clause was also dominant in Europe between 1830 and 1860. There was a tendency as well to interpret in a conditional way a most-favoured-nation clause that did not explicitly state whether it was conditional or unconditional.

While this form of the clause aims at treating the beneficiary State upon exactly the same footing as the favoured third State, it is evident that in practice it lacks the "automatism" of the unconditional clause (except in cases where "the concession was freely made"). It has been observed that the granting of the conditional clause really amounts to a polite refusal to grant most-favoured-nation treatment and that it constitutes a → *pactum de contrahendo*, by which the contracting States undertake to enter into → negotiations to grant each other certain advantages similar or correlative to those previously granted to third countries. While no rule of international law prohibits States from including a conditional clause in their treaties, this form has definitively fallen into disuse.

6. *The Unconditional Clause*

Under an unconditional clause the granting State is bound to accord to the beneficiary State every advantage – falling within the compass of the clause – which it has extended to any third State, immediately and as a matter of right, without the beneficiary State being required to give anything by way of compensation – except, of course, that the clause usually contains a reciprocal most-favoured-nation pledge (→ Reciprocity). This is the form of the clause which is now generally applied: The overwhelming majority of international trade (i.e. exports and imports) is conducted on the basis of unconditional most-favoured-nation clauses.

The most important of such clauses is Art. I of the → General Agreement on Tariffs and Trade (GATT), which provides that: "With respect to customs duties and charges of any kind imposed on . . . importation or exportation . . . , any advantage . . . granted by any contracting party to any product . . . shall be accorded immediately and unconditionally to the like product . . . of all other contracting parties."

Several important international documents spell out the desirability of conducting international trade on the footing of unconditional most-favoured-nation clauses: General Principle 8 adopted by the first → United Nations Conference on Trade and Development (UNCTAD) in 1964, Art. 26 of the 1974 → Charter of Economic Rights and Duties of States, and the 1975 Final Act of the → Helsinki Conference on Security and Cooperation in Europe. General international law has not, however, developed a binding rule which would oblige States to include such clauses in their commercial treaties or to grant most-

favoured-nation treatment in the absence of a treaty obligation. In any case it is generally considered an → unfriendly act if a State refuses, without serious reasons, another State's offer to base their reciprocal trade on a most-favoured-nation commitment.

It is in the nature of a clause containing an unconditional reciprocal most-favoured-nation pledge that, while endowing the parties with equal rights, it does not ensure them an equality of material advantages. This uncertain effect of the clause, however, does not by itself afford legal grounds for its denunciation. To avoid such situations, States have evolved the use of safeguards in the form of various conditions and restrictions attached to the "unconditional" clause.

7. Conditions and Other Restrictions

The adjective "unconditional" as used above is misleading. It means only that the clause in question is not made subject to the condition that the beneficiary State must compensate the granting State for placing it in the position of the most-favoured third State if the latter itself received the granting State's favours, also against compensation. But the "unconditional" clause may indeed be made subject to other conditions or be otherwise restricted. This clearly follows from the principle of → sovereignty of States and from their contractual freedom, as confirmed by their practice.

The clause, being a treaty provision, is obviously subject to denunciation. In the respective treaties, conditions are often set as to the duration of the most-favoured-nation treatment.

To agree on conditions unconnected to the third State's legal position, relating only to a requirement the beneficiary State must fulfil to qualify as the most-favoured-nation, is perfectly feasible. A striking example of this is the condition set in Art. II of the GATT, which commits contracting parties to granting reciprocal tariff concessions as a prerequisite to becoming entitled to the rights embodied in the Agreement. Other conditions are often stipulated in the documents on the accession of a State to the GATT.

Examples of other restrictions to which the rights of a State beneficiary of an "unconditional" most-favoured-nation clause may be subjected can be found in abundance in the GATT. Some of these restrictions are quite specific, such as the right of the contracting parties to set aside their most-favoured-nation obligation so as to safeguard their balance of payments (Art. XII) or to prevent serious injury to their domestic producers (Art. XIX). Other restrictions are similar to those which may be included in bilateral commercial treaties (Arts. XX and XXIV). Whether some of these "exceptions" – and notably the → customs union and the → free trade area exception – also operate in the absence of a treaty stipulation is a matter of controversy.

The reasons for the practice of States as reflected in the GATT and in the multitude of bilateral clauses concluded in the field of international trade can be mostly, if not exclusively, found in the nature and in the uncertain and hazardous effect of a purely unconditional most-favoured-nation clause. The conditions and other restrictions customarily embodied in or attached to the clause aim at outweighing this effect and at securing viable compromise between the opposing material interests of the trading partners.

Outside the trade area, the most-favoured-nation promise in consular and establishment treaties is sometimes made subject to the condition that the beneficiary State accord to the → consuls of the granting State the same treatment as its own consuls enjoy.

8. Preferences for Developing States

According to the classical economic theory, most-favoured-nation clauses (particularly if they are coupled with national treatment clauses) assist – by ensuring non-discrimination and equal treatment of imports – in guiding international trade along the lines of efficiency in production. Such clauses obviously facilitate the exports of those goods in the production of which a country enjoys a comparative advantage and promote imports of those goods in which it suffers a comparative disadvantage. To this theory the majority of economists *grosso modo* still adhere.

Ever since the first session of UNCTAD in 1964, however, another aspect of the clause has come to the fore: The application of the most-favoured-nation clause to all countries may satisfy the conditions of formal equality, but it in fact involves implicit discrimination against the weaker members of the international community.

Holding this view strongly, the → developing States demand for themselves not equal but differential treatment, asserting that since their trade needs are substantially different from those of developed countries, the two types of economies should not be subject to the same rules in their international trade relations.

In response to these demands a so-called "generalized, non-reciprocal, non-discriminatory system of preferences" (GSP) was agreed in principle at the second session of UNCTAD (in 1968), with the following objectives: to increase the export earnings of the developing countries, to promote their industrialization, and to accelerate their rates of economic growth. In 1970 an informal agreement was reached under the aegis of UNCTAD according to which no country will invoke its rights to most-favoured-nation treatment with a view of obtaining the preferential treatment granted to developing countries by the developed ones within the system. However, the following reservations were made and accepted in this connection: the tariff preferences are temporary in nature; their grant does not constitute a binding commitment; and, in particular, it does not prevent their subsequent withdrawal or reduction, or the subsequent general reduction of tariffs either unilaterally or following international arrangements.

In 1971 the GATT contracting parties decided to waive the provisions of Art. I for a period of ten years to permit developed contracting parties to grant preferential tariff treatment to the exports of developing countries. In 1979 the system was extended beyond its initial ten-year period by a decision of the GATT contracting parties. This decision was taken following negotiations within the framework of the so-called Tokyo Round. It transformed the 1971 → waiver into a so-called "enabling clause" and thereby gave a full legal status to the GSP within GATT. Thus a new and important restriction of the most-favoured-nation clause (some calling it erosion, others departure) came into being.

The same text exempted from the operation of that clause arrangements entered into among developing countries and special measures adopted in favour of the least developed countries. It was at the same time agreed, however, that with the progressive development of their economies and the improvement of their trade situation, the less developed contracting parties would "accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement".

The GSP was originally conceived as a system which would be generalized and non-discriminatory, i.e. that preferences would be granted by all developed countries to all developing ones in an equal measure. As implemented, however, GSP consists of a series of individual national schemes which differ in many respects. The donor countries exercise their right to self selection, i.e. to grant preferences to certain but not necessarily all developing countries. This *de facto* discriminatory practice is based on various considerations. The → Organisation for Economic Co-operation and Development (OECD) countries, for example, reserved their right not to grant preferential treatment on grounds "which they would hold compelling". The United States denies preferential treatment to certain individual developing countries on the basis of unilaterally determined political and economic criteria. Some of the socialist countries of Eastern Europe reserved their right to exclude from their schemes those developing countries which discriminated in trade against them or which had a *per capita* income higher than theirs. The individual national schemes also differ as to product coverage, tariff cuts, safeguards (escape clauses) and rules of origin. They all reserve the donor countries' right to modify their system (see also → International Law of Development).

9. General Rules of Application

The most-favoured-nation clause, as a treaty provision, is subject to the general rules of treaty interpretation. It follows, *inter alia*, that a rebuttable presumption militates in favour of the unconditionality of the clause.

In situations where the favoured position of the third State is anchored in a treaty (the third-party treaty), it is not this treaty, but rather the treaty containing the clause, i.e. the clause itself, which is the basic act (*acte règle*) and the source of the rights of the beneficiary State. The third-party treaty is but an *acte condition* determining the extent of favours to which the beneficiary State may lay claim, on the basis of the obligation

undertaken by the granting State in the treaty containing the clause.

The beneficiary State can only claim rights which belong to the subject-matter of the clause, which are within the time-limits and other conditions and restrictions set by the agreement, and which are in respect of persons or things specified in the clause or implied from its subject-matter. The beneficiary State is entitled to the same treatment as extended by the granting State to a third State, as long as that treatment lasts, only in respect of persons and things which belong to the same category and have the same relationship to the beneficiary State as those persons and things related to the third State which enjoy the favoured treatment extended to them by the granting State.

The application of this rule, although itself theoretically sound, sometimes causes difficulty in practice. This is so because its application involves judgment as to what subject-matters, persons or things are of the same category – *ejusdem generis*. The determination of what is a "like product" is an example of this type of difficulty in the trade area.

By its nature, the unconditional clause, unless otherwise agreed, attracts all favours extended on whatever grounds by the granting State to the third State. Some authorities hold, however, that this rule should not apply to favours extended as national treatment or to those based on all or certain types of multilateral treaties.

10. Attempts at Codification

In the → League of Nations, the Committee of Experts for the Progressive Codification of International Law made a study of the rules pertaining to the most-favoured-nation clause as it appeared in commercial treaties (→ Codification of International Law). It came to the conclusion in 1927 that the international regulation of these questions by way of a general convention, even if desirable, would encounter serious obstacles.

The international economic conferences held in the inter-war period as well as the Economic Committee of the League also devoted consideration to the study of the clause. While the reports of these bodies show that no formal agreement was reached on the matter, they contain much valuable material conducive to a deeper understanding of the problems involved.

In the → United Nations, the → International Law Commission prepared a draft on "most-favoured-nation clauses" consisting of 30 articles with commentary. The draft is not restricted to clauses appearing in commercial treaties. The Commission recommended to the → United Nations General Assembly in 1978 that the draft be submitted to the member States with a view to the conclusion of a convention on the subject. The matter is still (1984) under consideration by the General Assembly.

With the intent of promoting an unofficial codification of the topic, the → Institut de Droit International adopted in 1936 a detailed resolution on "the effects of the most-favoured-nation clause in matters of commerce and navigation". A short resolution was adopted by the Institut in 1969 entitled "The most-favoured-nation clause in multilateral treaties". The preparatory works of both resolutions as published in the Yearbooks of the Institut (AnnIDI) give an instructive picture of the diverse views prevailing on the topic during the respective periods.

11. Conclusion

A general agreement on full equality of treatment in all aspects of international economic relations or at least in trade relations would not appear to be the aim of States, who wish to retain their sovereign rights in the domain of customs, tariffs and many other areas in line with the traditional diversity of their economic structures. This by itself does not theoretically exclude a general system under which the treatment accorded by the individual States is different but each State treats the others and their nationals, companies, ships, and products equally. Yet even this idea cannot be realized in practice where less than laboratory conditions prevail. Instead, an age-old device continues to be of service: the clause can be employed by States at their will by including it in their treaties. It protects them against discrimination according to and within the limits of their needs. It can be tailored to fit individual interests and even adjusted to correct the inherent injustice of treating unequals equally. While it is obviously not a panacea and is only one institution among others which can be used to

build a better → international economic order, the finding of one League of Nations expert still holds true: "... nations do not seem able to escape the use of the clause".

Committee of Experts for the Progressive Codification of International Law, The most-favoured-nation clause, Report adopted by the Committee at its third session, held in March–April 1927, LoN Doc. C.205.M.79.1927.V.

Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause, LoN Doc. E.805.1933.II.B.1.

Economic Committee; Equality of Treatment in the Present State of International Commercial Relations: The Most-Favoured-Nation Clause, LoN Doc. C.379.M.250.1936.II.B.

Report of the International Law Commission on the work of its thirtieth session, YILC (1978 II, 2) 8–72.

G. SCHWARZENBERGER, The Most-Favoured-Nation Standard in British State Practice, BYIL, Vol. 22 (1945) 96–121.

R.C. SNYDER, The Most-Favoured-Nation Clause, An analysis with particular reference to recent treaty practice and tariffs (1948).

R. ZINSER, Das GATT und die Meistbegünstigung (1962).

E.T. USENKO, Forms of the Regulation of the Socialist International Division of Labour (1965) 216–261 [in Russian].

P. PESCATORE, La clause de la nation la plus favorisée dans les conventions multilatérales, Rapport provisoire et rapport définitif, AnnIDI, Vol. 53 I (1969) 1–292.

D. VIGNES, La clause de la nation la plus favorisée et sa pratique contemporaine, Problèmes posés par la Communité économique européenne, RdC, Vol. 130 (1970 II) 209–349.

U. BOSCH, Meistbegünstigung und Staatshandel (1971).

H.G. ESPIELL, The Most-Favoured-Nation Clause, Journal of World Trade Law, Vol. 5 (1971) 29–44.

E. SAUVIGNON, La clause de la nation la plus favorisée (1972).

D. CARREAU, P. JUILLARD and T. FLORY, Droit international économique (2nd ed. 1980) 253–439.

S.J. RUBIN, Most-Favoured-Nation Treatment and the Multilateral Trade Negotiations, International Trade Law Journal, Vol. 6 (1980–1981) 221–241.

J. LEBULLENGER, La portée des nouvelles règles du G.A.T.T. en faveur des parties contractantes en voie de développement, RGDIP, Vol. 86 (1982) 254–304.

ENDRE USTOR

MULTINATIONAL CORPORATIONS *see* Transnational Enterprises

NANSEN PASSPORT *see* Passports; Refugees, League of Nations Offices; Stateless Persons

NATIONALITY

1. Historical Background. – 2. Notion. – 3. Regulation by Municipal Law. – 4. Limitations by International Law: (a) Criteria recognized by international law for the conferment of nationality. (b) Criteria not recognized for the conferment of nationality. (c) Nationality and transfer of territory. (d) Limitations concerning the loss of nationality. – 5. Consequences of Nationality: (a) Diplomatic protection as a corollary of nationality. (b) Duty of States to admit their own nationals. – 6. Special Problems: (a) Multiple nationality. (b) Statelessness. (c) "Nationality" of legal persons, ships and aircraft.

1. Historical Background

A permanent population, i.e. nationals, is one of the constituent elements of statehood; thus, nationality has existed as long as → States have. During a very long period, States abstained from regulating the acquisition and loss of nationality by specific provisions and relied on vague principles of customary law. Specific provisions appeared around the end of the 18th and the beginning of the 19th centuries. The increasing participation of citizens in State affairs and the development of the idea of the nation State made it necessary to determine exactly who was a national, as a basis, for example, for the right to vote, or for the duty to render military service. France was the first State to promulgate specific regulations concerning nationality. Those regulations were first enshrined in Arts. 2 to 6 of the 1791 Constitution as a prerequisite for the enjoyment of political rights. Later on they were part of the civil code as a necessary basis for the unlimited enjoyment of civil rights.

The original French model, to regulate nationality within the constitution, was followed during the first half of the 19th century by several European States, including Spain (1812), Bavaria (1818) and Portugal (1822). The developments in Spain and Portugal influenced States in Latin America so that the constitutions of some of these between 1815 and 1853 reveal provisions concerning nationality. During the same period other States, for example Austria, some German and Italian States, Greece and Haiti, followed a second stage of the development in France, regulating nationality in their civil codes.

Specific and comprehensive nationality acts were promulgated during the second half of the 19th century. The starting point was marked by the relevant Prussian law of December 31, 1842,

which served as a model for numerous other German States. Similar nationality acts were promulgated in Hungary (1879), Norway (1888), Sweden (1894), Denmark (1898) and Japan (1899). Nationality acts in other States regulated only some aspects of nationality, for example the problem of naturalization (Great Britain 1844, Russia 1864).

Nowadays States commonly regulate their nationality by specific and comprehensive laws.

2. *Notion*

Nationality as a legal term denotes the existence of a legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that State (→ Jurisdiction of States). The opinions of writers differ as to whether this tie should be qualified as a legal relationship or as a legal status. In the opinion of the present writer nationality comprises elements of both. Nationality is a concept both of municipal law and of international law.

It is often stated that nationality "denotes a specific relationship between individual and State conferring mutual rights and duties . . ." (Weis, p. 29). As far as nationality as a concept of municipal law is concerned, this statement is not completely correct in pretending that mutual rights and duties are derived immediately from nationality. In fact nationality is a precondition of the relevant rights and duties but not its immediate source. Municipal laws concerning nationality confine themselves to regulate acquisition and loss of nationality, but say nothing about rights and duties as a corollary of nationality.

As far as nationality as a concept of international law is concerned, rights and duties of the State (not of the individual) are immediately derived from nationality: the right of → diplomatic protection and the duty of admission. Although there are exceptional cases where the right of diplomatic protection is not the corollary of nationality, namely in cases of multiple nationality, this connection between nationality and diplomatic protection exists generally.

3. *Regulation by Municipal Law*

In principle, the regulation of nationality falls within the → domestic jurisdiction of each State (see the → advisory opinion of the → Permanent Court of International Justice in the case of the → Nationality Decrees in Tunis and Morocco; PCIJ, Series B, No. 4 (1923) p. 24).

Nevertheless the freedom of States to regulate their nationality is today somewhat more restricted by rules of international law than it was in 1923, especially by a number of treaties concerning nationality. These limitations of the freedom to regulate nationality were circumscribed in Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed in the Hague on April 12, 1930 (LNTS, Vol. 179, p. 89): "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

It is the common view that this article, which as a treaty provision is valid only for a rather restricted number of States, describes a rule of general → customary international law. Thus, State practice, the decisions of international and municipal courts and tribunals and the views of writers acknowledged that matters of nationality are left to municipal law, but subject to the international obligations of States.

Examples for the great variety of regulations contained in national legislation are described in special articles: → German Nationality; → British Commonwealth, Subjects and Nationality Rules.

4. *Limitations by International Law*

The principle that nationality is primarily a matter of domestic jurisdiction of States means that States need no authorization in international law to regulate the acquisition and loss of nationality and that international law does not positively prescribe to States the criteria for acquisition and loss of nationality.

The fundamental limitation international law imposes in matters of nationality is that a State can regulate only its own nationality and not that of another State. But limitations exist on the regulation by a State of its own nationality, in so far as other States may not recognize every criterion for the conferment of its nationality. The validity of the conferment of nationality in municipal law is in no way limited by international law. Limitations only exist concerning the conse-

quences of nationality in the international sphere, where criteria recognized for the conferment of nationality need to be distinguished from criteria not so recognized.

(*a*) *Criteria recognized by international law for the conferment of nationality*

The two criteria most generally accepted in international law and predominantly applied in municipal law for the conferment of nationality are descent from a national (*jus sanguinis*) and the fact of birth within State territory (*jus soli*). One of these two criteria is the dominant basis of acquisition of nationality in every existing State. The sole anomaly is the Vatican City State (→ Holy See), where nationality is acquired neither by *jus sanguinis* nor by *jus soli* but by residence together with the holding of an office.

Although the principles of *jus sanguinis* or *jus soli* are used by the municipal laws of all States, they are not prescribed by international customary law. The principle of *jus soli* is, however, prescribed by Art. 1 of the United Nations Convention on the Reduction of Statelessness of August 30, 1961, a Convention which up to now is binding only on ten States, but the obligation exists only when a person would otherwise be stateless (→ Stateless Persons). States that wish to increase the number of their nationals apply both the principles of *jus sanguinis* and *jus soli*, such a combination being permissible under international law.

A generally accepted limitation by customary international law to the principle of *jus soli* is that children of persons having diplomatic immunity do not acquire the nationality of the State where they are born (→ Diplomatic Agents and Missions). This rule of customary international law exists also as a treaty provision in Art. 12 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of April 12, 1930 and in Art. II of the Optional Protocol concerning Acquisition of Nationality to the → Vienna Convention on Diplomatic Relations of April 18, 1961 (UNTS, Vol. 500, p. 223). The corresponding regulation is found in Art. II of the Optional Protocol concerning Acquisition of Nationality to the → Vienna Convention on Consular Relations of April 24, 1963 (UNTS, Vol. 596, p. 469).

An extension of the principle of *jus soli* found in several States and recognized by international law is that birth on a vessel on the → high seas or on an → aircraft shall be deemed to have occurred within the territory of that State whose flag the vessel flies or where the aircraft is registered (→ Flag, Right to Fly).

A further basis for conferment of nationality applied by municipal law and recognized by international law is the acquisition of domicile *animo manendi* (with the intention of establishing permanent residence). Even if the → alien in such a case does not wish to acquire nationality, its conferment is compatible with international law. Voluntary acquisition of domicile is a stronger link with the State than the mere fact of birth within the State territory, which may be purely accidental. On the other hand, only temporary residence without *animus manendi* may not be deemed as a sufficient basis for conferment of nationality against the individual's will.

When a State has recognized by treaty a right of settlement of foreign nationals in its territory (→ Aliens, Admission), this must be deemed as a → waiver of its right to confer its nationality upon foreign nationals against their will only on the basis of their domicile or residence within the State territory.

According to the law of some States the entry into State service entails *ipso facto* acquisition of nationality. The law of some States confer nationality automatically upon certain changes in civil status: adoption, legitimation, affiliation, or marriage with a national of that State. As to marriage, in several States the acquisition of nationality does not occur automatically but conditionally. All these criteria are recognized by customary international law. As far as marriage is concerned, however, there is in treaty law a strong tendency to replace the principle of family unity by the principle of sexual equality. Thus Art. 10 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of April 12, 1930 provides that the naturalization of the husband during marriage shall not involve a change in the nationality of the wife except with her consent; see also Art. 1 of the Convention No. 1 of Montevideo on the Nationality of Married Women of December 26, 1933 (AJIL, Vol. 28, Supp. (1934) p. 61); more detailed regulations are found in the Convention on the Nationality of Married Women of February

20, 1957 (UNTS, Vol. 309, p. 65), today in force for 54 States.

Another form of conferment of nationality recognized in almost every municipal law is voluntary naturalization, or the grant of nationality to an alien by a formal act upon an application made for this specific purpose. Conditions most commonly required by States are: a prolonged residence within the State territory, knowledge of the language, and self-support. These additional conditions are not required by international law, nor is the consent of the former State. In an effort to remove the cause of conflicts between the State of origin and that of naturalization a considerable number of conventions have been concluded in State practice, especially by the United States. The first of those conventions was concluded in 1868 between the United States and several German States (the so-called → Bancroft Conventions). In the following years until 1928 many other such conventions were concluded. The main provision in these conventions is the mutual recognition of naturalization by the contracting parties.

The voluntary act of application for conferment of nationality, that is to say the deliberate will of an individual to associate itself with a State, is a sufficient link with that State and must be ranked with birth and descent, not to mention marriage, adoption and affiliation. This opinion is not in contradiction with the award of the → International Court of Justice in the → Nottebohm Case. This award does not deal with the conferment of nationality in general, not even with the conferment of nationality by naturalization, but only with the problem of diplomatic protection as a consequence of conferment of nationality by naturalization (see *infra*).

(*b*) *Criteria not recognized for the conferment of nationality*

Art. 2 of the Draft Convention on Nationality of the Harvard Law School of April 1, 1929 (AJIL, Vol. 23, Special Supp. (1929) p. 13) refers to the limitation of the power to confer nationality by international law; the commentary to this article gives examples of such limitations. If a State should attempt, for instance, to naturalize persons totally unconnected with its territory or nationals, and who are nationals of other States, it would seem clearly to have gone beyond the limits recognized by international law (see p. 26). Similarly, if a State should attempt to naturalize all persons in the world holding a particular political or religious faith or belonging to a particular race or if a State should attempt to naturalize all persons speaking its language, it would clearly have exceeded those limits. These examples are cited affirmatively by most writers but in practice no such cases have occurred.

Of practical importance in several cases was another criterion for the conferment of nationality: acquisition of real estate by an alien. The Mexican Constitutions of 1857 and 1886 stated that foreigners who acquired real estate within the Mexican Republic became Mexican nationals, if they did not manifest their desire to retain their own nationality. In the settlement of disputes arising out of these provisions, decisions of the United States–Mexican Mixed Claims Commission and the Claims Commissions established in the 1920s between Mexico and several States expressed the view that the mere fact of acquisition of real estate was not a sufficient connection between a State and an individual to automatically confer the nationality of that State (→ Mixed Claims Commissions). This view is still valid in principle today. It is incompatible with international law to confer nationality automatically by subsequent legislation to aliens who have acquired real estate prior to this legislation. To provide that in future cases the acquisition of real estate has the consequence of acquisition of territory is, however, compatible with international law.

The connection between the inhabitants of mandated and trust territories and the mandatory or administering authority is undoubtedly not sufficient for the conferment of nationality (→ Mandates; → United Nations Trusteeship System). A violation of international law would also occur if an occupying power conferred its nationality upon the inhabitants of the occupied territory (→ Occupation, Belligerent). According to Arts. 42 to 56 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land belligerent occupation gives only a temporary right of administration over the territory and its inhabitants, but not territorial or personal jurisdiction (→ Hague Peace Conferences of 1899 and 1907; → Land Warfare).

(*c*) *Nationality and transfer of territory*

As to the effect of transfer of territory (→ State Succession) on nationality the opinions of authors show a considerable diversity. There is a strong group in favour of the view that "the population follows the change of sovereignty in matters of nationality" (I. Brownlie, Principles of Public International Law (3rd ed. 1979) p. 658), i.e. the population of the territory transferred to another State automatically loses its original nationality and acquires the nationality of the other State.

In support of this view reference is often made to the → minorities treaties concluded in connection with the → peace treaties after World War I (→ Versailles Peace Treaty (1919); → Saint-Germain Peace Treaty (1919); → Trianon Peace Treaty (1920)). And indeed, Art. 4 of the Minorities Treaty signed at Versailles stipulates: "Poland admits and declares to be Polish nationals *ipso facto* and without the requirements of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory transferred to Poland of parents habitually resident there, ..." According to Art. 4 para. 2 those persons, within two years after coming into force of the treaty, could make a declaration to abandon Polish nationality. Reference is made also to the similar provision of Art. 19 of the → peace treaty of 1947 with Italy.

The agreements for an automatic change of nationality by transfer of territory are not strong enough to prove the existence of a respective rule of customary international law. When these minorities treaties were concluded, the fact that treaty provisions were deemed necessary evidenced the non-existence of a customary rule at that time. Since then, the treaty practice or other relevant State practice has not been sufficient and uniform enough for a rule of customary international law to have developed.

The transfer of territory does not cause an automatic change of nationality, but it is recognized that the successor State has the right to confer its nationality on the population domiciled in the transferred territory, under the condition that the acquisition of the territory is lawful. Some writers think that there is not only a right, but a duty of the State to confer its nationality. As the arguments in favour are mostly the same as used to support the thesis of an automatic change of nationality, this is not convincing. This would be, furthermore, incompatible with the fundamental rule of the freedom of States to regulate who are its nationals.

Such a duty can, however, exist on the basis of a treaty. Thus Art. 10(2) of the United Nations Convention on the Reduction of Statelessness of August 30, 1961 provides: ". . . a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition." (Cf. also the article on → option of nationality.)

(*d*) *Limitations concerning the loss of nationality*

Loss of nationality may follow an act of the individual or of the State. In most cases where municipal law offers the possibility of renunciation of nationality by the individual, acceptance by the State is necessary to make valid this renunciation. International law contains no general rule limiting the possibility of renunciation of nationality. On the other hand it does not oblige States to provide this possibility in municipal law.

Of far greater practical importance is the loss of nationality by a → unilateral act of the State, called denationalization. Although legislation in this respect is far from uniform the following grounds for denationalization are provided in most municipal laws: the voluntary acquisition of a foreign nationality; entry into foreign civil or military service; and conviction for certain crimes (for detailed examination of the phenomenon of individual and mass deprivations of nationality see the article on → denationalization and forced exile).

5. Consequences of Nationality

(*a*) *Diplomatic protection as a corollary of nationality*

The most important consequence of nationality in international law is the right of → diplomatic protection, despite certain exceptions in the case of multiple nationality.

A State's right of diplomatic protection comprises two aspects: firstly, the helping and protection of nationals abroad in the pursuance of their rights and other lawful activities by consular or diplomatic organs (see Art. 3(1)(b) of the Vienna Convention on Diplomatic Relations and Art.

5(a) and (e) of the Vienna Convention on Consular Relations); secondly, the claiming of compensation from a State which has treated the nationals of the protecting State in a manner incompatible with international law (→ Internationally Wrongful Acts; → Reparation for Internationally Wrongful Acts).

In exercising diplomatic protection, the State pursues its own right and does not act as mandatory of the right of the individual. In the award of August 30, 1924 in the → Mavrommatis Concessions Cases the PCIJ held:

"It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law" (PCIJ, Series A, No. 2, p. 12).

The same view was expressed by the PCIJ in its award of February 28, 1939 in the → Panevezys-Saldutiskis Railway Case (PCIJ, Series A/B, No. 76, p. 16) and by the ICJ in the Nottebohm Case (ICJ Reports (1955) p. 24).

Municipal courts have followed this view which is one generally accepted by scholars. Thus, renunciation of the right of diplomatic protection by the individual is not valid and does not affect the legal position of the State (→ Calvo Doctrine, Calvo Clause). It is possible, however, for the individual to renounce a specific right, the infringement of which would be a violation of international law. In such a case no violation of international law arises and there is no basis for the State to exercise diplomatic protection. It must be emphasized, however, that in such a case there is no renunciation by the individual of the right of diplomatic protection.

The decision of the ICJ in the Nottebohm Case does not deal with the conferment of nationality in general, nor with the conferment of nationality by naturalization, but only with diplomatic protection as a consequence of conferment of nationality by naturalization.

Many textbooks give the impression the Court had declared itself in favour of a general rule concerning the conferment of nationality, citing only the statement of the Court that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments . . ." (ICJ Reports (1955) p. 23). But the context in which this statement is made reveals very clearly that its meaning is restricted to the problem of diplomatic protection in the particular case of conferment of nationality by naturalization. Furthermore, the opinion of some writers that the theory of genuine link has gone beyond the narrow scope in the Nottebohm Case and developed into a general rule concerning the conferment of nationality is incorrect. Reference is often made to the decisions of the Italian Conciliation Commissions (→ Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947), where the theory of genuine link was applied, but only, it must be stressed, in cases of multiple nationality, and not in connection with the problem of conferment of nationality in general (see Weis, Nationality, pp. 181–184). In the → Flegenheimer Claim decided on September 20, 1958 before the United States-Italian Conciliation Commission (RIAA, Vol. 14, p. 376), the Commission rejected a generalization of the decision in the Nottebohm Case and held that the theory of genuine link should not be transferred from the problem of multiple nationality to the problem of conferment of nationality in general.

The main argument against the decision in the Nottebohm Case is that it is in no way convincing to make a distinction, as to diplomatic protection, between nationality based on naturalization and naturalization based on *jus soli* or *jus sanguinis*. It is undisputed that, for instance, the right of diplomatic protection exists also in cases where birth occurred haphazardly in a State the nationality of which is based on *jus soli*, even if the individual left the country shortly after birth and never had any relations with it. The same is true with respect to nationals of a State, the nationality of which is based on *jus sanguinis*, who were born abroad and never resided in their State of nationality. In these cases, undoubtedly, there does not exist a "social fact of attachment, a genuine connection of existence, interests and sentiments . . .". In comparison with those cases the mere fact of application for naturalization is a

closer connection with the State and there is no sound reason to require additional conditions for the right of diplomatic protection.

(b) Duty of States to admit their own nationals

Under general international law no State is bound to grant access to its territory to an alien. As a consequence of nationality, however, a State is under a duty towards other States to receive its own nationals. It is not possible for a State to shrink completely from that duty by means of denationalization. If denationalization occurs after the individual has abandoned his State and is in the territory of another State the duty of admission persists, because otherwise the other State would be deceived in its expectation that the State whose nationality the individual possessed is obliged to receive the individual.

Another question is whether besides this duty towards other States, a corresponding right of the individual also exists. Art. 13(2) of the Universal Declaration of Human Rights of December 10, 1948 states that everybody has the right to return to his country (→ Human Rights, Universal Declaration (1948)). However, the Universal Declaration as such is not a binding instrument of international law. Art. 12(4) of the International Covenant on Civil and Political Rights of December 19, 1966 states that no one shall arbitrarily be deprived of the right to enter his own country (→ Human Rights Covenants). Art. 3(2) of Protocol No. 4 to the → European Convention on Human Rights (1950) prohibits the denial of an individual's right to enter his country. Some writers assert that the right of the individual to enter his country is a rule of general customary international law. This is, however, very doubtful with regard to the restrictions of this right stated in Art. 12(4) of the International Covenant on Civil and Political Rights.

6. Special Problems

(a) Multiple nationality

Multiple nationality exists if an individual is the national of two or more States. This can occur because of the fundamental freedom of States in choosing the criteria for the conferment of their nationality. Very often multiple nationality is the result of a coincidence of *jus sanguinis* and *jus soli*: for instance, a child of parents of a "*jus sanguinis* State" born in another "*jus soli* State" acquires *ipso facto* the nationalities of both States. Multiple nationality can also come into existence if a new nationality is added to the original one acquired by birth. This is the case if, for instance, a new nationality is acquired by entry into foreign State service, by marriage, adoption, affiliation, or naturalization, and the municipal law of the original State does not provide for denationalization under such circumstances.

The existence of multiple nationality is not contrary to general customary international law. However, since it is a source of serious problems (e.g. military service), attempts by treaty law have been made to avoid or to reduce cases of multiple nationality or to resolve the conflicts arising therefrom and there are a considerable number of bilateral treaties in existence having that purpose. A multilateral treaty, the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality of May 6, 1963, concluded within the → Council of Europe, deserves special mention (ETS, No. 43). According to Art. 1 of the Convention nationals of the contracting States who acquire the nationality of another party by means of naturalization shall lose their former nationality. According to Arts. 5 and 6, military service must be fulfilled only in the State where the individual is ordinarily resident. The convention is in force for ten European States. The problem of military service in cases of multiple nationality is regulated in the same way in Art. 1 of the Protocol Relating to Military Obligations in Certain Cases of Double Nationality of April 12, 1930 (LNTS, Vol. 178, p. 227), in force for about twenty States.

The coming into existence of multiple nationality can also be avoided by the regulations of the conventions concerning the nationality of married women, for instance providing that marriage or change of nationality by the husband shall not affect the nationality of the wife. It is apparent that these treaties exclude multiple nationality only in a very restricted manner.

As to diplomatic protection concerning individuals with multiple nationality, a distinction should be made between diplomatic protection in relation to the States of which the individual is a national, and diplomatic protection against a third State. Concerning the first problem, Art. 4 of the

Hague Convention on Certain Questions Relating to the Conflict of Nationality of April 12, 1930 provides: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." This is the so-called principle of equality. Concerning the second problem Art. 5 of the Convention states: "Within a third State, a person having more than one nationality shall be treated as if he had only one . . . a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected." This is the so-called principle of effective nationality.

There can be found a considerable number of decisions of international tribunals in favour of these regulations (see survey in Weis, Nationality, p. 170). However, it must be doubted whether the principles of equality and of effective nationality can be separated in their applicability so neatly as it is done in Arts. 4 and 5 of the Hague Conventions (see also the award of May 3, 1912 by the → Permanent Court of Arbitration in the → Canevaro Claim Arbitration and the decision of June 10, 1955, by the United States-Italian Conciliation Commission concerning the → Mergé Claim). Some cases before the Iran-United States Claims Tribunal set up in accordance with the → United States-Iran Agreement of January 19, 1981, have raised questions which are of interest in this connection.

(*b*) *Statelessness*

Statelessness exists if an individual lacks the nationality of any State (→ Stateless Persons). Besides this *de jure* statelessness there is a so-called *de facto* statelessness with respect to individuals who possess the nationality of a State but, having left their State, enjoy no protection by it, either because they themselves decline to claim such protection, or because the State, mostly for political reasons, refuses to protect them. This *de facto* statelessness is connected with the problem of → refugees and must be dealt with under that topic.

Like multiple nationality, statelessness is a possible result of the fundamental freedom of States to choose the criteria for the conferment of nationality, and of their right of denationalization.

Again, like multiple nationality, statelessness is not contrary to customary international law. Art. 15 of the Universal Declaration of Human Rights, stipulating that everyone has a right to a nationality, and prohibiting arbitrary denationalization, is not binding international law. Because of the problems to which it gives rise, however, statelessness is undesirable from the point of view not only of the individual, but also of States.

A number of treaties aim at reducing the cases of statelessness and at regulating the status of stateless persons. The Hague Convention of 1930 contains in Arts. 7 to 9 and 13 to 17 regulations to avoid statelessness. Art. 1 of the United Nations Convention on the Reduction of Statelessness of August 30, 1961 provides that a contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. This obligation is limited, however, by several conditions. Art. 8 of the same convention provides that a contracting State shall not deprive a person of his nationality if such deprivation would render him stateless. This obligation, too, is limited by several conditions. Art. 1 of the Convention on the Reduction of Cases of Statelessness of the → International Commission on Civil Status (signed on September 13, 1973) stipulates that a child whose mother is a national of a contracting State acquires by birth that nationality if he otherwise would be stateless. An attempt to alleviate the legal situation of stateless persons is made by the Convention relating to the Status of Stateless Persons of September 28, 1954 (UNTS, Vol. 360, p. 130).

A critical review of these treaties must come to the conclusion that they are only a modest contribution to the struggle against statelessness. These treaties are binding today only for a restricted number of States. They deal only with very few causes of statelessness, and the obligations contained in them can be limited by the contracting States in numerous ways. Thus, statelessness will remain a problem of considerable dimensions.

Since diplomatic protection depends on nationality, a State may not exercise it on behalf of stateless persons. This was already stated by the United States-Mexican Special Claims Com-

mission in July 1931 in the Dickson Car Wheel Company Case (RIAA, Vol. 4, p. 669, at p. 678).

The protection by a body within the framework of the → United Nations provided in Art. 11 of the Convention on the Reduction of Statelessness is only a modest substitute for the lack of diplomatic protection by a State. In accordance with this provision United Nations General Assembly Resolution 3274 (XXIX) of December 10, 1974 authorized the United Nations High Commissioner for Refugees to exercise this function (→ Refugees, United Nations High Commissioner). A possibility to protect stateless persons also exists within the framework of the European Convention on Human Rights. According to Art. 24 of the Convention a contracting State can bring a breach of the Convention before the → European Commission of Human Rights. Such a breach may also arise with respect to the treatment of a stateless person.

(c) *"Nationality" of legal persons, ships and aircraft*

The notion of nationality is often used also in connection with legal persons, ships and → aircraft (→ National Legal Persons in International Law; → Ships, Nationality and Status). It is apparent, however, that nationality in this sense is something different from the nationality of an individual, appearing more as an attribution of function and less as a formal and general status of the kind relating to individuals.

C. PFEIFFER, Das Problem der Effektiven Staatsangehörigkeit im Völkerrecht (1933).

H. LESSING, Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit zu Straf- und Sicherungszwecken (1937).

R. GRAUPNER, Nationality and State Succession, Transactions of the Grotius Society, Vol. 32 (1946) 87–120.

H.J. JELLINEK, Der Automatische Erwerb und Verlust der Staatsangehörigkeit durch Völkerrechtliche Vorgänge (1951).

R. HEGI, La nationalité de la femme mariée (1954).

B. DUBOIS, Die Frage der völkerrechtlichen Schranken landesrechtlicher Regelung der Staatsangehörigkeit (1955).

H. GOLSONG, Nationalité et protection diplomatique, A propos de l'affaire Nottebohm, JIR, Vol. 8 (1959) 258–266.

H.F. VAN PANHUYS, The Role of Nationality in International Law (1959).

W. WENGLER, Betrachtungen zum Begriff der Staatsangehörigkeit, in: Internationalrechtliche Abhandlungen, Festschrift für Walter Schätzel (1960) 545–558.

N. BAR YAACOV, Dual Nationality (1961).

A.N. MAKAROV, Allgemeine Lehren des Staatsangehörigkeitsrechts (2nd ed. 1962).

I. BROWNLIE, The Relations of Nationality in Public International Law, BYIL, Vol. 39 (1963) 284–364.

R. PINTO, Les problèmes de nationalité devant le juge international à propos de l'affaire Flegenheimer, AFDI, Vol. 9 (1963) 361–375.

E. LAPENNA, La cittadinanza nel diritto internazionale generale (1966).

H.A. SCHMIDT, Staatsangehörigkeitswechsel bei Staatensukzession (1966).

C. JOSEPH, Diplomatic Protection and Nationality, The Commonwealth of Nations (1968).

H. HECKER, Mehrseitige völkerrechtliche Verträge zum Staatsangehörigkeitsrecht (1970).

B. DUTOIT, La nationalité de la femme mariée, 3 vols. (1973–1980).

G. BREUNIG, Staatsangehörigkeit und Entkolonisierung (1974).

P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979).

G. GINSBURGS, The Citizenship Law of the USSR (1983).

ALBRECHT RANDELZHOFER

NATIONALIZATION *see* Expropriation and Nationalization

NATIVE POPULATIONS *see* Indigenous Populations, Protection; Indigenous Populations, Treaties with

NEW INTERNATIONAL ECONOMIC ORDER *see* International Economic Order

OPTION OF NATIONALITY

1. Terminology

Option of nationality designates the right of an individual to effect or avoid a change of → nationality by unilateral declaration. Such a change of nationality may consist in the acquisition and/or the loss of nationality. Under that wide and formal definition, option of nationality is characterized neither by the regulatory problem it seeks to solve nor by the source of law it is based upon. The emphasis is rather on the automatic effect of the declaration of option: Administrative examination is limited to verifying the requirements of a right of option, there being no room for administrative discretion. As an instrument of acquisition, loss or maintenance of nationality, the right of option has to be distin-

guished, on the one hand, from general provisions describing conditions under which, by operation of law, nationality is acquired, lost or maintained, and, on the other hand, from administrative acts effecting a change of nationality, usually upon the request of the individual concerned. Earlier, the term option of nationality was used in the narrower sense of a treaty clause allowing individuals to retain their old nationality in the case of a cession of territory. A more comprehensive study of modern State practice reveals that such a right constitutes but one, though interesting, field of application of option of nationality. (See articles on → Territory, Acquisition and → Individuals in International Law.)

2. Fields of Application

When State A cedes part of its territory to State B, the treaty of cession usually accords to the inhabitants the right to opt for the nationality of State A within a specified period of time, lest they become (or remain) nationals of State B (e.g. Art. 19 of the Peace Treaty with Italy of February 10, 1947; → Peace Treaties of 1947). In contrast to the right of → self-determination as exercised by → plebiscite, the right of option does not relate to → territorial sovereignty, nor does it protect the ethnic and cultural identity of the inhabitants of the ceded territory as a minority group within the new State (→ Minorities). In the process of territorial changes, the right of option seeks to contribute to the formation of nation-States and to alleviate some of the individual hardship that may, and usually does, result from a cession of territory. The former State may recover those persons that have an especially strong feeling of loyalty to it, while the new State may not be too unhappy about losing them, since they are most likely to disagree with the territorial change. Thus, public interests of both the old and the new State are reconciled by granting a freedom of choice to the individuals concerned.

In addition to cession of territory, further instances of territorial change which may prompt the granting of a right of option of nationality are → secession and → dismemberment (e.g. Arts. 3 and 4 of the Dutch-Indonesian Round-Table Conference Agreement of December 27, 1949, UNTS, Vol. 69, p. 3; Federation of Rhodesia and Nyasaland (Dissolution) Order in Council 1963, No. 2085, and Sections 3 and 8 of the Malawi Citizenship Act 1964). Those types of territorial change relate to the entire population of each of the newly established States. The number of persons affected may therefore be very high in comparison with the remaining population of the old State. Granting a right of option could, as a result, entail migration processes unacceptable to both the receiving State and the State of origin (→ Migration Movements; → Population, Expulsion and Transfer). The need to grant such a right may, however, be less strong if the new State, as often occurred during the process of → decolonization, emerges from a non-sovereign State encompassing the same territory and inhabited by the same population.

A right of option may also be granted to avoid or terminate situations of double nationality whether or not resulting from territorial changes (e.g. Art. 1 of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of May 6, 1963, UNTS, Vol. 634, p. 221). For example, nowadays children of couples of different nationality will usually acquire the nationality of each of their parents, since the nationality of the child no longer exclusively follows the nationality of the father. Furthermore, a right of option may be offered to certain clearly defined categories of persons instead of naturalization (e.g. Agreement on Nationality between Denmark, Norway and Sweden of December 21, 1950, UNTS, Vol. 90, p. 3).

3. Legal Basis

Under a generally recognized conflict of laws rule, the nationality of a person is always determined in accordance with the municipal law of the State whose nationality is in question. Correspondingly, international law treats the law of nationality as falling within the sphere of → domestic jurisdiction of the respective State. Since option of nationality is an instrument of the law of nationality, its legal basis primarily lies in municipal law. International law may, of course, prescribe certain rules of nationality law or refer to such rules. It does so quite frequently in respect of rights of option of nationality, because in such cases the municipal laws governing the nationality of two or more States must be coordinated to reach solutions accepted by all the States concerned. Provisions on the option of

nationality have been included in treaties, especially in the course of territorial changes. The effect of such provisions on an individual's nationality will, however, depend on whether the respective international law provision is applicable within the municipal law of each of the States whose nationality is affected.

If a right of option is granted solely by municipal law, such law cannot bring about any change of a foreign nationality. Change could, however, follow from a corresponding provision in the nationality law of the foreign State which may, for instance, provide for a loss of its nationality as a result of the acquisition of the former State's nationality. If no such corresponding provision exists, the exercise of a right of option granted under municipal law may yield undesirable results, such as multiple nationality or even statelessness (→ Stateless Persons), which the conclusion of a treaty might avoid.

4. *Customary International Law*

Regular patterns of State practice in cases of cession of territory have led to a discussion about the eventual emergence of rules of → customary international law. It has been maintained, and to some extent still is, that ceding part of a territory automatically entails a change of nationality for the population affected. Some authors have gone further and assumed that in such instances the population affected by an automatic change of nationality is entitled to retain its former nationality by way of an option. Neither of those views however, stands up to closer scrutiny.

The assumption of an automatic change of nationality is at odds with the general proposition that municipal law attributes or withdraws nationality to or from the population concerned. The act of cession has to be understood as establishing the jurisdictional authority of the new State to regulate the nationality of the population concerned. Notwithstanding that conclusion, it may be possible to construe a treaty of cession which is silent on matters of nationality to the effect that the population concerned changes its nationality with the entry into force of the treaty. Such an assumption would, however, be exclusively a matter of treaty interpretation (→ Interpretation in International Law). Customary international law does not provide for an automatic change of nationality.

Similarly, a right of option of nationality does not automatically result from a treaty of cession or from any other territorial change. The exercise of a right of option requires some administrative cooperation, if only to the extent of receiving and registering incoming declarations. Both the municipal law character of the law of nationality and such administrative requirements make it impossible to regard the right of option of nationality as an existing or emerging rule of customary international law, regardless of the regularity with which the right has been granted.

At most it may be asked whether the States party to a cession of territory are under an obligation to grant a right of option to the population concerned. The present writer has, in a monograph of 1966, assumed that such an obligation is part of customary international law, although as a non-peremptory obligation between States it could be abrogated by the States concluding the treaty of cession. In fact, State practice has fairly regularly provided for a right of option in cases where territories were ceded. Also, in view of the → human rights aspect of option of nationality, such a practice may be deemed to have resulted at least in part from a desire to fulfil some legal obligation. The variety of legal forms in which that choice has been granted would, however, suggest that customary international law contains no more than a broad inter-State obligation to respect the affected persons' affinity to a particular State as freely expressed by each person individually. In any case, if the States concerned deliberately decide not to abide by this obligation, it is difficult to conceive how a violation of customary international law could be invoked.

5. *Collateral Provisions*

The group of persons entitled to opt must be defined; so must the formalities of the option, such as the designation of the agency to which the declaration has to be addressed and the period of time during which declarations of options may be filed. These details have to be determined according to the respective statute or treaty clause as applicable within municipal law. To some extent, it may be possible to fill regulatory gaps by reference to traditional State practice.

It has to be decided on a case-by-case basis whether a declaration of option has retroactive effect, which might make sense if a person reac-

quires his or her former nationality within a short period of time. Sometimes the exercise of a right of option is combined with an obligation to leave the State whose nationality has been renounced. In principle, this obligation is in conformity with international law. If, however, it is tied to further conditions, such as limitations on the amount of property to be taken abroad, the freedom of choice envisaged by granting a right of option may be undermined. Furthermore, specific human rights provisions regarding freedom of movement might be violated (→ Denationalization and Forced Exile).

6. *Trends of Development*

The principle of freely acquiring and/or severing bonds to a certain State reflects the strong emphasis which has been placed upon the position of the individual since the 16th century. The idea of granting a right of option resulted from the general development of nationality law which gained its present form in the 18th and 19th centuries. Thus, the right of → emigration, as granted, for example, by the Augsburg Treaty of Peace of Religion of 1555 (J.J. Schmauss, Corpus Iuris Publici, p. 153 (1794, Repr. 1973)), was gradually replaced by specific clauses on the option of nationality from the beginning of the 19th century. The Peace Treaty of Zurich of November 10, 1859 (CTS, Vol. 121, p. 145) served as a model for option clauses in connection with cessions of territory during the late 19th and early 20th centuries. The practical importance of that type of option reached its zenith in the → peace treaties after World War I, in which cessions of territory were usually accompanied by a right of option. A notable exception was the retransfer of Alsace-Lorraine to France. There the theory that that territory had never ceased to form part of France was supplemented by the retroactively operated assumption that the inhabitants "virtually" continued to possess French nationality between 1871 and 1918.

After World War II also, cessions of territory were usually accompanied by the granting of a right of option, though that right was not always extended to all the inhabitants of the ceded territory. It must be noted that many factual changes of territory, brought about during the last decades, have not or not yet been legalized by peace treaties providing for a formal cession. Besides, some of the → annexations which had taken place just before or during World War II were simply annulled. Consequently, the status of nationality was re-established following the model of Alsace-Lorraine.

Since World War II vast territorial changes have occurred in the course of the dissolution of the colonial empires. Those secessions were usually regulated not by treaties but solely by legislation in the metropolitan States which, to some extent, granted a right of option to the population concerned under municipal law. However, the exercise of the right of option usually depended on taking up residence in the State whose nationality was to be acquired. As a result, → immigration requirements often reduced the practical impact of generous rules of municipal law granting a right of option; the main problem became the restrictions on transferring residence from the new State to the old State. Similarly, the inhabitants of territories which after World War II had passed only *de facto* from one State to another were subjected to severe restrictions on their right to leave the new State for the old State which may have continued to regard them as its nationals. From the point of view of human rights, therefore, the more basic right of freedom of movement appears to supersede the subtle technicalities of the right of option of nationality.

F. STOERK, Option und Plebiscit bei Eroberungen und Gebietscessionen (1879).

C.G. BRUNS, Staatsangehörigkeitswechsel und Option im Friedensvertrag von Versailles (1921).

J.L. KUNZ, Die völkerrechtliche Option, 2 vols. (1925–1927).

J.L. KUNZ, L'option de nationalité, RdC, Vol. 31 (1930 I) 107–176.

E. SZLECHTER, Les options légales de nationalité en droit français (1942).

J.L. KUNZ, Nationality and Option Clauses in the Italian Peace Treaty of 1947, AJIL, Vol. 41 (1947) 622–631.

E. SZLECHTER, Les options conventionnelles de nationalité à la suite de cessions de territoires (1948).

H. JELLINEK, Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge, zugleich ein Beitrag zur Lehre von der Staatensukzession (1951).

A.N. MAKAROV, Le droit d'option en cas de double nationalité dans les conventions internationales, Ned-TIR, Vol. 6 (1959) 194–202.

R. BERNHARDT, Option, in: Strupp-Schlochauer, Wörterbuch des Völkerrechts, Vol. 2 (2nd ed. 1961) 661–665.

G. GINSBURGS, Option of Nationality in Soviet Treaty Practice 1917–1924, AJIL, Vol. 55 (1961) 919–946.
I. SIPKOV, Settlement of Dual Nationality in European Communist Countries, AJIL, Vol. 56 (1962) 1010–1019.
K.M. MEESSEN, Die Option der Staatsangehörigkeit (1966).
G. BREUNIG, Staatsangehörigkeit und Entkolonisierung (1974).
P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979).
Y. ONUMA, Nationality and Territorial Change: In Search of the State of the Law, Yale Journal of World Public Order, Vol. 8 (1981) 1–35.
F. MÜNCH, Staatsangehörigkeit und Gebietswechsel, in: Recht und Staat im sozialen Wandel, Festschrift für Hans Ulrich Scupin (1983) 441–452.

KARL M. MEESSEN

PASSPORTS

1. Notion and Types

Passports or their substitutes are documents issued by national or international authorities to individuals or groups of persons in order to facilitate their movement across State → boundaries. There is general agreement on the document's essential physical characteristics since the → League of Nations and the → United Nations recommended the international type of passport. The document takes the shape of a booklet with a serial number and the word "passport" printed on it. It identifies the holder by photograph, signature, physical description, and other relevant information. It also indicates the period of validity. Passports are recognized, as a matter of international → comity, for establishing their bearer's identity before foreign and domestic authorities. They indicate the issuing State or organization whose → diplomatic protection the bearer may invoke.

Besides individual passports there are collective passports, e.g. for families, and official passports (service passports, diplomatic passports and "ministerial passports" for ranking officials of government departments). Diplomatic → couriers carry a special couriers' certificate besides their diplomatic passport. Individual passports are issued either to nationals of the issuing State (national passport) or, as "aliens' passports", to → stateless persons or individuals whose nationality is unclear, or to → aliens who are unable to obtain a passport from their national authorities. The emerging European Passport Union will, after 1985, introduce a common format for passports issued under the national prerogative of its member States.

Passports must be distinguished from a number of similar documents such as collective lists for tourist groups, childrens' identification documents, border permits for residents in the immediate vicinity of boundaries (→ Boundary Régimes; → Boundary Traffic), seafarers' identity documents, and certificates for navigators on inland → boundary waters. For aviators, crew member certificates are virtually universally recognized. Other documents in lieu of passports are "temporary travel documents" for the return to the holder's State of origin, no-objection certificates, visitors' passes, passports issued by the Sovereign Order of Malta (→ Malta, Order of), the *laissez-passer* issued by international organizations to their officials and travel documents for → refugees or for refugee and stateless seafarers. Consular certificates of registration, issued by consulates domiciled in the host country, and corpse transport permits are not equivalent to passports.

2. Historical Development of Legal Rules

The notion of passports developed after the late Middle Ages. Presentation of passports became a general prerequisite for international boundary traffic before 1800, and subsequently emerged as a major obstacle to growing international mobility of persons. Thus efforts started after 1850 to limit the compulsory nature of passport-holding led to numerous bilateral and multilateral agreements, the most important of which were concluded after World War II. The League of Nations sponsored conferences from 1920 to 1929 for the purpose of recommending an international type of passport and for the simplification of procedures on the issuance and control of passports and their equivalents. The United Nations took up the subject in 1947 and 1963, but was less successful than regional or sectoral arrangements.

The first European efforts directed towards easing passport rules after 1945 were motivated by exigencies relating to the free movement of labour. Between 1944 and 1960, Belgium, the Netherlands and Luxembourg developed joint

standards of immigration and passport control and a common external frontier (→ Benelux Economic Union). The Scandinavian States achieved a waiver of passport controls at intra-Nordic boundaries by 1957 (→ Nordic Cooperation). In the → Council of Europe, progress towards the liberalization of passport requirements after 1956 culminated in the → European Social Charter of 1961, which recognized the right of nationals to leave their country. Parallel efforts by the → European Economic Community (EEC) led in 1968 to recognition of the individual right to be issued travel documents. In the Americas, the Inter-American Tourist Card was promoted in the → Organization of American States after 1949, and has been accepted by most OAS member States since 1965.

International movement of persons by air and sea was furthered by the adoption of relevant standards and recommended practices by the → International Civil Aviation Organization (1969) and the Inter-Governmental Maritime Consultative Organization (Convention of 1965; → International Maritime Organization). The recognition of ICAO crew member certificates became nearly universal after the early 1950s. The issue of travel documents for refugees first arose after World War I. The activities of the Intergovernmental Committee on Refugees (→ Refugees, League of Nations Offices) led to the introduction in 1946 of the London Travel Document for endangered persons. The International Committee of the Red Cross issued certificates for other categories of refugees (→ Red Cross). Conventions of 1951, 1954, 1957 and 1958 regulated the granting of travel documents to refugees, seafarers and refugee seafarers (see *infra*).

3. Current Legal Situation

National passports are issued by internal public authorities, according to rules of domestic law, commonly in the exercise of the sovereign prerogative to conduct foreign affairs (→ Sovereignty). Passports do not in themselves embody individual rights, e.g. to leave the issuing country or to enter a foreign State. The scope of their functions depends upon recognition by other → subjects of international law, but → minimum standards have been established by comity, and by bilateral and multilateral agreements.

The central function of a passport is to identify its holder. It also provides documentary evidence for the consent of the issuing State that the holder may invoke its diplomatic protection. It establishes a refutable presumption of the bearer's → nationality. A general request, still printed in many passports, to protect and assist their holders, has become a subsidiary function, except for diplomatic agents and other persons travelling on official passports (→ Diplomatic Agents and Missions).

The issuing State is duty-bound to readmit its passport holders into its own territory, and would be estopped from disavowing them (→ Estoppel). Deportation of aliens (→ Aliens, Expulsion and Deportation) to their country of origin has occasionally been delayed when the deportee's nationality was difficult to establish, or due to absence or slowness of communication between the States concerned.

Passports do not automatically lose their international recognition after expiry. The → immigration authorities of the issuing State may honour them for the purpose of permitting the individual to return home. Some European and African States treat foreign passports which have expired within the previous five years as valid. Passports become invalid through permanent loss, destruction, mutilation or alteration.

Recognition of foreign passports on the basis of → reciprocity is normally granted by international comity. Travel documents for refugees or other special categories of persons must be recognized by States parties to the relevant → treaties or conventions. Selectively recognized are, for example, passports issued by the Order of Malta or by some → governments-in-exile.

Dual nationals holding two passports may not invoke diplomatic protection of their national States against each other, except where overriding rules of humanitarian law are involved. Special problems of recognition by the Soviet Union of passports of the Federal Republic of Germany issued to permanent residents of West Berlin were resolved with the conclusion of the Quadripartite Agreement on → Berlin in 1971.

International boundaries may normally be crossed only upon presentation of a passport or equivalent (→ Border Controls). In addition, States often require separate permission to enter or leave their territory in the shape of a written or

stamped entry (visa) in the traveller's passport, which is given in advance and individually. Exit visa requirements for nationals of the issuing country have been on the decline since World War II. In most cases the issuance of a passport implies the right to travel abroad. Entry visas for short-term tourist purposes are still required by many States, but numerous multilateral and bilateral agreements concluded since 1945 have abolished them between nationals of virtually all western European States. Entry visas are often waived, usually on a reciprocal basis. As the issuance of a visa establishes a legal relationship between the applicant and the granting State under the latter's municipal law, international law is not violated if permission to enter is withdrawn after the issuance of a valid entry visa.

Diplomatic or official passports (→ Diplomatic Agents and Missions, Privileges and Immunities) entitle their holders to immunities or privileges only if these persons have been duly announced to the receiving government. Under Art. 36 of the → Vienna Convention on Diplomatic Relations (1961), holders of diplomatic passports are accorded preferential treatment by immigration and customs authorities in the receiving State. Although not strictly entitled to the same privileges, holders of other official passports are granted some privileges by most States. With the emergence of a large number of international organizations, a body of officials has been formed whose tasks require a commensurate degree of mobility under the protection of their organization (→ International Organizations, Privileges and Immunities). A special *laissez-passer* was created by the United Nations. It is used by regular officials of the United Nations and the → United Nations Specialized Agencies in the exercise of their functions. As the nationality of their holders is not mentioned, entry visas are normally required. Regional organizations have followed this pattern for their functionaries (e.g. the EEC, OAS, Council of Europe and → Organization of African Unity, but not the → Western European Union or → North Atlantic Treaty Organization).

In order not to violate the sovereignty of States over their citizens, national travel documents have been issued to aliens only in order to facilitate mobility across boundaries and to further → emigration from the country of provisional residence. National "aliens' passports" have also been issued to foreigners unable to obtain or prolong national passports. In order to provide uniform travel documents to refugees and at the same time to ensure their widest recognition, the Convention relating to the Status of Refugees of July 28, 1951 contained in its annex a specimen of a travel document for refugees. A similar travel document for stateless persons was recommended in the Convention relating to the Status of Stateless Persons of July 28, 1954. Stateless and refugee sea-farers' identity documents have gained recognition as a result of the 108th Convention of the → International Labour Organisation of 1958 and the Hague Agreement relating to Refugee Seamen of November 23, 1957. Such documents are issued by national authorities, contain a return clause and provide for the possibility of renewal.

4. Special Legal Problems

In the absence of a universally binding convention on the law of passports and variegated State practice in this field, it is unclear whether only public officials of a State may deliver valid passports. The recognition of such documents issued by non-State entities (the Order of Malta, → resistance movements, authorities of → protectorates or → condominium) seems to point to a negative answer. Freedom of travel is sometimes hampered by the slow operation of central passport offices maintained by many States, or by prohibitive fees being charged for the issuance or renewal of a passport. The frequent use of passports as an instrument of foreign policy to restrict travel to and from boycotted territories is regrettable (→ Boycott). Territorial restrictions do not bind foreign States; they should be used only for the protection of the traveller. State practice has also permitted a host country to issue aliens' passports in cases where a country seeks to force its citizen to return by refusing to prolong his passport. The refusal of a State to take back a deported national without a passport may be challenged by establishing his nationality through other means (Agreement between Sweden and West Germany of May 31, 1954) or at least by raising a presumption of his nationality (Agreement between Austria and

West Germany of 1969). The practice of depriving nationals of their citizenship and of cancelling their passports would not pass the test of estoppel if put on trial (→ Denationalization and Forced Exile).

Temporary confiscation of foreign passports to secure the appearance of an alien in court has been held by German courts (see, for example, the judgment of the Oberlandesgericht Saarbrücken of September 12, 1977) not to infringe upon the issuing State's right to the passport because of the temporary nature of the measure, as the holder is at liberty to deposit his passport with third persons. Permanent withdrawal of a foreign passport may be lawful only if its holder has indicated his submission to domestic legislation by applying for local travelling documents or citizenship.

Dual nationals are deported to the country that issued their passport. In case of doubt, the choice should be left to the deportee. A passport application in one country by a dual national might constitute tacit renunciation of his other nationality where explicitly provided for in municipal law.

A recent problem is the arrest of a holder of a UN *laissez-passer* passing through his country of origin. The invocation of functional protection by the organization will be legally irrefutable only if the sojourn was taking place in the functionary's official capacity rather than during a home leave.

Conflicts still arise between restrictive passport practices and the freedom of movement incorporated in Art. 13(2) of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)), Art. 12 of the International Covenant on Civil and Political Rights (→ Human Rights Covenants) and Art. 2 of the Fourth Protocol to the → European Convention on Human Rights.

5. Evaluation

Passports have proved their value as the most widely used international travel and identification document, although one of their original functions has been largely taken over by visas. The convenience of passports makes most States unwilling to abolish them altogether, though bilateral, regional and sectoral arrangements for simplified border control and identification procedures have replaced passports to some extent. One of the realistic goals for the future should be to renew efforts aimed at increased harmonization of national passport laws.

The issuance of passports will generally remain a national prerogative. The development of the international law on free movement of persons should prompt States increasingly to refrain from using passport regulations as a means of applying sanctions motivated by foreign policy decisions rather than by considerations of public order (→ Ordre public (Public Order)). It is to be hoped, above all, that massive flows of "economic refugees" and applicants for political asylum do not indicate a general return to restrictive visa practices (→ Asylum, Territorial).

D.C. TURACK, The Passport in International Law (1972).
D.C. TURACK, Freedom of Movement and the Travel Document, California Western International Law Journal, Vol. 4 (1973–1974) 8–42.
M. BOGDAN, Admission of Foreign Tourists and the Law of Nations, ZaöRV, Vol. 37 (1977) 87–106.
P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979).
P. LANSING, Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Government Prerogative?, Denver Journal of International Law and Policy, Vol. 11 (1982) 15–35.

FRIEDRICH L. LOEHR

PATENT LAW *see* Industrial Property, International Protection

PERMANENT NEUTRALITY AND ECONOMIC INTEGRATION

1. Introduction

The question as to what extent a permanently neutral State can participate in international economic integration without running into legal or political problems is difficult to answer for a number of reasons. The main reason is that the few precise legal rules of neutrality applicable only in times of → war must be reconciled with a complicated system of international cooperation created for an indefinite period and directed towards an integration of various economic sectors. A further important complication arises from the

different historical situations from which the law of neutrality and international economic integration have emerged. In view of the heterogeneous origin and nature of the rules concerned, an evaluation very rarely leads to clear legal statements. More often, the results are political rather than legal in substance. Much therefore depends on the practice of States that are committed to permanent neutrality under international law. This applies particularly to Switzerland and → Austria. Malta and Costa Rica, whose permanent neutrality was established in 1980 and 1983 respectively, have not yet demonstrated a clear policy of neutrality towards economic integration.

2. *The Law of Neutrality and Economic Relations*

The legal rules of neutrality, as contained in the Fifth and the Thirteenth Hague Conventions (1907) (→ Hague Peace Conferences of 1899 and 1907) and partly developed by → customary international law, must be observed by States not taking part in a particular war (→ Neutrality, Concept and General Rules). Without distinction, they apply both to temporarily and permanently neutral States. In times of peace, however, the legal effects of these obligations are restricted to States committed to permanent neutrality under international law (→ Permanent Neutrality of States).

(*a*) *Legal obligations in war time*

According to strict rules of neutral conduct a neutral State is forbidden: to supply belligerents in any manner, whether directly or indirectly, with → war materials of whatever kind; to grant belligerents loans or financial aid directly for purposes of warfare; or to allow belligerents either the transport of war material across its territory, or the installation and use of telephone and telegraph devices upon its territory for purely military purposes.

A neutral State is not forbidden to supply belligerents with goods other than those serving military purposes. In doing so, however, it must observe strict impartiality.

A neutral State is not bound to prevent its nationals from exporting or transporting goods (including war material) on behalf of belligerents, or permitting belligerents the use of telephone or telegraph devices. (The latter also applies to State-owned devices.) If, however, a neutral State intervenes by conducting economic and financial relations with belligerents, it must observe strict impartiality to both sides.

(*b*) *Indirect legal obligations in peace time*

In times of peace, a State committed to permanent neutrality under international law must observe indirect, or secondary, obligations of a legal character. These duties emerge from those applying in times of war. Accordingly, a permanently neutral State has to shape its foreign relations with a view to preventing possible violations of its neutrality and protecting itself against an involvement in future wars. Thus, the conduct of foreign relations must enable the permanently neutral State to perform its duties in times of war, wherever the war may take place and whatever State may become involved in it. In general, this imposes certain restrictions upon the State's freedom of action, although these limitations may differ considerably in detail according to the given States and circumstances.

The determination of foreign policy is left to the discretion of the State concerned. This applies also in cases where the conduct of foreign relations is influenced by indirect obligations of permanent neutrality.

3. *Policy of Neutrality*

There are situations in times of war and peace in which a permanently neutral State may find it advisable to go beyond legal requirements to render its neutrality unquestionable and trustworthy. In this sphere, it is particularly difficult to distinguish clearly between the law and policy of neutrality, even with regard to the conduct of economic relations. For that reason too, it is important to emphasize that outside attempts to intervene in the determination of the policy of neutrality are illegal. Permanently neutral States, therefore, tend to react sensitively to any such attempts.

4. *State Practice and Policy in External Economic Affairs*

Permanent neutrality implies restrictions upon the neutral State's freedom of action in particular with respect to treaties. Thus, even in external economic affairs, a permanently neutral State must

consider whether a treaty obligation is compatible with the legal duties of neutrality or whether it is politically wise to accept such an obligation. These incompatibility difficulties may follow from bilateral and multilateral conventions relating to particular sectors of the economy, e.g. transboundary traffic and transport (→ Traffic and Transport, International Regulation).

More often, however, the question of incompatibility arises when a permanently neutral State has to decide whether to participate in international economic integration, e.g. in a → free trade area, in → customs union or an economic community (→ Economic Organizations and Groups, International). In those cases, the main points of consideration are:

(i) Compatibility of legal obligations. Is there any obligation resulting from participation in international economic integration, the implementation of which would directly infringe upon duties of a permanently neutral State, either in times of war or in times of peace?

(ii) Clarity of goals and obligations. Are the goals and obligations of a particular framework of economic integration clear enough to allow an evaluation of their compatibility with the status of permanent neutrality?

(iii) Goods supply and economic independence. How useful (or necessary) is a participation in international economic integration for the supply of goods serving the basic needs of the permanently neutral State's population, particularly in times of war? On the other hand, could participation lead to a degree of interdependence which involves the danger of economic pressure or even coercion on the permanently neutral State?

(iv) International decision-making and its (legal) implications. What is the legal character of an international decision and what is the procedure to be followed by an international organ in taking a particular decision? Are member countries legally bound to abide by an international decision, even if they did not vote in favour of it?

(v) Special status of participation. Is a permanently neutral State entitled to evade those duties (flowing either directly from participation or indirectly from decisions taken on international level) which would be incompatible with its particular international status by referring to a special legal rule (neutrality, security or emergency clause) or by terminating participation?

Having thoroughly examined and balanced those questions against each other, Austria and Switzerland considered most types of international economic integration as both legally and politically compatible with permanent neutrality. Therefore, they joined as full members the → General Agreement on Tariffs and Trade (1947), the United Nations Economic Commission for Europe (→ Regional Commissions of the United Nations), the → Organisation for Economic Co-operation and Development, the → European Conference of Ministers of Transport, the → International Energy Agency, the → European Free Trade Association and the Inter-American Development Bank. In addition, Austria adhered to the → International Monetary Fund as well as to the institutions of the World Bank Group (→ International Bank for Reconstruction and Development; → International Finance Corporation; → International Development Association). With regard to these latter organizations, the reticence of Switzerland is not based upon considerations of neutrality (see Bundesblatt der Schweizerischen Eidgenossenschaft, 1969, Vol. 1, No. 28, p. 1532).

Serious doubts have remained as to the compatibility of membership in the → European Economic Community with permanent neutrality. There are, however, only few obligations arising from Community membership which might interfere with the duties of a permanently neutral State under particular circumstances, i.e. the transport policy, the commercial policy and the → European Investment Bank. Considerations of neutrality policy could also be involved in such fields as the common agricultural policy and the free movement of persons, services and capital. These qualifications which are partly legal and partly political, have prompted Austria and Switzerland to confine themselves to bilateral Free Trade Agreements with the EEC (and the → European Coal and Steel Community) concluded in 1972 (Amtsblatt Europäische Gemeinschaften, Vol. 15 IV(2) (1972) Nrs. L 300/1 and L 300/188).

Developments within the EEC have led to gradual changes in the political evaluation of the EEC by Austria and Switzerland. Thus, the idea of EEC membership now seems to be viewed less unfavourably than during the period of the free trade negotiations. However, membership in the Community could only be contemplated if the EEC

were prepared to accept neutrality reservations by the neutral States of a nature and extent necessary for the performance of their legal obligations and their national security in general (→ Treaties, Reservations).

Conception officielle suisse de la neutralité, Annuaire Suisse de Droit International, Vol. 14 (1957) 195–199.

U. PLESSOW, Neutralität und Assoziation mit der EWG, dargestellt am Beispiel der Schweiz, Schwedens und Österreichs (1967).

H.M. MAYRZEDT and H.C. BINSWANGER, Die Neutralen in der europäischen Integration (1970).

H. PFUSTERSCHMID-HARDTENSTEIN, Die Regelung der Beziehungen der Neutralen zum Gemeinsamen Markt als Teil eines europäischen Gesamtkonzepts, Österreichische Zeitschrift für Außenpolitik, Vol. 11 (1971) 195–216.

D. TARSCHYS, Neutrality and the Common Market: The Soviet View, Cooperation and Conflict, Vol. 6 (1971) 65–75.

H.M. MAYRZEDT and H.C. BINSWANGER, Europapolitik der Rest-EFTA-Staaten (1972).

T. OEHLINGER, H. MAYRZEDT and G. KUCERA, Institutionelle Aspekte der österreichischen Integrationspolitik (1976).

M. SCHWEITZER, Dauernde Neutralität und europäische Integration (1977) 176–266.

F. WEISS, Austria's Permanent Neutrality in European Integration, Legal Issues of European Integration (1977) 87–127.

K. ZEMANEK, Neutralität und Außenhandel, in: Um Recht und Freiheit, Festschrift für Friedrich August Freiherr von der Heydte zur Vollendung des 70. Geburtstags (1977) 759–774.

M. ROTTER, Die dauernde Neutralität (1981) 193–238.

D. SCHINDLER, Neue Fälle dauernder Neutralität: Malta und Costa Rica, Mélanges à Georges Perrin (1984) 277–291.

HERBERT MIEHSLER

PLEBISCITE

1. *Definition, Scope*

Plebiscite is the organized expression of the will of the population of a particular territory, in favour of or against territorial change. It may be based upon the concept that such consent is a prerequisite for the valid transfer by cession of → territorial sovereignty over a populated area from one State to another (→ Territory, Acquisition); under current international law, a corresponding rule of customary law does, however, not exist. The term plebiscite originates in Roman law: A law enacted by the *plebs* (from Latin: citizens with the exception of patricians and senators) or commoners at the request or proposition of a plebeian magistrate (tribune). Its theoretical basis in modern times goes back to the *contrat social*, to ideas of democracy, → sovereignty of nations and nationalities, and lately to the principle of → self-determination of nations.

According to G. Scelle (Précis du droit des gens, Vol. 2 (1934) p. 277) plebiscites as consultation of the people concerned could be: (a) "ratifications", i.e. confirmations of territorial changes which have already taken place; (b) "determinations" of future territorial changes, already negotiated; and (c) "initiatives" to desirable territorial changes. Territorial changes could range from → secession from an existing territorial unit, → decolonization or any other abolition of dependent status to simple cession of territory from one State to another.

As consultation of the free will of the people concerned, plebiscites could be organized as direct consultation of all the people or as indirect consultation in the form of popular representation. The people concerned could consist of the entire population of a State, of the territory in question, of the autochthonous or eponymous population, or only of a particular group (ethnic, national, religious or racial). The legal basis of a plebiscite could be a bi- or multilateral treaty (most of the recorded cases), a request or a resolution by an international organization or a provision of municipal law (e.g. Art. 53(3) of the French Constitution of 1958).

Plebiscites could be organized or supervised by international organizations, by or under the control of neutral or unaffected States, or by the States concerned. One can thus differentiate between international and national plebiscites.

2. *Historical Evolution*

(a) *Before World War I*

Territorial changes, including the automatic transfer of the → nationality of the new sovereign upon the population of the territory concerned, have been regarded since the 17th century as a hardship to the affected people; thus, together with the right of → option of nationality, the mechanism of the plebiscite emerged. The American Bill of Rights, the War of Independence and

the French Revolution put into practice some of the ideas of the Enlightenment, such as the sovereignty of peoples and their right to self-determination. During the second half of the 19th century there were a number of cases in which territorial changes were made dependent on the consent of the population concerned; for example, plebiscites on Tuscany, Modena, Parma, Papal Romagna (Decree of King Victor Emmanuel II of March 18/22, 1860), the Neapolitan Provinces and Sicily (Decree of King Victor Emmanuel II of December 17, 1860), all incorporated into Sardinia in 1860; Savoy and Nice (Franco-Sardinian Treaty of March 24, 1860), incorporated into France in 1860; the Ionian Islands (Anglo-Greek Treaty of November 14, 1863), merged with Greece in 1867; and the island of Barthélemy (Swedish-French Treaty of October 18, 1877), ceded to France in 1877. Plebiscites were provided for by treaties but did not take place in northern districts of Schleswig (Treaty between Prussia and Austria 1866) and Tacna and Arica (Treaty between Peru and Chile 1883); in the latter case a solution was finally reached by agreement in 1929 (→ Boundary Disputes in Latin America).

(*b*) *1919–1945*

In the aftermath of World War I and pursuant to the → Versailles Peace Treaty and the → Saint-Germain Peace Treaty both of 1919, several plebiscites were provided for and held. There were also consultations of populations which were either not recognized by an affected State (Austria did not recognize the plebiscite in a small part of Burgenland, which by virtue of the → Trianon Peace Treaty was to be incorporated into Austria, but as a result of voting based on the Austro-Hungarian Protocol of Venice of November 13, 1921 was joined to Hungary) or were a simple manifestation of disapproval (the watered-down plebiscite on the German Kreise Eupen and Malmédy, incorporated into Belgium pursuant to Art. 34 of the Versailles Treaty). Some plebiscites were attempted but never realized, such as in Teschen, Spisz and Orava in 1920 (Decision of the Inter-Allied Commission of Control of March 23, 1920) and in Vilna (Decision of the → League of Nations Council of October 28, 1920, to be carried out under the control of the League's Plebiscite Commission).

The Versailles Treaty provided for plebiscites in Arts. 49, 88 to 97 and 109 to 111 and in various Annexes. The first plebiscite under the Versailles Treaty was held in Schleswig. It was conducted in two zones, roughly corresponding to the national composition of the inhabitants, Danes and Germans. The northern zone voted in February in favour of Denmark, the southern in favour of Germany in March 1920. The voting with regard to two zones in East Prussia went in favour of Germany (July 11, 1920). In Upper Silesia the vote of March 20, 1921 was organized by communes and a majority both of the communes and of the voters opted for Germany (54 per cent of the communes and 59.6 per cent of the voters). However, after a bloody Polish revolt under W. Korfanty, the Paris → Conference of Ambassadors decided to partition the territory between Germany and Poland. The plebiscite on the → Saar Territory of February 13, 1935, organized and controlled by the League of Nations, led to its incorporation into Germany.

Arts. 49 to 51 of the Treaty of Saint-Germain called for a plebiscite on the Klagenfurt area. The voting on the southern area was held on October 10, 1920 and brought a clear majority in favour of Austria, so that the consequent voting in the northern area became redundant. The plebiscite at Oedenburg (Sopron) resulted in a small majority for Hungary, and the entire territory was assigned to Hungary without partition.

The Peace Treaty of Sèvres contained a provision on plebiscite (Art. 64 on Kurdistan) but this provision was not carried over by the subsequent → Lausanne Peace Treaty of 1923. The Treaty of Sèvres between Greece and Italy of 1920 contained in Art. 2 a conditional provision on a plebiscite with regard to Rhodes.

The Treaty between Great Britain and the Irish Free State of December 6, 1921 provided in Art. 12 that if the Parliament of Northern Ireland should not vote in favour of inclusion into the Irish Free State, the boundary between the two areas should be determined by a Committee in accordance "with the wishes of the inhabitants . . . ." Again, → consultation of the inhabitants never took place.

There were two further demands for plebiscites put forward by the governments of Sweden and Turkey. The first concerned the → Aaland Islands, the second the boundary between Turkey

and Iraq and involving the oil-fields of Mossul. In the first case a commission of jurists appointed by the League of Nations denied the → domestic jurisdiction claimed by Finland, but a subsequent commission of inquiry pronounced itself in favour on Finnish sovereignty. The latter case was decided on a treaty basis.

Two abortive attempts of "spontaneous plebiscites" were held in the Austrian provinces of Tyrol (April 24, 1921; 145302 votes in favour of union with Germany, 1805 against) and Salzburg (May 29, 1921; 103000 votes in favour, 800 against). The union was prevented by British and French opposition based on Arts. 80 of the Versailles Peace Treaty and 88 of the Treaty of Saint-Germain.

Bills adopted by the Philippine legislature in 1925 and 1926 to hold a plebiscite on the wishes of the population for independence were vetoed by United States President Coolidge.

After the incorporation of → Austria into Germany in 1938 a consultation of both the population of former Austria and of Germany seeking their *ex post* approval of the "reintegration" of Austria took place (99.7 per cent affirmative votes in Austria and 99.02 per cent in Germany). Other territorial changes before 1945, such as the → annexation of the → Baltic States by the Soviet Union, were not accompanied by even those pseudo-approvals of the population concerned. The mock elections there could not be regarded as approbation of the Soviet occupation, because the voters were called upon to vote for candidates for the new parliament and not to express their opinion with regard to a future merger with the Soviet Union.

(*c*) *1945–1982*

The → Atlantic Charter (1941) had already provided that no territorial change should take place without the consent of the population concerned and that all peoples should have the right to determine their governmental structure. In the United Nations Conference on International Organizations (UNCIO) emphasis was made on consultation of the people. In 1952 → United Nations General Assembly Resolution 637(VII) referred to ". . . the wishes of the peoples being ascertained through plebiscite or other recognized democratic means". The first plebiscite envisaged by a resolution of the United Nations Commission for India and Pakistan (January 5, 1949) on Jammu and Kashmir was never implemented. Plebiscites were also proposed for the former Italian colonies (→ Colonies and Colonial Régime) of → Eritrea and Somaliland in 1949.

The first plebiscite under the supervision of the UN Plebiscite Commissioner took place on May 9, 1956 with regard to British Togoland (GA Res. 944(X)) and brought a majority in favour of a merger with the Gold Coast (now Ghana). It was followed by two plebiscites on British Cameroons on November 7, 1959 and February 11/12, 1961 (Res. 1350(XII) and 1473(XIV)) in which the northern part voted for union with Nigeria and the southern for integration into the United Republic of Cameroon. The fourth plebiscite was held in Western Samoa on May 9, 1961 (Res. 1569(XV)) in which an overwhelming majority voted in favour of independence and the adoption of a new constitution. On September 18 and 25, 1961 a referendum in Rwanda-Burundi (Res. 1579(XV) and 1605(XV)) produced a majority in favour of independence and the maintenance of a monarchy, and on September 11, 1968 a 63.1 per cent majority in Spanish Guinea voted for a constitution granting independence. The plebiscite held in West Irian in June 1969 (by virtue of the 1962 Indonesian-Dutch Agreement) was observed solely by a UN representative. Here the "one man one vote" rule was applied only in the capital Dili, whereas in the rest of the country representation on consensus and consent (collective consultation/*musjawarah*) was exercised, by which tribal chiefs and kings as well as religious groups and others formed the voting body; as a result of the vote, West Irian remained a part of Indonesia. On June 17, 1975 a plebiscite in the Mariana Islands District of the United States Trust Territory of the Pacific Islands (→ United Nations Trusteeship System; → Strategic Areas) was conducted by the United Nations and produced a 78.8 per cent majority in favour of becoming a commonwealth of the United States (→ Pacific Islands). In 1967 the United Nations refused to endorse the results of the 1967 plebiscite conducted by France in French Somaliland (GA Res. 2356(XXII)) in which 60 per cent of the votes were in favour of maintaining colonial rule and a UN sponsored plebiscite there on May 8, 1977 produced a 98.7 per cent majority in favour of independence. On July 12, 1978 a plebiscite took

place under UN observation in the Caroline and Marshall Islands, after which separate constitutions were accepted by the population.

In various other territories plebiscites were demanded within the framework of the United Nations: e.g. Spain was unsuccessfully invited to hold a referendum on the Spanish Sahara (GA Res. 2229(XXI) to 2711(XXV)), and a resolution of the → Organization of African Unity calling for a referendum in Western Sahara was rejected by the Polisario upon the grounds that the population had already achieved self-determination through that body.

3. *Legal Problems*

(*a*) *Territorial application, delimitation of zones*

While in most plebiscites the population of a distinct area is asked to decide between two or more alternatives for its territory, in some cases the territory in question has been divided into two or more zones, in accordance with the national origin of the predominant local population. This leads consequently to a partition between two States. In other plebiscites such territorial division is not provided for but is rather the subsequent decision, made pursuant to the result of the plebiscite, by an international organ (League of Nations in Upper Silesia) or by the administering power (France with regard to the Island of Mayotte). In the case of the plebiscite in British Cameroons, votes were counted in two sections and showed different results: taken as a whole, the territory favoured a union with the Republic of Cameroon by a clear majority. In the 1968 plebiscite Spanish Guinea was taken as a unit, but in Fernando Poo a clear majority voted for separation from the mainland Rio Muni. The United Nations here tended to apply the principle of → territorial integrity whereas in Micronesia, the Gilbert and Ellice Islands (a single colony) separated with the approval of the United Nations and Ellice Islands later became independent as Tuvalu. In the case of → Cyprus, Turkey has argued that this island is a continuation of the Anatolian Peninsula and the votes of the Turks of the mainland should therefore also be taken into account in a plebiscite.

(*b*) *Personal application, composition of the voters*

As a rule, the entire population of a territory is admitted to a plebiscite on a "one man one vote" basis; only on rare occasions have voters from only one nationality (Greek in Cyprus 1950), or a select representative body (West Irian 1969) been called to the polls. In such cases the results may lead to a distortion of the will of the entire population concerned. The territorial delimitation of an area for a plebiscite, taken together with the admission to the polls, may substantially influence the outcome of such a referendum, e.g. in cases where a disputed area with a compact indigenous population is artificially enlarged by adding to it, for plebiscite purposes, parts of other territory containing a majority of nationals of the State concerned.

If a plebiscite envisages territorial separation, the continued integrity of already existing territorial units may be as much a value to be protected as is the will of the indigenous population, but in the United Nations the principle of self-determination has been watered down to a strict demand of immediate decolonization – taken as equivalent to abolition of white or overseas colonial rule. Any vote in favour of continued dependent status has simply been disregarded. Nor has the viability of future independent territorial units always been given due consideration (e.g. Tuvalu with 6000 inhabitants and 36 km^2).

The acceptance by the vast majority in the United Nations of the "collective consultation" in West Irian, adopting the territorial integrity claim of Indonesia, again shows a clear departure from generally accepted democratic patterns. The dictum of the UN representative that ". . . an act of free choice has taken place in West Irian" should also in the future not be left undisputed.

(*c*) *The binding nature of results and control of plebiscites*

If plebiscites are held as a result of an international agreement, their outcome is binding upon the parties by virtue of treaty obligations (→ Pacta sunt servanda). If they are organized solely by one State under its municipal law, but announced internationally, they may become binding owing to the principle of → estoppel (→ Unilateral Acts in International Law) if it is clear that international effects were intended and the plebiscite was not designated to be a mere consultation of the population. If plebiscites are conducted by the UN, the States concerned have

as a rule committed themselves to accept the results by agreement with the United Nations. It seems inconceivable that a referendum could be organized against the will of the territorial sovereign. The United Nations has recognized results of plebiscites which clearly favoured decolonization (e.g. Algeria 1962), but has rejected votes in favour of the maintenance of any dependant status (in British Cameroons (northern part) 1959, Gibraltar 1967, French Somaliland 1967, Island of Mayotte 1974 and 1976). This attitude corresponds to the general trend within the United Nations but is a distortion of the proper aim of a plebiscite – the investigation of the genuine will of the population.

International control of a plebiscite conducted under municipal law has the advantage of a presumption of the correctness of the procedure. Only Soviet writers see such international control as the replacement of State authorities by an international commission of representatives of imperialist powers (→ Socialist Conceptions of International Law).

4. Conclusions, Policy Considerations

A right to plebiscite exists only with regard to territorial changes between existing States. In the context of self-determination, the few cases where the population of a distinct territory was asked to express its will concerning a future sovereign do not justify the assertion that contemporary international law demands the consent of the population to every territorial change.

Judging from the fact that plebiscites were deemed necessary mainly to protect the interests of people during the → dismemberment of multinational and, subsequently, colonial empires, it may appear that with the independence of the last → non-self-governing territories they have lost their importance and should be regarded only as historical institutions.

However, it seems that colonialism or "alien" domination is not necessarily white, western or European, and certain people may be more suspicious of their immediate neighbours than of their more distant "colonial" rulers. As a result of the drawing of decolonization → boundaries in Africa (→ Boundary Disputes in Africa) largely in accordance with pre-existing colonial borders, territorial change there may cause difficulties, and existing disputes (e.g. Somaliland, Western Sahara) indicate the existence of many unsolved problems. Plebiscites would be an appropriate tool to examine the genuine will of peoples with regard to their adhesion to particular States or to their wish to establish an independent State. The United Nations should encourage more States to make use of this instrument rather than claim domestic jurisdiction even in cases where dissent of a part of their population is obvious and territorial changes could possibly lead not only to a just solution for such people, but also to improved security in politically unstable areas.

S. WAMBAUGH, La pratique des plébiscites internationaux, RdC, Vol. 18 (1927 III) 149–258.
S. WAMBAUGH, Plebiscites since the World War, with a Collection of Official Documents, 2 vols. (1933).
M. MERLE, Les plébiscites organisés par les Nations Unies, AFDI, Vol. 7 (1961) 425–444.
J. MORAND, Autodétermination en Irian et à Bahrain, AFDI, Vol. 17 (1971) 513–540.
L.I. VALOVA, The Plebiscite in International Law (1972) [in Russian].
K. RABL, Das Selbstbestimmungsrecht der Völker (1973).
A. RIGO SUREDA, The Evolution of the Right of Self-Determination (1973).
H. AMIEL, La pratique française des plébiscites internationaux, RGDIP, Vol. 80 (1976) 425–501.
M. POMERANCE, Self-Determination in Law and Practice (1982).

HENN-JÜRI UIBOPUU

POPULATION *see* World Population

POPULATION, EXPULSION AND TRANSFER

1. Notion

"Population" as used in this article refers to ethnic or religious groups of at least several thousand individuals, established over a long period of time in a particular area. The special legal issues affecting → migration movements, in particular → migrant workers or individual → aliens (→ Aliens, Expulsion and Deportation) are beyond the scope of this essay; so too are → denationalization and forced exile, since these measures affect individuals or groups but seldom populations. Questions of → forced resettle-

ment concern involuntary displacements within the → jurisdiction of a State (→ Territorial Sovereignty) and not transfrontier movements. This article focuses on unilateral expulsions and on internationally agreed transfers of populations across international → boundaries or jurisdictional frontiers.

2. *Historical Evolution of Legal Rules*

The right of a population not to be expelled from its homeland is so fundamental that until after World War II it was not deemed necessary to codify it in a formal manner. In a sense, this right fell within the realm of → natural law and ethics.

The Hague Regulations annexed to Convention IV on the Laws and Customs of War on Land of 1907 (→ Hague Peace Conferences of 1899 and 1907) do not refer to the question of collective expulsions, because at the beginning of this century the practice was regarded as having fallen into abeyance. Yet, following World War I numerous population transfers took place, primarily in the Balkans (cf. → Balkan Wars (1912/1913)). In a Convention on Reciprocal Voluntary Emigration signed on November 27, 1919 at the same time as the → Neuilly Peace Treaty the Governments of Greece and Bulgaria agreed upon an exchange of → minorities on a voluntary basis (see also → Greco-Bulgarian "Communities" (Advisory Opinion)). The first large-scale, compulsory population exchange followed in 1923 under the → Lausanne Peace Treaty and the Greco-Turkish agreement on the exchange of minorities of January 30, 1923, pursuant to which one and one half million ethnic Greeks of Turkish → nationality were forced to leave Asia Minor (or, having fled during the war of 1922, were prevented from returning to their homes) and to settle in Greece, while some 400 000 ethnic Turks of Greek nationality were required to leave Greece and settle in Turkey. British Foreign Minister Lord Curzon, who participated in the Lausanne Conference, warned of the dire consequences that would follow the establishment of a legal precedent for forcible transfers of populations. The Lausanne Treaty provided for a → mixed commission of members representing Greece, Turkey and the Council of the → League of Nations to supervise the exchange of population and liquidation of property. Whereas the exchange of persons was carried out speedily, the settlement of property matters proved unworkable, so that finally all accounts were liquidated by a → lump sum arrangement (see also → Exchange of Greek and Turkish Populations (Advisory Opinion)).

Several population transfers pursuant to bilateral treaties with a clause on → option of nationality occurred after the outbreak of World War II. Following a speech to the Reichstag on October 6, 1939 announcing "a new order of ethnographical conditions . . . a resettlement of nationalities in such a manner that the process ultimately results in the obtaining of better dividing lines", Hitler summoned millions of *Volksdeutsche* (ethnic Germans living in neighbouring States) to return to Germany (*Heim ins Reich*). On October 15, 1939 the Reich concluded an agreement with Estonia involving the transfer of 12 900 "splinters of the German nationality", followed on October 21, 1939 by an agreement with Italy involving 185 365 South Tyrolians (→ South Tyrol), on October 30, 1939 by an agreement with Latvia involving 48 600 Baltic Germans, on November 3, 1939 by an agreement with the Soviet Union involving 128 000 Germans from Volhynia and East Galicia, and by other agreements. Since the → repatriations were to be voluntary, many of the Baltic Germans opted to stay in their host countries; only after the Soviet Union invaded and annexed the → Baltic States (→ Annexation), did the majority of the remaining 70 000 ethnic Germans decide that they would rather be transferred to Germany. A new transfer treaty with option clause was negotiated on January 10, 1941, this time between the Reich and the Soviet Union, barely five months before Hitler's invasion. Meanwhile the majority of the Germans of South Tyrol declined to opt for transfer to the Reich; this explains why today there is still a large but well integrated German-speaking minority in Northern Italy.

Different from these optional transfers of population were the forced resettlements that Hitler imposed on millions of non-Germans during the war. Among the victims were over 100 000 Frenchmen who were expelled from Alsace-Lorraine (→ Occupation, Belligerent) into Vichy France, and over one million Poles who were deported from the western parts of occupied Poland (Warthegau) into the so-called General-

gouvernement. These specific acts were included in Count 3, section J and Count 4, section A of the indictment of the → Nuremberg Trials. Such deportations were defined to constitute → war crimes and → crimes against humanity pursuant to Art. 6(b) and (c) of the Charter of the International Military Tribunal. Several of the accused were found guilty of having committed this crime of mass deportation.

In the period after World War II population expulsions have taken place in many parts of the world, particularly in Africa. In November and December 1969 some 200 000 African aliens were forced to leave Ghana under conditions of panic. In August 1972 President Idi Amin of Uganda announced that all Asians residing in Uganda who were not of Ugandan nationality would have to leave the country within 90 days, "because they are sabotaging the economy". Some 50 000 persons were affected, over 27 000 of whom were admitted to the United Kingdom (→ British Commonwealth, Subjects and Nationality Rules), while the remaining were resettled in many receiving States thanks to the intercession of the United Nations High Commissioner for Refugees (→ Refugees, United Nations High Commissioner). Those Asians not holding British → passports were provided with travel documents issued by the International Committee of the → Red Cross.

In March of 1976 the Government of Libya expelled over 20 000 Egyptians and confiscated their property (→ Aliens, Property). In July and August of 1978 some 6 000 Benin nationals were expelled from Gabon. In October 1982 some 80 000 persons of Rwandese origin were driven out from the south-western areas of Uganda, most of them being expelled into Rwanda and the remainder being moved to refugee settlements in Uganda. During January and February of 1983 as many as two million persons were expelled from Nigeria into neighbouring States, including Ghana, on the grounds that they were "illegal immigrants".

It appears that this type of "mass" expulsion, defined in Art. 12(5) of the 1981 → African Charter on Human and Peoples' Rights (not yet in force) as "aimed at national, racial, ethnic or religious groups" continues unabated (→ Human Rights, African Developments).

3. *Special Legal Problems*

(*a*) *Mass expulsion*

Distinguished legal scholars argue that population expulsions are necessarily incompatible with modern international law, in particular with the law of → human rights. Such transfers constitute the most blatant violation of the right to → self-determination, which many publicists consider to be part of → *jus cogens*. The right to self-determination was eloquently advocated by President Woodrow Wilson during World War I (→ Wilson's Fourteen Points), reaffirmed in the → Atlantic Charter of August 14, 1941, in Arts. 1 and 55 of the → United Nations Charter, in Art. 1 of the International Covenant on Civil and Political Rights (→ Human Rights Covenants) and in numerous resolutions of the → United Nations General Assembly. Prior to and inseparable from the right to self-determination is, however, the right to one's homeland, for before a people can exercise the right to self-determination in freely choosing a form of government or in seceding (→ Secession) from another State, they must first have the right to live on their own soil. The right to self-determination would have no meaning if it could be frustrated by simply expelling the population that claims it.

Although positive international law has not yet codified this "right to the homeland", the existence of such a right can be deduced by *argumentum e contrario*, since modern international law proscribes population expulsions in most instances. In wartime, Art. 49 of Geneva Convention IV of 1949 (→ Geneva Red Cross Conventions and Protocols) provides that "Individual or mass forcible transfers . . . are prohibited, regardless of their motive". This provision only allows the occupying power to undertake "total or partial evacuation of a given area if the security of the population or imperative military reasons so demand . . . . Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased" (→ Military Necessity).

In peacetime, there are numerous provisions proscribing expulsions of both nationals and aliens. Art. 3 of the 1963 Protocol No. 4 to the → European Convention on Human Rights pro-

vides: "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national." Art. 4 provides that "Collective expulsion of aliens is prohibited". Violations of these articles can be brought before the → European Commission of Human Rights. Similarly, Art. 22(5) of the 1969 → American Convention on Human Rights provides that no one can be expelled from the territory of the State of which he is a national.

An international convention on the prevention and punishment of the crime of mass expulsion has been proposed, but there is little likelihood of its being drafted or adopted in the near future. Nor are there universal human rights instruments in force which specifically prohibit population expulsions. Yet such practices would necessarily violate numerous provisions of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)), including Art. 3 ("Everyone has the right to life, liberty and security of person"), Art. 5 ("No one shall be subjected to . . . cruel, inhuman or degrading treatment . . ."), Art. 9 ("No one shall be subjected to arbitrary . . . exile"), Art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home . . ."), and Art. 15 ("(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality . . .") as well as the parallel provisions of the International Covenant on Civil and Political Rights (Arts. 6, 7, 12, 13, 17). It must be incontrovertible that population expulsions are not only draconian measures with serious consequences for the populations affected but also arbitrary acts which are inevitably indiscriminate in their application, and in practice are likely to have the additional vice of being inspired by → racial or religious discrimination.

In this connection regard should also be had to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to its applicability in cases of mass expulsion which cause, either deliberately or recklessly, a heavy loss of life (→ Genocide). Art. II of the Convention defines the crime of genocide to include acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, by "causing serious bodily or mental harm to members of the group" or "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". It is certain that uprooting a population from its homeland always causes grave psychic trauma and may also lead to the physical destruction of part of the group.

But in judging the legality of population expulsions, it does not suffice to focus on the human rights of the persons subject to expulsion and on the → sovereignty of the expelling States. Obviously, mass expulsions also affect the State of destination. With regard to aliens, no State is required to open its doors to unwanted → immigration, and an expulsion into its territory without its consent would constitute an → internationally wrongful act; at the very least the State would be entitled to close its frontiers and to return the unauthorized aliens. On the other hand, according to → customary international law, a State is under an obligation to admit its own nationals (see also Art. 6 of the Havana Convention on the Status of Aliens of February 20, 1928 which provides: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory", LNTS, Vol. 132, p. 307). But even in the case of nationals, it is important from the legal and humanitarian point of view to determine whether a receiving State would be able to cope with a sudden influx of large numbers of destitute people. If a mass expulsion would lead to chaos and starvation, this may entail a breach of the Genocide Convention.

(*b*) *Internationally organized population transfers*

In the light of the above considerations, it is doubtful whether mass expulsions could be made compatible with international law merely by an international agreement or treaty made by the interested parties to the detriment of the population about to be expelled.

This is what occurred at the Potsdam Conference (July 17 to August 2, 1945; → Potsdam Agreements on Germany), where the Allies authorized the transfer of millions of Germans from the German provinces East of the → Oder-Neisse Line, from pre-war Poland, from Czechoslovakia (primarily from the Sudetenland, which had been annexed to Germany 1938 pursuant to the → Munich Agreement) and from Hungary. The Protocol of the Proceedings provided in part:

"The Three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations ... will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner" (Section XIII (renumbered XII), Foreign Relations of the United States, the Conference of Berlin (FRUS) Vol. 2, pp. 1495 and 1511).

Although the Western Allies had originally envisaged transfers on a much smaller scale and under the supervision of a population transfers commission responsible for making arrangements for compensation payments and ensuring the "orderly and humane" execution of the transfer, these plans were thoroughly frustrated by events at the end of the war, including the flight of part of the population and the highly disorderly expulsions that actually started long before the Potsdam Conference. Thus, there was no population transfers commission, no compensation, and the loss of life resulting from the flight and expulsion of a population of over 14 million was well in excess of two million people.

While it may be theoretically possible that a transfer of population could be internationally supervised and carried out gradually, in an orderly manner, it would seem that a transfer which is accompanied by atrocities and inhumanities claiming a great number of victims would constitute a serious violation of positive international law in the dimension of a crime against humanity.

In a broader sense, it would appear that internationally authorized population transfers can only be compatible with international law if these transfers are carried out on a voluntary basis, e.g. if the population by way of → plebiscite or option of nationality consents to being transferred, and a → minimum standard is observed with respect to an orderly transfer and suitable compensation for abandoned movable and non-movable property. This was the majority view expressed at the 1952 Siena session of the → Institut de Droit International, which was partly devoted to the question of the legality of mass population transfers. But more fundamentally, and notwithstanding the modalities of any given transfer, it is the principle of compulsory population transfers itself that appears as an anachronism and as incompatible with the fundamental human right to one's homeland.

(c) *Right to return*

In order to achieve a just settlement of → refugee problems caused by mass expulsions, the first and obvious solution would be to facilitate the voluntary repatriation of the victims. Art. 13(2) of the Universal Declaration of Human Rights provides that "Everyone has the right ... to return to his country". Similarly, Art. 12(4) of the International Covenant on Civil and Political Rights states that "No one shall be arbitrarily deprived of the right to enter his own country".

It is significant that the drafters of these instruments avoided the use of narrow terms such as "nationals" and "State" but preferred the broader terms "everyone" and "country", so as to forestall any legalistic device designed to allow the expulsion of certain inhabitants of a State and then to prevent their return on the false grounds that they are not nationals of the expelling State.

Although a right to return exists in theory, recent experience shows that this right is not being implemented in practice, as illustrated in the case of more than one million Palestinian refugees from the Arab-Israeli conflicts of 1948 and 1967 (→ Palestine; → Israel and the Arab States). The UN General Assembly has specifically affirmed the right of Palestinian refugees to return, in numerous resolutions beginning with Resolution 194(III) of December 12, 1948, paragraph 11 of which provides

"that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the governments or authorities responsible".

This resolution also established a Conciliation Commission for Palestine, composed of three member States of the → United Nations (France, Turkey and the United States), with broad powers to make arrangements for repatriation and compensation. In view of the Commission's failure to persuade Israel to cooperate, the General Assembly adopted Resolution 513(VI)

on January 26, 1952 endorsing a programme proposed by the → United Nations Relief and Works Agency for Palestine Refugees in the Near East, designed to expedite the reintegration of the displaced Arabs into the economic life of the area, without prejudicing, however, the repatriation provisions of Resolution 194(III). This principle of repatriation was reaffirmed in General Assembly Resolutions 2452 A(XXIII), 2535 B(XXIV), 2963 C and D (XXVII), 3005 (XXVII), 3089 C (XXVIII), 3236(XXIX), 3331 D (XXIX), 3419 C (XXX), 33/28 A, 34/52 E and 35/13 E, in which the "right of all displaced inhabitants to return to their homes or former places of residence" is described as "inalienable", and most recently in Resolution 38/83 B of December 15, 1983. The United Nations Commission on Human Rights has also been seised with this question and has affirmed the right to return in its Resolutions No. 6 (XXIV) of February 27, 1968, No. 3 (XXVIII) of March 22, 1972, No. 6 A (XXXI) of February 21, 1975, No. 1 A (XXXVI) of February 13, 1980, No. 1983/1 A of February 15, 1983, and No. 1984/1 A of February 20, 1984 (see also → Israel: Status, Territory and Occupied Territories; → Palestine Liberation Organization).

The German refugees and expellees who poured into the truncated Reich after World War II (→ Germany, Occupation after World War II) have not been the subject of United Nations resolutions recognizing their right to return, but their representatives have repeatedly affirmed this right, while at the same time renouncing the → use of force to realize it. Obviously, their return to East Prussia, Pomerania or Silesia would be as difficult as the return of the Palestinians to their homes, since the German provinces East of the Oder-Neisse Rivers have been under Polish administration since 1945 pursuant to Section IX B (renumbered VIII, FRUS p. 1491) of the Potsdam Protocol, and two generations of Polish citizens have been born there, whose claim to these territories as their new homeland also arises. There are conflicting interests and conflicting rights, the balancing of which must be undertaken in the name of peace. Perhaps the current development toward greater → interdependence in the world may eventually lead to the increased permeability of national frontiers and allow the settlement and → coexistence of these neighbours.

4. Evaluation

As a fundamental denial of the right to self-determination and in the light of the Nuremberg principles, the Genocide Convention and the developing body of human rights law, population expulsions must be seen as incompatible with modern international law. Yet, since mass expulsions have not ceased to occur, there appears to be a need to further develop the pertinent law and to devise better preventive machinery. An international convention on the prevention and punishment of the crime of mass expulsion would probably not put an end to the practice of expulsion as an instrument of national policy, just as the condemnation of the crime of aggressive war has not ended → war (→ Aggression). However, by bringing population expulsions to the attention of world public opinion, their incidence may decrease and to this extent a convention would be well justified. Population "transfers", even if internationally authorized and supervised, should not be judged differently from expulsions, unless they are genuinely voluntary. But is the right to one's homeland ever relinquished voluntarily?

Foreign Relations of the United States, Conference of Berlin 1945, 2 vols. (1960).

Statistisches Bundesamt, Die deutschen Vertreibungsverluste (1958).

T. SCHIEDER, A. DIESTELKAMP, R. LAUN et al. (eds.), The Expulsion of the German Population from the Territories East of the Oder-Neisse-Line (1958). The Expulsion of the German Population from Czechoslovakia (1960). The Expulsion of the German Population from Hungary and Romania (1961). The Expulsion of the German Population from Yugoslavia (1962).

J. SCHECHTMAN, European Population Transfers (1946).

E. KULISCHER, Europe on the Move (1948).

J. SCHECHTMAN, Population Transfer in Asia (1949).

M. PROUDFOOT, European Refugees: 1939–1952. A study in forced population movement (1956).

K. SKUBISZEWSKI, Le transfert de la population allemande, était-il conforme au droit international?, Cahiers Pologne-Allemagne (1959) 42 et seq.

G. GOODWIN-GILL, The Limits of the Power of Expulsion in Public International Law, BYIL, Vol. 47 (1975) 55–156.

A. DE ZAYAS, International Law and Mass Population Transfers, Harvard ILJ, Vol. 16 (1975) 207–258.

O. KIMMINICH, Das Recht auf die Heimat (1978).

K.N. RADLEY, The Palestinian Refugees: The Right to Return in International Law, AJIL, Vol. 72 (1978) 586–614.

The Right of Return of the Palestinian People, United Nations Publication ST/SG/SER.F/2 (1978).

A. DE ZAYAS, Nemesis at Potsdam, The Anglo-Americans and the Expulsion of the Germans (2nd ed. 1979).

W.T. MALLISON and S.V. MALLISON, The Right to Return, Journal of Palestine Studies, Vol. 9 (1980) 125–136.

SADRUDDIN AGA KAHN (Special Rapporteur), Study on Human Rights and Massive Exoduses, UN Doc. E/CN.4/1503 Rev.1 (1983).

ALFRED-MAURICE DE ZAYAS

PROSTITUTION *see* Traffic in Persons

PROTECTED PERSONS

1. Notion

Rights and interests of individuals are in principle subject to protection by national law and → domestic jurisdiction. For humanitarian or economic reasons, however, such rights and interests may become a matter of international concern. This is the case, for example, when nationals of one State fall under the territorial jurisdiction of another State (→ Jurisdiction of States; → Aliens), when such rights and interests are not adequately protected if at all (→ Human Rights) or when persons in exceptional circumstances need special protection, e.g. victims of → armed conflicts. The protection of such rights and interests is the objective of a great number of customary as well as conventional legal rules forming part of either universal or → regional international law.

However, individuals, as a rule, have no legal personality under public → international law (→ Individuals in International Law; → Subjects of International Law), so that on an international level they can neither claim nor enforce compliance by States with the norms of international law. To give effect nonetheless to their protection within the realm of the law of nations, States and in specific cases some international agencies (e.g. the International Committee of the → Red Cross, the → European Commission of Human Rights or the → Inter-American Commission on Human Rights) are entitled under certain conditions to grant protection to individuals against States failing to observe norms of international law. States may protect their own nationals against foreign States (→ Diplomatic Protection) or, if diplomatic relations between the States concerned are non-existent or have been suspended or interrupted (→ Diplomatic Relations, Establishment and Severance), the State seeking redress for the unlawful treatment of its nationals may authorize another State to act on its behalf. This third State is called the → protecting power. In fact, the notion of protected persons as a specific legal term has thus far been used exclusively in the context of protection granted to persons who are not nationals of the protecting State (→ Nationality).

There are two important branches of international law today where the protection of individuals is generally assumed by legal persons other than the State to which the protected person owes allegiance: international humanitarian law applicable in armed conflicts (→ Humanitarian Law and Armed Conflict) and the law of human rights. Yet the notion of protected persons, which plays an eminent role in international humanitarian law, has hardly been used in the language of human rights because the law of human rights and humanitarian law are of differing constructions. Human rights are in principle the individual rights of all human beings, whereas in the case of humanitarian law it is the State which is entitled to the protection provided for its nationals. The individual who claims his human rights is therefore, strictly speaking, not a protected person, although in practice, the two legal fields frequently overlap (→ Human Rights and Humanitarian Law).

2. Historical Evolution of Legal Rules

In some of the early capitulations granted by Oriental Moslem rulers to European countries, → consular jurisdiction, in principle restricted to nationals of the consul's home country, was extended to litigation between Christians generally, effectively giving legal protection to nationals of third States as well. Moreover, → concessions made in the 16th century by the Ottoman sultans to France and subsequently to England included the right of the States to grant the protection of

their flag to the ships of nationals of other Christian States (→ Flag, Right to Fly). By the end of the 18th century, European → consuls used to offer their capitulatory protection not only to non-Moslem Ottoman subjects but also to Moslem employees of their consulate (→ De facto Subjects).

In the 19th and 20th centuries, colonial powers and later those administering → mandates and trust territories used to extend their diplomatic protection to members of the indigenous populations of the dependent territories (→ Indigenous Populations, Protection; → United Nations Trusteeship System). Thus, for example, the inhabitants of British → protectorates, protected States, Indian native States and other dependent territories, although not altogether British subjects, were recognized as "British protected persons".

Apart from the system of capitulations and colonial dependencies there have been, and still are, other instances of protection by third States. Not only small countries like → Andorra, → Monaco, → Liechtenstein and → San Marino, but also some medium-sized States with few diplomatic missions abroad have usually empowered other States to protect their nationals in foreign countries.

During the 19th century another type of protection by third States took on growing significance. In times of → war, neutral powers were charged with the protection of nationals of one belligerent in territories under the control of the other (→ Enemies and Enemy Subjects). Thus in 1870/1871 the United States protected German nationals and interests in France, and in 1904/1905 France took care of Russian interests in Japan, while the United States acted as Protecting Power for Japanese nationals and interests in Russia. The institution of Protecting Power developed further during the two World Wars. Among other neutral countries Switzerland played an outstanding role, being at times during World War II the Protecting Power of 35 belligerent States. The most important task of Protecting Powers in wartime has been to supervise the correct application of the Hague Regulations on Land Warfare (→ Hague Peace Conferences of 1899 and 1907) and of the Geneva Conventions (→ Geneva Red Cross Conventions and Protocols).

After World War II, when the promotion of the respect for fundamental human rights had become one of the main purposes of the → United Nations, a new dimension was given to the protection of individuals by international law. The Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)), the → European Convention on Human Rights (1950), the → Human Rights Covenants (1966), the → American Convention on Human Rights (1969) and the Banjul Charter (1981) for Africa (→ African Charter on Human and Peoples' Rights) were milestones in the development of human rights which have not only reinforced and improved international standards for the treatment of aliens but have for the first time also provided for international protection of individuals against their own State.

3. Current Legal Situation

In time of peace when according to Art. 46 (or Art. 45) of the → Vienna Convention on Diplomatic Relations (1961) one State transfers the protection of its nationals residing in another State to a third State, the right of the latter to grant protection is limited in scope to the right of the authorizing State. Thus, individual protection can only be given to nationals of that State in conformity with the rules concerning the nationality of claims. Further restrictions may be determined by the actual mandate. Subject to those limitations, the objectives and conditions of the protection are defined by the principles of fundamental human rights and the legal standards applicable to aliens.

It should also be mentioned here that apart from the case of transfer of protection, States are given by the Conventions on Human Rights conditional access to the procedures therein provided, if another State bound by the respective Convention has violated the human rights of its own nationals or those of nationals of a third State or even of → stateless persons. The respect for human rights is due to all human beings.

In case of war the protection of nationals of one belligerent who are under the control of the opposing party is based on specific regulations and provisions contained in the Geneva Red Cross Conventions and Protocols and in the Hague Regulations Respecting the Laws and Customs of War on Land. The overall objectives of

international humanitarian law applicable in armed conflicts lie in the principles of humanity and in the respect for human dignity and for inalienable fundamental rights. Victims of armed conflicts are thus entitled to humane treatment and to respect for human dignity as well as to a minimum of human rights. The requirements of these basic principles vary considerably according to the needs of the victims in a specific situation. The "humane treatment" of prisoners of war will be different from that of civilians. The wounded and sick will need medical care, whereas children will be entitled to special respect and protection. In addition, humanitarian law not only protects the victims of armed conflicts themselves (direct or original protection) but also those whose task consists in the care of the victims, like the medical and religious personnel (indirect or derivative protection).

Because of the differences between the kinds of protection granted to various groups of protected persons and in view of the fact that the protection is limited to certain categories of individuals, excluding others, a clear definition of the most important groups is indispensable. Accordingly, there are, for example, definitions contained in Protocol I to the Geneva Conventions of the → wounded, sick and shipwrecked, of medical and religious personnel (Art. 8), of → combatants and → prisoners of war (Arts. 43 and 44) and of civilians and → civilian population (Art. 50). Other categories of protected persons need no definition, like → refugees and stateless persons, women and children, journalists, internees (→ Internment) or "persons whose liberty has been restricted" (Protocol II, Art. 5).

In some instances the legal status of protected persons according to humanitarian law is conditional on assignment and/or on compliance with certain rules of conduct. Thus the privileged status may also be forfeited. On the other hand, such status may allow acts which would otherwise constitute crimes. Combatants, for example, are only recognized as such if they are members of the armed forces of a party to a conflict (Protocol I, Art. 43(2)). They have the right to participate directly in hostilities. But for the sake of the protection of civilians they have to be recognizable as combatants. If they fail in this they may lose their right to be prisoners of war (Art. 44(3) and (4)). Medical personnel have to be assigned, by a party to the conflict, exclusively to medical purposes (Art. 8(c)) and religious personnel must be exclusively engaged in the work of their ministry and attached either to the armed forces or to authorized medical units or transports (Art. 8(d)).

4. Special Legal Problems

Recent developments in humanitarian law have brought about important changes in the requirements for the status of combatant and prisoner of war. Because of the recognition of guerrilla warfare as a legitimate means of conducting hostilities, the time-honoured obligation of combatants to distinguish themselves clearly and unequivocally from civilians has been curtailed to the detriment of the civilian population (→ Guerrilla Forces). A clear distinction between the two categories used to be an important stipulation for the protection of civilians. Some military experts consider these new provisions of Protocol I (Art. 44(3)) as a major obstacle to the orderly conduct of hostilities.

The denial of combatant and prisoner of war status to → mercenaries (Protocol I, Art. 47) constitutes another disputed innovation which is in clear contradiction to the fundamental principle of non-discrimination so far unquestioned in international humanitarian law.

Recent tendencies in State practice and in legal doctrine view the two branches of international law, human rights and international humanitarian law, as belonging together and forming one family of legal rules which serve one common goal: the overall protection of human dignity, justice and fundamental human rights in time of peace as well as in cases of armed conflicts. The fundamental guarantees provided in the Additional Protocols of 1977 (Protocol I, Art. 75, Protocol II, Art. 4), which are also applicable to the belligerent's own nationals, constitute but one example supporting that legal conception. However, this approach is not yet generally accepted.

5. Evaluation

The development of the protection of the individual by international law has made remarkable progress in the last few decades. A great number

of conventions and other legal instruments considerably improving the situation of the individual have been adopted both in the field of human rights and in the field of international humanitarian law. Humanitarian law in particular has grown rapidly into a vast conglomerate of casuistic legal provisions; in some instances the protection demanded goes far beyond what would be realistic and practicable from a military commander's point of view. This is, of course, one of the many reasons for the notorious gap between the rules of law and their practical application; a similar gap exists in the field of human rights. In the interests of the individuals protected, an early elimination of present reluctance in the application of those rules is much to be desired.

J.M. JONES, Who are British Protected Persons?, BYIL, Vol. 22 (1945) 122–129.

P. VON MURALT, Die Schweiz als Schutzmacht (1947).

A. JANNER, La puissance protectrice en droit international (1948).

C. PARRY, Some Considerations upon the Protection of Individuals in International Law, RdC, Vol. 90 (1956 II) 653–726.

R. BINDSCHEDLER Die Unterscheidung zwischen Zivilbevölkerung und bewaffneten Kräften: Ein Grundproblem des Kriegsrechts in der heutigen Zeit, Internationale Festschrift für Alfred Verdross zum 80. Geburtstag (1971) 55–69.

C. PILLOUD, Protection of Journalists on Dangerous Missions in Areas of Armed Conflict, International Review of the Red Cross, Vol. 11 (1971) 3–7.

M. VEUTHEY, Comportement et statut des combattants, Revue de droit pénal militaire et de droit de la guerre, Vol. 12 (1973) 47–56.

M. VEUTHEY, Guérilla et droit humanitaire (1976).

J.J.A. SALMON, Le statut de combattant légitime dans les guerres de libération nationale, RevBelge, Vol. 12 (1977) 353–378.

R. LAPIDOTH, Qui a droit au statut de prisonnier de guerre?, RGDIP, Vol. 82 (1978) 170–210.

M. BOTHE, Le statut de la profession médicale en temps de conflit armé, Annales de droit international médical, Vol. 28 (1979) 52–59.

O. KIMMINICH, Schutz der Menschen in bewaffneten Konflikten (1979).

A. CASSESE, Mercenaries: Lawful Combatants or War Criminals?, ZaöRV, Vol. 40 (1980) 1–30.

E. KUSSBACH, Le développement du statut des combattants et le droit international humanitaire, Revue de droit pénal militaire et de droit de la guerre, Vol. 22 (1983) 377–418.

ERICH KUSSBACH

RACIAL AND RELIGIOUS DISCRIMINATION

1. Notion

(a) Introduction

Religious and racial prejudices are phenomena as old as the history of mankind. Ethnocentrism and also the feeling of superiority with respect to other races and religions have frequently been created by conflicts with such groups. It cannot be proved, however, that these phenomena are restricted to primitive cultures. The history of words such as *barbaros* (foreign) in the Greek world indicate the contrary.

For many centuries the major cause of group conflicts was religious differentiation, along with ethnic and national considerations. Racial differentiation only surpassed it with the development of pseudo-scientific "racial" theories in the middle of the 19th century (J.A. Gobineau, H.S. Chamberlain, Doctrines of an Aryan "Herrenvolk").

Frequently religious and racial intolerance coincided. Common religions have in many cases prevented ethnic differentiations from becoming visible. On the other hand cases are noted where religious differentiations separated ethnic groups of the same stock (e.g. Jews and Arabs).

In many early → peace treaties terminating wars which had a religious connotation, clauses regarding the treatment of the adherents of a certain religion may be found (→ Westphalia, Peace of (1648)). Less common are clauses regarding racial discrimination. An example of the latter is the prohibition of → slavery in the Final Act of the → Vienna Congress (1815).

(b) Concepts

Present international law regulates the two forms of discrimination with different intensity. In the relevant declaration on religious discrimination (see *infra*) no definition of "religion" or "belief" is given owing to the difficulty in including atheist or non-theist beliefs. The definition of "race" in Art. 1 of the 1965 "Racial Convention" (for full title see Section 2(b) *infra*) is binding in character and avoids any doctrinal approach in the sense of para. 6 of the → preamble that "any

doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous". "Race" according to this definition is not a biological concept but comprises, besides colour, "descent, or national or ethnic origin" (Art. 1), i.e. differentiations of cultural and historic connotations. The criteria of "national or ethnic origin" present the same difficulties as the term "people". Are tribes, castes and similar social groups included? The question is controversial.

2. *Historic Evolution of Legal Rules*

(*a*) *After World War I*

Prohibition of racial and religious discrimination (→ Discrimination against Individuals and Groups) appear in the instruments protecting → minorities in the period after World War I. Life and liberty, civil and political rights were to be guaranteed without distinction of race and religion (Arts. 2 and 7 of the Treaty between the Allied Powers and Poland, June 28, 1919, CTS, Vol. 225, p. 412; see also Agreement on the → Mandate on → Palestine, July 24, 1922, LNTS, Vol. 43 (1926) p. 42). In the Declaration of International Human Rights, accepted by the → Institut de Droit International of October 12, 1929 (AnnIDI, Vol. 35 II (1929) p. 298) this ban was extended to the guarantee of nationality, property and other private rights (Arts. 1, 4 to 6); it was added that equality must be effective and not merely nominal, and must exclude any direct or indirect discrimination (Art. 5). General machinery for the elimination of discrimination had yet to be established; this explains why no initiative against the racial measures of national-socialist Germany against Jews and other "non-Aryans" was taken before the organs of the → League of Nations (see however the case of F. Bernheim before the League Council, May/June 1933, Ermacora, p. 427).

(*b*) *After World War II*

The elimination of distinctions based upon race and religion is recited four times in the → United Nations Charter (Arts. 1(3), 13(1)(b), 55(c) and 76(c)) as one of the purposes of the Organization in connection with the promotion of → human rights. The → International Court of Justice has interpreted these provisions as constituting binding obligations mainly regarding racial discrimination (ICJ Reports (1971) p. 57; → South West Africa/Namibia (Advisory Opinions and Judgments)).

These Charter provisions have been implemented by different methods. On the one hand the general instruments for the protection of human rights elaborated and accepted by the → United Nations contain clauses on racial and religious discrimination. The history begins with the Universal Declaration on Human Rights (→ Human Rights, Universal Declaration (1948)) which prohibits such discrimination as would contravene "the rights and freedoms set forth in this Declaration" (Art. 2) without prohibiting discrimination in other fields. The → Human Rights Covenants of 1966 (Art. 2) follow the same pattern.

On the other hand, the United Nations early developed the remarkable activity of enacting special conventions in the field of racial discrimination. Indeed, there has been criticism that "instead of an Organization concerned with respect for all human rights everywhere, we have one almost wholly preoccupied with racial discrimination" (L.M. Goodrich, E. Hambro and A.E. Simons, Charter of the United Nations (3rd ed. 1969) p. 17). The first result was the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (UNTS, Vol. 78, p. 277; → Genocide), an immediate response to the racialist atrocities committed during World War II by the Axis Powers. The incentive for further implementation of the relevant Charter provisions emerged partially from another source: a link between the 1965 Racial Convention and → decolonization is undeniable (cf. GA Res. 2106(XX) by which the Convention was adopted and Res. 2547(XXIV) on southern Africa). The emergence of a great number of new States (→ New States and International Law) and their active interest in racial equality has certainly accelerated not only the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination on December 21, 1965 (following the Declaration on the Elimination of all Forms of Racial Discrimination of November

20, 1963; GA Res. 1904(XVIII)), but also its entry into force in January 1969, seven years before that of the Human Rights Covenants, and its great number of ratifications – 124 by August 1984 – including all permanent members of the → United Nations Security Council except the United States. The main organ created by this Convention (Art. 8), the Committee on the Elimination of Racial Discrimination (CERD), is composed of 18 independent experts and elected by the States parties to the Convention for a period of four years. It began work in January 1970 and by 1984 had presented 14 annual reports to the → United Nations General Assembly.

In order to create an effective instrument against measures such as → apartheid in South Africa the General Assembly adopted an International Convention on the Suppression and Punishment of the Crime of Apartheid (Res. 3068(XXVIII) of November 30, 1973, in force since 1976). It was ratified only by Eastern and Third World countries. States members of the Western and Others Group objected to declaring apartheid a → crime against humanity without defining the term. It was also felt that in view of the broad, all-inclusive provisions of the Racial Convention of 1965, no new convention was necessary.

Religious discrimination was not covered by any of these instruments. In 1962 a decision had been taken to draft separate instruments (a declaration and a convention; see UN GA Res. 1780 and 1781(XVII)). The work took twenty years. It was not easy to reach common ground between atheistic countries and those adhering to a religious faith and between countries with quite different relationships between religious and State authorities. Only after the intention to prepare a legally binding convention had been abandoned – a 1965 draft was rejected by the General Assembly in 1967 – was it finally possible to find a → consensus for a Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of November 25, 1981 (UN GA Res. 36/55). In this Declaration an attempt is made to define the legitimate forms of religious activities (Art. 6) without adding much to the relevant articles of the Human Rights Covenants. It has been characterized as a compromise with weaknesses and lacunae, but affirming at least that the "right to express one's religious faith" is still "a dimension of human existence" (comment by the Observer for the Holy See at the General Assembly's 36th session, UN Doc. A/C.3/36/SR. 32, para. 28).

→ United Nations Specialized Agencies have also been active in the field. Amongst other instruments of the → International Labour Organisation of a more general character, there should be special mention of the Discrimination (Employment and Occupation) Convention (ILO Convention No. 111) of June 25, 1958 (in force June 15, 1960: UNTS, Vol. 362, p. 31) as well as the → United Nations Educational, Scientific and Cultural Organization's Convention Against Discrimination in Education, of December 14, 1960 (in force 1962: UNTS, Vol. 429, p. 93) together with a Protocol instituting a Conciliation and Good Offices Commission for the settlement of disputes between States parties (in force 1968; → Conciliation and Mediation; → Good Offices). Greater importance has now been attached to the Committee on Conventions and Recommendations (CR) instituted by the UNESCO Executive Council in April 1978 (104/EX/Decision 3.3) which is entrusted with the examination of complaints in the field of competence of UNESCO upon the basis of the Universal Declaration. On November 27, 1978, UNESCO also adopted a Declaration on Race and Racial Prejudice.

The instruments created by specialized agencies cover racial as well as religious discrimination. The same applies to the clauses prohibiting discrimination with regard to the enjoyment of rights guaranteed in regional instruments for the protection of human rights: the → European Convention on Human Rights (1950), Art. 14; the → American Convention on Human Rights (1969), Art. 1; and the → African Charter on Human and Peoples' Rights (1981), Art. 2 (see also → Human Rights, African Developments).

3. Current Legal Situation

(a) Competences and political measures

A complicated network of conventional obligations legally binding upon a varying number of States and of resolutions of international organs (→ International Organizations, Resolutions) have been created and developed by a great num-

ber of inter-related régimes, sometimes lacking the necessary coordination. In the United Nations the political initiative rests with the General Assembly and its Third Committee, with the → United Nations Economic and Social Council (ECOSOC) and with the Human Rights Commission and its subcommittees. Additional work has been done by the specialized agencies and, not least, by various regional organizations.

The UN Security Council made an important contribution to the battle against racial discrimination by recommending a weapons → embargo against the racial régime of South Africa (Res. 181 (1963); → Arms, Traffic in), which has been renewed at different occasions in the following years, albeit without imposing → sanctions according to Chapter VII of the Charter as requested by the General Assembly (Res. 2054 A (XX), December 15, 1965). The racial policy of the Republic of South Africa was also the reason for the decision of the 29th General Assembly that that State was not entitled to participate in the session. Similar actions were taken in the organs of specialized agencies – as at the International Labour Conference of 1981 – which went even further by requesting the suspension of all diplomatic, commercial and cultural relations with racialist régimes.

(*b*) *Implementation of human rights instruments*

Implementation is the task of various organs. As far as clauses regarding racial or religious discrimination are contained in general instruments for the protection of human rights, reference must here be made to the pertinent organizations and conventions. Most such clauses prohibit discrimination only in connection with a breach of the rights set forth in the instruments and have no "independent existence" (Judgment of the → European Court of Human Rights, July 23, 1968 (Belgian Linguistic Cases), Series A6, p. 33).

(*c*) *Committee on the Elimination of Racial Discrimination*

The specific elimination of racial discrimination in its broad sense is the task of the CERD, which employs four different kinds of procedures: the examination of periodic State reports (Art. 9 of the Convention); the settlement of disputes between States (Arts. 11 to 13); the consideration of communications from individuals and groups which are victim of violations (Art. 14); and finally the examination of reports and petitions from trust and → non-self-governing territories (Art. 15; → United Nations Trusteeship System). Up to now only the procedures according to Arts. 9 and 15 have been of actual importance. No State disputes have been referred to the CERD and the Committee received the competence to handle individual petitions – after ten States had made the necessary special declarations – only in 1983.

The effectiveness of the first procedure has been considerably increased since the practice was introduced of inviting State representatives to be present when the reports of their governments were examined. A dialogue with the reporting governments was established and considerable improvements in the internal legal order resulted from this dialogue. For instance, more than half of the States parties to the Convention have amended their penal codes in order to be able to punish racialist acts. Important improvements also have been reached in the administrative field. Conciliation procedures were established; in some cases special commissioners for race relations, working after the model of ombudsmen, were nominated.

The Committee lacks the power to impose direct sanctions in order to force member States to accept its proposals. It has, however, the competence to report directly to the General Assembly and in many cases results were undeniable. Frequently measures were apparently taken in order to enable the reporting of positive achievements.

On the other hand, it cannot be denied that certain weaknesses still exist. The sources of information regarding the situation in member States are limited to the reports of the States themselves, to official documents from the States and from intergovernmental organizations. Material from the mass media or from → non-governmental organizations – such as → Amnesty International – cannot be used. States with a free opposition in Parliament are more severely scrutinized than authoritarian States with a one-party system. Though the Convention has been ratified

by more States than any other convention concluded under the auspices of the United Nations, some States with grave racial problems, such as the Republic of South Africa (→ South African Bantustan Policy), remain outside, as does the United States.

4. *Special Legal Problems*

(*a*) *In general*

Apart from the drawbacks already mentioned above, such as the scarcity of the information available, the lack of the possibility to examine conditions on the spot and of first hand information, there are other problems of a legal character.

(*b*) *Racial discrimination (CERD)*

The difficulty in interpreting the term "national or ethnic origin" (Art. 1 of the Convention) has already been mentioned above in section 1(b).

According to the Racial Discrimination Convention (Art. 3) the obligation of States to eradicate all practices of racial segregation and apartheid is limited to "territories under their jurisdiction" (→ Jurisdiction of States). On the other hand the preamble recites as a goal (para. 10) "to build an international community free from all forms of racial segregation and racial discrimination". The CERD has tried to solve this problem by extending its competence to the requesting of information regarding acts of foreign policy, such as the maintenance of diplomatic and commercial relations with racialist régimes (→ Diplomatic Relations, Establishment and Severance). Under these circumstances it is up to the States whether they decide to cooperate voluntarily or take a formal position.

Racialist acts must be penalized "with due regard to the principles embodied" in human rights instruments (Art. 4). The relationship between freedom of opinion and the suppression of racialist propaganda is a genuine legal problem. It is questionable whether a State is entitled to solve it by reserving such decision to itself instead of trying to find an objective solution based upon the evaluation of legal values.

One of the main problems is the manner in which racial prejudices can be overcome. The Convention envisages punishment (Art. 4) and education (Art. 7). In the field of penal law decisive progress has been achieved. In education much remains to be done. Only few States have introduced into their school curricula educational measures regarding racial prejudice. The educational effect of conciliatory procedures has not yet been sufficiently employed.

Human rights should not be nullified or impaired by discriminatory acts (Art. 5). It is not certain whether the enumerated rights are as such guaranteed by the Convention. In its practice, the CERD has taken the position that it is entitled to investigate whether and to what extent these rights are respected in order to examine racial elements for their non-recognition or undue limitation. It has, however, sometimes met with opposition from States which argue that the Committee is not competent to do so.

Not all States possess effective remedies against acts of racial discrimination (Art. 6). In some a wide discretionary power is given to officials when individual claims against official acts are admitted. The Committee does not accept this position.

Measures in the field of teaching, education, culture and information are thoroughly examined by the Committee.

(*c*) *Sanctions for religious discrimination*

No comparable international machinery is available for the elimination of religious discrimination. It is, however, noteworthy that the 1981 Declaration provides that the rights and freedoms set forth "shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice" (Art. 7). This is at least an appeal to member States to bear the necessary remedies in mind, even if no sanction in the technical sense exists.

5. *Evaluation*

A general political problem such as the elimination of racial or religious discrimination can be only partially solved by non-political means. It is certainly important to publicize the phenomenon and to increase the consciousness of States as to the task to be accomplished. In this regard much has been achieved between States willing to cooperate.

In an international order based upon the com-

petence of sovereign States in their internal affairs there is no satisfactory means available to oblige those not ready to conform with this goal to cooperate fully. An appeal to their international prestige may have certain effects, but will not ensure success in all situations.

Reports of the Committee on the Elimination of Racial Discrimination, UN GA Official Records, 25th session, Supp. 27; since the 26th session, Supp. 18.

Study on the Work of the CERD for the World Conference to Combat Racism and Racial Discrimination, UN Doc. A/CONF.92/8.

Report of the World Conference to Combat Racism and Racial Discrimination, Geneva, 1978, UN Doc. A/CONF.92/40.

Report of the Second World Conference to Combat Racism and Racial Discrimination, Geneva, 1983, UN Doc. A/CONF.119/26.

A. KRISHNASWAMI, Study of Discrimination in the Matter of Religious Rights and Practices (1960) UN Doc. E/CN.4/Sub.2/Rev.1, Repr. in: New York University Journal of International Law, Vol. 11 (1978) 197–225.

E. SCHWELB, The International Convention on the Elimination of All Forms of Racial Discrimination, ICLQ, Vol. 35 (1966) 996–1068.

B.V. BITKER, International Treaty against Racial Discrimination, Marquette Law Review, Vol. 53 (1970) 68–93.

L.B. SOHN and T. BUERGENTHAL, International Protection of Human Rights (1973) 856–913.

UNESCO, Le racisme devant la science (2nd ed. 1973).

F. ERMACORA, Menschenrechte in der sich wandelnden Welt, Vol. 1 (1974).

T. BUERGENTHAL, Implementing the Racial Convention, Texas ILJ, Vol. 12 (1977) 187–221.

H. SANTA CRUZ, Racial Discrimination (Rev. version 1977) UN Doc. E/CN.4/Sub.2/370/Rev.1.

K.J. PARTSCH, Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights, Texas ILJ, Vol. 14 (1979) 191–250.

N. LERNER, The UN Convention on the Elimination of all forms of Racial Discrimination (2nd ed. 1980).

G. TÉNÉKIDÈS, L'action des Nations Unies contre la discrimination raciale, RdC, Vol. 168 (1980 III) 269–487.

K.J. PARTSCH, Religions- und Weltanschauungsfreiheit als Menschenrecht, Vereinte Nationen, Vol. 30 (1982) 82–86.

A. EIDE and T. OPSAHL (eds.), The Human Rights Organs of the United Nations – a review and appraisal (1985).

T. MERON, The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination, AJIL, Vol. 79 (1985) 283–318.

KARL JOSEF PARTSCH

REFUGEES

1. Notion

The term "refugee" in the sociological sense has been used for centuries, whenever and for whatever reasons persons have been compelled to leave their homes and to seek refuge elsewhere; it is only in modern times, however, that the term has acquired legal significance. Thus the term has been used to define the competence, *ratione personae*, of international bodies dealing with refugee problems. It has likewise been used in international agreements relating to the status of persons who have had to leave their home States in order to take refuge in another country. Correspondingly, the term appears in national legislation regulating the status of refugees in a given country.

There does not exist a generally accepted definition of the term "refugee", the significance of which varies in accordance with the intentions of the States initiating international action on behalf of refugees or, on the national level, according to the intention of the legislator.

When under the auspices of the → League of Nations a series of international bodies (→ Refugees, League of Nations Offices; → Human Rights, Activities of Universal Organizations) was created to deal with the refugees of that time and a number of agreements were concluded to regulate certain aspects of their legal status, the term "refugee" was defined each time in relation to a specific refugee problem. These legal definitions related to the national or ethnic origin of the group in question and the lack of protection afforded by the government of their country of origin. Such definitions were adopted for Russian and Armenian refugees in the Arrangements of July 5, 1922 (LNTS, Vol. 13, p. 237) and of May 12, 1926 (LNTS, Vol. 89, p. 47) and for Assyrian, Assyro-Chaldean, Syrian, Kurdish and Turkish refugees in the Arrangement of June 30, 1928 (LNTS, Vol. 89, p. 63). In the Convention of August 10, 1938 (LNTS, Vol. 192, p. 59) a similar definition was used for refugees coming from Germany.

When the → United Nations started to take action concerning refugees, there was general agreement that the refugee problem should be dealt with as a whole (→ United Nations Relief

and Rehabilitation Activities). Consequently the definition contained in the Constitution of the → International Refugee Organisation, while referring to specific groups of pre-war and war-time refugees, included a general clause according to which the term "refugee" was also to apply to persons outside their home State who could not or who, for valid reasons, were unwilling to avail themselves of the protection of that State (→ Diplomatic Protection). This latter clause foreshadowed the basic elements of the definition of the term "refugee" included in the Statute of the office of the United Nations High Commissioner for Refugees (UNHCR) (UN GA Res. 428(V); → Refugees, United Nations High Commissioner) and the Convention relating to the Status of Refugees of July 28, 1951 (UNTS, Vol. 189, p. 137) as extended by the Protocol relating to the Status of Refugees of January 31, 1967 (UNTS, Vol. 606, p. 267). Both definitions are very similar in terms and include any person who is outside the State of his → nationality or, if he has no nationality (→ Stateless Persons), the country of his former habitual residence, owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion (→ Discrimination against Individuals and Groups; → Racial and Religious Discrimination) and is unable or, because of such fear, unwilling to avail himself of the protection of the government of the country of his nationality or, if he has no nationality, to return to the country of his former habitual residence.

This definition is now recognized on a worldwide basis, and is also the model for national legislation relating to refugee matters, including admission for asylum (→ Asylum, Territorial).

The definitions in the UNHCR Statute and in the refugee instruments of 1951 and 1967 were primarily conceived from the point of view of regulating the status of refugees and of arranging for their international protection. It was soon felt by the international community, however, that international action for refugees, and in particular humanitarian assistance, must be extended in refugee situations wherever they occur and independently of whether or not the group concerned, or every single member of that group are refugees *stricto sensu*. Consequently, in a large number of resolutions the → United Nations General Assembly has enabled the UNHCR to use his → good offices in refugee situations not falling strictly within his mandate. In dealing with the activities of UNHCR, the General Assembly has since 1977 generally referred to "refugees and displaced persons", the latter term meaning victims of man-made disasters who find themselves in a refugee-like situation outside their home countries (cf. also → Population, Expulsion and Transfer).

The need for a widening of the definition of refugee was particularly felt by the African States which, on September 10, 1969, concluded a Convention under the auspices of the → Organization for African Unity governing the specific aspects of refugee problems in Africa (UNTS, Vol. 1001, p. 45; → Human Rights, African Developments). The refugee definition in this Convention, while retaining the general definition of the 1951 Refugee-Convention, provides in addition that

> "[t]he term 'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

This African definition is now increasingly used outside the African continent to interpret the term "refugees and displaced persons" as used by the UN General Assembly.

Although the term refugees is normally applied to uprooted people outside their country of origin, it is sometimes also used in referring to the so-called "national refugees" or "internally displaced persons", i.e. persons who are living in a refugee-like situation although they have remained within the internationally recognized borders of their country or who, having left their home country, have taken refuge in another country which grants them the same status as their own nationals. These "refugees" can evidently not be placed under international protection, but there may be a need for international assistance. Thus in various instances the General Assembly has requested UNHCR to extend humanitarian assistance in such situations.

2. *Historical Evolution of Legal Rules regarding Refugees*

Before the beginning of this century there were no rules of → customary international law which took into account the special difficulties confronting refugees; nor did there exist any bilateral or multilateral agreements to regulate their status. Refugees were thus treated in accordance with the national laws concerning → aliens, which were conceived only for the protected alien who is not bound to live abroad and may return home at any time.

The need for international legal action concerning refugees first found expression in the adoption under the auspices of the League of Nations of various international instruments to define their legal status. This was done in a series of multilateral treaties (→ Treaties, Multilateral) relating to specific groups of refugees as they emerged. The primary object of these instruments was to create identity certificates for refugees, which became known as "Nansen passports" (cf. → Passports).

The first of the international instruments of relevance to the legal status of refugees was the Arrangement relating to the Legal Status of Russian and Armenian Refugees of June 30, 1928 (LNTS, Vol. 89, p. 53). It recommended *inter alia* the extension of certain quasi-consular functions to Russian and Armenian refugees by the representatives of the League of Nations High Commissioner for Refugees. The first legally binding treaty in the area was the Convention relating to the International Status of Refugees of October 28, 1933 (LNTS, Vol. 159, p. 199), which became a model for subsequent international instruments. Besides regulating the issuance of refugee travel documents, it dealt with a variety of matters affecting the daily life of refugees such as personal status, employment, social rights, education, exemption from → reciprocity and expulsion. Since the Convention of 1933 was limited in its application to the then existing refugees, new instruments were elaborated to cover the new waves of refugees from Germany (Provisional Arrangement concerning the Status of Refugees from Germany of July 4, 1936 (LNTS, Vol. 171, p. 75) and Convention concerning the Status of Refugees coming from Germany of February 10, 1938 (LNTS, Vol. 192, p. 59), extended on September 14, 1939 to refugees from Austria (LNTS, Vol. 198, p. 141)).

Soon after the end of World War II the need was felt for a truly universal and comprehensive instrument on refugees. In 1947 the United Nations Commission on Human Rights expressed the wish that "early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government as regards their legal and social protection and their documentation" (UN Doc. E/600; → Human Rights).

The preparatory work within the United Nations, undertaken mainly within the framework of the → United Nations Economic and Social Council (ECOSOC), resulted in the adoption on July 28, 1951 of the Convention relating to the Status of Refugees. Also called the "Magna Charta of Refugees", its purpose was to revise and consolidate all previous international instruments relating to the status of refugees and to regulate that status in a more comprehensive manner than had previously been done. While the personal scope was limited to the refugee problems known at the time of its adoption, its terms were later on made applicable to all new refugee situations (Protocol of January 31, 1967). The 1951 Convention defines the → minimum standard of treatment of refugees by setting out the basic rights to be granted to them in the country of refuge and also lays down the duties of refugees *vis-à-vis* that country. As of May 1, 1985 there were 95 States parties to the 1951 Convention and 94 States parties to the 1967 Protocol.

3. *Current Legal Situation*

In setting out the basic rights of refugees, the 1951 Refugee Convention accords a variety of treatments ranging from a "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally" (e.g., acquisition of property (→ Aliens, Property), self-employment and the practice of liberal professions, housing and public education; Arts. 13, 18, 19, 21 and 22) to "the most favourable treatment accorded to nationals of a foreign country" (e.g., right of association, employment in general; Arts. 15 and 17) and to "the same treatment as is accorded to nationals" (e.g. elementary education, public relief, as well as, subject to certain

conditions, employment, labour and social security legislation and regulations; Arts. 22 to 24). In addition, the Convention confirms in favour of refugees the principles of non-discrimination and of freedom of religion; it exempts refugees from the requirement of reciprocity and from exceptional measures taken against nationals of the State of origin in time of war or other exceptional circumstances and from the *cautio judicatum solvi*; it provides that the personal status of the refugee shall in principle be governed by the law of the country of his domicile or residence; it makes provision for protection against expulsion and from forcible return to a country where he has reason to fear persecution (principle of *non-refoulement*) and it sets rules in respect of administrative assistance, identity papers and travel documents. In this latter respect a Schedule attached to the Convention specifies the manner in which the document is to be printed and the legal consequences attaching to the issuance of such documents. Finally, the Convention imposes on States an obligation to cooperate with the Office of the UNHCR in the exercise of its functions and, in particular, to facilitate its duty of supervising the application of the provisions of the Convention.

Apart from the two principal universal instruments of 1951 and 1967 relating to the status of refugees, there exist a number of other international instruments of relevance, such as the Agreement relating to Refugee Seamen of November 23, 1957 (UNTS, Vol. 506, p. 125) and the Protocol thereto of June 11, 1973 (UNTS, Vol. 965, p. 445), the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and Protocol I Additional to the 1949 Geneva Conventions of June 8, 1977 (→ Geneva Red Cross Conventions and Protocols; → Humanitarian Law and Armed Conflict).

At the regional level there exists the Convention of the Organization of African Unity of September 10, 1969 governing the specific aspects of refugee problems in Africa which, apart from recognizing the 1951 Refugee Convention as modified by the 1967 Protocol thereto as "the basic and universal instrument relating to the status of refugees", contains provisions on asylum, prohibition of subversive activities, non-discrimination, voluntary repatriation and travel documents. In Europe a number of instruments adopted within the framework of the → Council of Europe regulate the status of refugees or are of relevance to the treatment of refugees. Of special importance are the European Agreement of April 20, 1959 on the Abolition of Visas for Refugees (ETS, No. 31), the European Convention of December 13, 1957 on Extradition (ETS, No. 24), the European Convention on Social Security of December 14, 1972 (ETS, No. 78) and the European Agreement relating to the Transfer of Responsibility for Refugees of October 16, 1980 (ETS, No. 107).

Finally, when dealing with the legal status of refugees regard should be had to the work of the Executive Committee of the Programme of the UNHCR, which from 1975 onwards has adopted a series of "conclusions" reflecting the → consensus of the 41 countries represented in that Committee on matters such as asylum and temporary refuge, *non-refoulement*, expulsion and → extradition, voluntary → repatriation and family reunion, travel of refugees and the protection of asylum seekers in large-scale refugee influxes.

4. Special Legal Problems

The most important legal problems concerning refugees are directly or indirectly related to the questions of asylum. In the absence of a universal instrument on asylum – indeed there is not even a generally accepted definition – there exists much dispute on the obligations of States to receive refugees (→ Aliens, Admission) and the legal consequences arising from the reception of refugees, be it for permanent asylum or merely on a temporary basis. Further legal problems result from the lack of generally accepted criteria for the granting of asylum and the determination of refugee status. This may lead to divergences in the practice of States and to the existence of numerous cases of refugees without an asylum country. More recently, special legal questions have arisen in connection with the rescue of asylum seekers in distress at sea.

In view of the increasing number of serious refugee situations throughout the world and their effect on the political and economic stability of countries and whole regions, initiatives have been taken in the UN General Assembly for international cooperation to avert new flows of refugees

(in 1980 to 1982: UN GA Res. 35/124, 36/148, 37/121 and 37/186).

5. *Evaluation*

The refugee problems in the world have undergone considerable change during the present century. While the refugees after World War I and during the first years following World War II were mainly European, today the refugee problem extends to all continents. In previous years European countries of asylum were normally able to meet the needs of refugees with only comparatively small-scale material assistance from the international community. Today, the majority of refugees are in → developing States and the receiving States cannot carry the heavy burden without substantial international assistance. At the same time there can be seen a growing reluctance on the part of States affected by large-scale refugee influxes to admit refugees on a permanent basis, and even the granting of temporary refuge is sometimes made dependant on concrete assurances of burden-sharing by other States.

In the legal field, the two universal instruments relating to the status of refugees have now been ratified by States in all parts of the world and the principle of *non-refoulement* of refugees is now widely recognized as a general principle of international law. On the other hand, the international community has not succeeded in having the concept of asylum legally defined except on a regional level, mainly in Africa, Europe and Latin America. More recently, efforts have been made to develop a concept for the granting of temporary refuge, distinct from permanent asylum, and to provide for a somewhat limited legal status of refugees in cases of mass influxes. Within the framework of the United Nations, initiatives have been taken towards international cooperation to deal with the root causes of refugee problems and to avert new flows of refugees.

United Nations Resolutions and Decisions relating to the Office of the UNHCR Geneva, HCR/Inf. 48 [loose leaf ed., English and French].

UNHCR, Collection of International Instruments Concerning Refugees (1979).

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979) [English, French, German, Spanish and Italian].

UNHCR, Conclusions on the International Protection of Refugees Adopted by the Executive Committee at the UNHCR Programme (1980 with later additions) [loose leaf ed., English and French].

UNHCR, Conventions, Agreements and Arrangements Concerning Refugees Adopted before the Second World War (1980).

UNHCR, Recueil de Traités et autres Textes de Droit International concernant les réfugiés (1982).

J. VERNANT, The Refugee in the Post-War World (1953).

P. WEIS, The International Protection of Refugees, AJIL, Vol. 48 (1954) 193–201.

E. JAHN, Der völkerrechtliche Schutz von Flüchtlingen, . Thesis, University of Bonn (1955).

J.G. STOESSINGER, The Refugee and the World Community (1956).

W. SCHÄTZEL and T. VEITER (eds.), Handbuch des internationalen Flüchtlingsrechts (1960).

O. KIMMINICH, Der Internationale Rechtsstatus des Flüchtlings (1962).

A. GRAHL-MADSEN, The Status of Refugees in International Law, Vol. 1 (1966), Vol. 2 (1972).

L.W. HOLBORN, Refugees: A Problem of our Time, 2 vols. (1975).

Prince S. AGA KHAN, Legal Problems relating to Refugees and Displaced Persons, RdC, Vol. 149 (1976 I) 287–352.

G. JAEGER, Status and International Protection of Refugees, Summary of Lectures, Ninth Study Session, International Institute of Human Rights, Strasbourg, July 1978.

EBERHARD JAHN

RELIGIOUS DISCRIMINATION *see* Racial and Religious Discrimination

REPATRIATION

1. *Concept*

Repatriation is understood primarily as the personal right of a → prisoner of war or civilian to return to his country of → nationality under specific conditions laid down in the → Geneva Red Cross Conventions and Protocols, in the Regulations Respecting the Laws and Customs of War on Land Annexed to the Fourth Hague Convention of 1907 (→ Hague Peace Conferences of 1899 and 1907), in the → Human Rights Covenants and other → United Nations → declarations and resolutions, as well as in → customary international law. The option of repatriation is bestowed upon the individual personally and not upon the country of origin or on

the detaining power (→ Individuals in International Law). Repatriation also entails the obligation of the Detaining Power to release eligible persons and the duty of the country of origin to receive its own nationals (→ States, Fundamental Rights and Duties; cf. → Aliens, Expulsion and Deportation).

2. *Prisoners of War*

In an → armed conflict of international character the whole of the Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War (hereinafter Third Convention) and the Hague Regulations apply. If hostilities do not constitute an international → war, the parties are only bound by the more general mandate of Art. 3 of the Third Convention and by customary international law (→ Humanitarian Law and Armed Conflict; → War, Laws of).

(*a*) *Repatriation during hostilities*

Assuming that the Geneva Conventions apply or that the belligerent powers regard them at least as a source of authoritative guidelines, Arts. 109 to 117 of the Third Convention make provision for the mandatory repatriation of "seriously wounded and seriously sick prisoners" during hostilities, i.e. before the termination of war (Art. 109, para. 1; → Wounded, Sick and Shipwrecked), unless such prisoners refuse repatriation (Art. 109, para. 3). Decisions with respect to repatriation based on the state of health of prisoners of war are made by the medical authorities of the detaining power or by mixed medical commissions established upon the outbreak of hostilities (Art. 112).

Although → reciprocity is not required, the → Protecting Powers (Third Convention, Art. 8) and/or the International Committee of the → Red Cross (ICRC, Art. 9) frequently try to organize exchanges of sick and wounded prisoners. Parties to a conflict may also endeavour to make arrangements in neutral countries to accommodate there certain categories of prisoners of war (Art. 110; → Internment; → Neutrality, Concept and General Rules).

Able-bodied prisoners of war who have undergone a long period of captivity may also be repatriated or interned in a neutral country (Art. 109, para. 2); but only in few international armed conflicts has there been an agreement for the repatriation of healthy prisoners of war prior to the cessation of hostilities (e.g. during the → Falkland Islands conflict of 1982 where 190 able-bodied Argentinians captured by the British were repatriated). During the → Vietnam war, however, the Government of North Vietnam on four occasions decided to liberate token groups of able-bodied American prisoners of war on parole. They were released not to a Protecting Power or to the ICRC, but to *ad hoc* American anti-war groups.

After repatriation has been effected the most important commitment to be observed is laid down in Art. 117 of the Third Convention: "No repatriated person may be employed on active military service."

(*b*) *Repatriation after hostilities*

An obligation of the detaining power to repatriate prisoners of war was already part of customary international law when Art. 20 of the Hague Regulations was adopted, stating: "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible." This provision proved inadequate because a very long time could elapse before the conclusion of peace; hostilities could even end without any → peace treaty at all. Whereas the → armistice ending World War I dates from November 1918, the → Versailles Peace Treaty was not signed until June 28, 1919, Art. 214 of which stipulated: "The repatriation of prisoners of war and interned civilians shall take place as soon as possible after the coming into force of the present Treaty . . ." (January 15, 1920, i.e. more than 14 months after the armistice). Art. 75 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War tried to expedite repatriation by stipulating that "[w]hen belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war". Nevertheless, for belligerents like Germany and Japan, World War II ended with unconditional → surrender and no provisions concerning the repatriation of Axis prisoners of war were included. Instead of being released in the summer of 1945, millions of German prisoners of war were kept in Allied captivity for many years after Germany's capitulation. In

fact, thousands were not released by the Soviet Union until 1955, ten years after the end of hostilities.

Art. 118 of the Third Geneva Convention of 1949 was designed to prohibit this prolongation of captivity and provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Each detaining power is bound to establish and execute without delay a plan of repatriation including, if possible, some order of priority. Thus, wounded and sick prisoners who have not yet been released under Art. 109 have the highest priority, followed by able-bodied prisoners of war who have been in captivity for the longest period.

3. *Repatriation of Civilians*

(*a*) *During hostilities*

Upon the outbreak of war States close their frontiers and enemy nationals may be interned because, in view of the system of compulsory military service, every enemy national is a potential soldier (→ Aliens; → Enemies and Enemy Subjects). During World War II alien civilians were interned in great numbers, but → negotiations through diplomatic channels or through the Protecting Powers made it possible for some to be repatriated, often on the basis of reciprocity. British and German women were the first to be allowed to return home in 1940, followed by French and German women returning via Switzerland. In 1942 more than 2000 persons were exchanged in this manner. Great Britain also unilaterally granted permission to 28000 Italians from Abyssinia – women, children, old people and the sick – to return to their home country. 1500 civilians of American and Canadian nationality were exchanged in Mormugao (Goa) 1943 against the same number of Japanese. In 1944 further exchanges took place between Germany and the British Empire, involving some 1000 persons on either side. Repatriation of diplomatic and consular staffs of the belligerent countries were also arranged between the majority of the countries taking part in the war (→ Diplomatic Agents and Missions).

In order to expedite the departure of aliens in time of war, the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War (hereinafter Fourth Convention) now provides: "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State" (Art. 35; → Civilian Population, Protection).

An obligation to repatriate civilians during hostilities also arises if during occupation and out of → military necessity evacuations outside the bounds of occupied territory occur (→ Occupation, Belligerent). Art. 49 of the Fourth Convention stipulates: "Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."

(*b*) *After hostilities*

Art. 133 of the Fourth Convention provides that "[i]nternment shall cease as soon as possible after the close of hostilities." Art. 134 further provides that "[t]he High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation".

Upon the conclusion of World War II there were in Europe alone an estimated eight million displaced nationals of the Allied powers, many of whom had been voluntarily or involuntarily brought to Germany to work in her war industries. The huge task of repatriating them was undertaken by the Allied armies, which by the end of September 1945 had repatriated some seven million persons. Through special agreement with the military authorities (→ Military Government; → Germany, Occupation after World War II), the → United Nations Relief and Rehabilitation Administration subsequently assumed the major responsibility for the displaced persons and refugees, repatriating an additional 1 047 282 persons by June 1947. The → International Refugee Organisation continued UNRRA's work and repatriated a total of 72834 refugees, and helped resettle more than one million persons who refused to return to their countries of origin.

After World War II the process of → decolonization brought major repatriations in its wake, e.g. of some 250000 Dutchmen who left Indonesia and returned to Holland from 1946

to 1957 (→ Decolonization: Dutch Territories). Other political upheavals and natural catastrophes have also led to major refugee movements throughout the world and to the phenomenon of millions of destitute aliens living in refugee camps in host countries neighbouring their homelands (→ Neighbour States). Humanitarian considerations have led host countries to accept the inflow of large numbers of refugees during periods of crisis, without, however, granting them permanent asylum (→ Asylum, Territorial). Worldwide organizations such as the ICRC and the Office of the United Nations High Commissioner for Refugees (UNHCR; → Refugees, United Nations High Commissioner) have cooperated with the States concerned in seeking durable solutions and facilitated voluntary repatriation to the country of origin in many cases, e.g. in Africa: 200 000 Algerian refugees after the end of Algeria's war of independence (1962), 200 000 Sudanese refugees after the Addis Ababa Agreement (1972/73), 250 000 Zimbabwean refugees after the Lancaster House Agreements (1980/81; → Rhodesia/Zimbabwe) and 250 000 refugees from Chad (1982); in Asia: several million East Pakistani refugees after the emergence of Bangladesh as a → State (1971; → Civil War; → New States and International Law), hundreds of thousands of Burmese refugees from Bangladesh (1978/79). In order to encourage voluntary repatriation, the countries of origin sometimes make official proclamations of amnesty to their nationals in exile. However, for the refugees who cannot or will not repatriate to their countries of origin, e.g. the Vietnamese "boat people" and other refugees from South-East Asia, other solutions must be found. Art. 8(c) of the Statute of UNHCR provides that the High Commissioner, besides promoting voluntary repatriation, shall also assist governmental and private efforts toward the resettlement and assimilation of refugees within new national communities. (For further analysis of the problems of voluntary repatriation or resettlement see → Refugees; → Emigration; → Migration Movements.)

4. Right of Non-Repatriation

Unlike expulsion and deportation of aliens, which fall primarily within the domain of State → sovereignty, repatriation is first and foremost an individual → human right; accordingly, neither the State of nationality nor the State of temporary residence or detaining power is justified in enforcing repatriation against the will of the eligible person, whether a civilian or prisoner of war (cf. → Extradition). Numerous repatriation provisions indicate that it shall be voluntary. Art. 11 of the Hague Regulations stipulates: "A prisoner of war cannot be compelled to accept his liberty on parole." Art. 109, para. 3 of the Third Geneva Convention of 1949 provides: "No sick or injured prisoner of war who is eligible for repatriation ... may be repatriated against his will during hostilities." Similarly, with respect to civilians, Art. 35, para. 1 of the Fourth Convention specifies that aliens may leave the territory of a belligerent State, without, however, requiring them to return to their countries of nationality. With respect to the repatriation of prisoners of war after hostilities, Art. 118 of the Third Convention does not specifically indicate that it shall be on a voluntary basis, but a study of the purpose and context of the Convention allows no other conclusion (→ Interpretation in International Law). The will of non-repatriation must, however, be clearly expressed and, if possible, verified by neutral → observers, so as to prevent the detaining power from pressuring prisoners of war to refuse their own repatriation. The overriding principle that has emerged since the conclusion of the Geneva Conventions and in particular since the war in → Korea is that no person shall be returned to a territory where his life or liberty would be threatened on account of his beliefs, race or status.

According to contemporary international law, a prisoner of war or civilian refusing repatriation, especially if motivated by fears of political persecution in his own country, should be treated as a refugee, protected from *refoulement* and given, if possible, temporary or permanent asylum pursuant to Art. 14 of the Universal Declaration of Human Rights which states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (→ Human Rights, Universal Declaration). Such a person may also exercise his right of expatriation as envisaged in Art. 15(2) of the Declaration: "No one shall be ... denied the right to change his nationality."

World War II was followed by forced repatriation of hundreds of thousands of Soviet prisoners

of war and civilians, among them not only → deserters who had fought in German uniform against the Allies (→ Flags and Uniforms in War), but also liberated soldiers who had been interned in German camps and even thousands of civilians, including many *émigrés* from the Bolshevist revolution (1917) who were registered → stateless persons or had Nansen → passports or even French, Italian or Yugoslavian papers. Since the United States and Great Britain had agreed at the → Yalta Conference (1945) to repatriate all Soviet persons in their custody, the issue of repatriation by force became acute. Mass suicides occurred in internment camps throughout Europe, leading American authorities to partly discontinue forced repatriation and to grant asylum in numerous cases. The problem of forced repatriation also arose with respect to thousands of displaced persons in Western Europe, who refused to return home. The matter was brought to the → United Nations General Assembly, which in a Resolution recommended on February 12, 1946 that "no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including adequate information from the governments of their countries of origin, expressed valid objections to returning to their countries . . . shall be compelled to return to their country of origin" (UN Yearbook (1946–1947) p. 74).

In Korea, the humanitarian trend against forced repatriation continued. In January 1952, during the armistice negotiations, the United Nations Command introduced a proposal designed to ensure that prisoners were only repatriated with their own consent. As this was opposed by North Korea, the United Nations Command later receded from the principle of "voluntary repatriation" to that of "no forced repatriation". When the matter was discussed before the General Assembly, it was resolved "that force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of the Convention" (UN GA Res. 610(VII) of December 3, 1952; → International Organizations, Resolutions). Ultimately, a special Agreement on Prisoners of War was concluded in Panmunjom in 1953, creating a Neutral Nations Repatriation Commission, and prisoners who did not choose to be repatriated were transferred to its custody. Over 21 000 Koreans and Chinese thus opted not to return to their homelands. Similarly, after the 1973 Vietnam armistice, the Government of South Vietnam released over 10 000 North Vietnamese prisoners of war instead of repatriating them to the North.

Although prisoners of war must never be put under pressure to relinquish their right to repatriation, it can be affirmed that they have a right, recognized by State practice, not to be repatriated by force. Indeed, forced repatriations must never occur again, because they are repugnant to the humanitarian purpose of the Geneva Conventions and to the universal commitment to the protection of human rights and human dignity enshrined in the → United Nations Charter and in the Human Rights Covenants.

J.P. CHARMATZ and H.M. WIT, Repatriation of Prisoners of War and the 1949 Geneva Convention, Yale Law Journal, Vol. 62 (1952/1953) 391–415.

L.B. SCHAPIRO, Repatriation of Deserters, BYIL, Vol. 29 (1952) 310–324.

J. MAYDA, The Korean Repatriation Problem and International Law, AJIL, Vol. 47 (1953) 414–438.

J. ROCKWELL, The Right of Nonrepatriation of Prisoners of War Captured by the United States, Yale Law Journal, Vol. 83 (1973) 357–384.

D.E. GRAHAM, Repatriation of Prisoners of War During Hostilities, A Task Unsuited for the Private Citizenry, International Lawyer, Vol. 8 (1974) 832–858.

R. FALK, International Law Aspects of Repatriation of Prisoners of War During Hostilities, in: R. Falk (ed.), The Vietnam War and International Law, Vol. 4 (1976) 326–339.

H. LEVIE, International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply, ibid., 340–357.

S. DELESSERT, Release and Repatriation of Prisoners of War at the End of Active Hostilities (1977).

N. TOLSTOY, Victims of Yalta (1978).

Y. DINSTEIN, Refugees and the Law of Armed Conflict, Israel Yearbook on Human Rights, Vol. 12 (1982) 94–109.

P. VAN KRIEKEN, Repatriation of Refugees under International Law, Netherlands Yearbook of International Law, Vol. 13 (1982) 93–123.

R. HOFMANN, Voluntary Repatriation and UNHCR, A Proposal, ZaöRV, Vol. 44 (1984) 327–335.

ALFRED-MAURICE DE ZAYAS

RESIDENCE PERMITS *see* Aliens, Admission

REVERE COPPER ARBITRAL AWARD

In Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation (OPIC), the liability of the defendant under an investment insurance contract concluded between the parties was at issue. The dispute concerned an enterprise set up by Revere Copper and Brass Corporation, Jamaica, a subsidiary wholly-owned by the plaintiff. The latter company had entered into an agreement with Jamaica in 1967 which was to govern the enterprise for 25 years. In particular, Revere promised to establish an alumina plant and to guarantee certain amounts of production in various phases. In return, Jamaica granted special treatment with regard to taxes and royalties, and agreed that this treatment would remain in force for 25 years.

In 1970, the plaintiff insured its investment against political risks in a contract with the defendant, an agency established and controlled by the Government of the United States.

Soon after the establishment of the plant, it became apparent between 1972 and 1974 that the plaintiff's enterprise incurred considerable financial loss; the plaintiff's efforts to establish a new consortium to run the enterprise failed. Also, Jamaica's newly-elected government intended after 1972 to change the structure of its largely bauxite-oriented economy. Thus, the Jamaican Government announced, *inter alia*, that it intended to acquire a majority of local equity participation in the plaintiff's company and to restrict the international transfer of currency. The Government also indicated that contractual commitments could not stand in the way of a revision of the agreement with Revere. In 1974, Jamaica enacted a law which changed Revere's tax and royalty obligations, prescribed minimum quantities of bauxite production, and in effect raised Revere's annual financial obligations towards Jamaica from 25 million US dollars to 200 million US dollars. Nevertheless, Jamaica never announced that a formal takeover of the Revere plant was intended (→ Expropriation and Nationalization).

Under these circumstances, Revere decided to shut down the plant and filed an application for compensation with OPIC. OPIC denied that an expropriation had occurred and argued that the decision to close the plant had been made due to the financial problems of the enterprise. Under the insurance contract, OPIC had to shoulder liability for expropriation in a case where the plaintiff was prevented for a period of one year from "effectively exercising its fundamental rights with respect to the Foreign Enterprise as shareholder or as creditor, as the case may be, acquired as a result of the investment . . .". However, the contract also stated that no liability existed in a case where "generally accepted international law principles" had not been violated. No agreement was reached between the two parties, and consequently an *ad hoc* arbitral tribunal was established in accordance with the insurance contract; the three arbitrators were appointed by the American Arbitration Association.

The majority of the Tribunal held OPIC liable. The decision is based on a chain of arguments stating that an expropriatory action of Jamaica in the sense of the insurance contract had occurred because (a) an enterprise like Revere depended upon "a continuous stream of decisions" and "some continuity of the enterprise", (b) such continuity was hindered in the absence of a contract and (c) Jamaica had in fact repudiated the contract.

In analysing the role of the contract between Jamaica and Revere, the Tribunal found that the contract had been governed by → international law even though it contained no explicit clause on the choice of law. This view was based firstly upon the assumption that the contract fell "within a category known as long-term economic development agreements" which were "part of a contemporary international process of economic development, particularly in the less developed countries". In this context, the Tribunal referred to the decisions in the → Shufeldt Claim, the → Sapphire Arbitration and the → Libya-Oil Companies Arbitration. With regard to the method of valuation of Revere's enterprise, the Tribunal largely rejected the plaintiff's assumptions and awarded about 1 million dollars instead of 80 million dollars which had been claimed.

The Tribunal's reasoning is open to considerable criticism. It is questionable whether the concept of "effective control" as laid down in the insurance contract under the circumstances required the analysis of the contract instead of existing factual conditions. Moreover, a closer

examination reveals that the Tribunal's peculiar construction of Revere's contract with Jamaica as an internationalized contract finds no precedent in international decisions. The dissenting arbitrator had voted in favour of dismissing the plaintiff's action, but he did not address the same points as the majority; his opinion was based upon the remarkable assertion that only the law of the United States was relevant in the case.

In the Matter of Revere Copper and Brass, Inc. and Overseas Private Investment Corporation, ILR, Vol. 56 (1980) 258–330.

M. REEDER, OPIC Investment Insurance Contracts: The Loss of Effective Control Test for Expropriation, Texas International Law Journal, Vol. 14 (1979) 475–494.

R. DOLZER, Nationale Investitionsversicherung und völkerrechtliches Enteignungsrecht, Bemerkungen zum Revere Copper Fall, ZaöRV, Vol. 42 (1982) 480–507.

RUDOLF DOLZER

ROSE MARY, THE

1. Background

In 1933 the British-owned and registered Anglo-Persian Oil Co. Ltd. entered into an agreement with the Imperial Government of Persia (→ Contracts between States and Foreign Private Law Persons) by which it was granted the exclusive right to search for and extract petroleum within the territory of a specified → concession for a period of 60 years. The agreement provided in part that it could not be altered by legislation and that disputes arising from it were to be referred to → arbitration.

By a law of May 1951 the Iranian Majlis purported to nationalize all property vested in the company by that concession as part of a policy of nationalization of the oil industry throughout the country (→ Expropriation and Nationalization).

In June 1952 the *Rose Mary*, a ship flying the flag of Honduras, arrived at Aden (then a British colony) with a cargo of crude oil purchased from the company's former concession in Iran and destined for Italy. The British company, by then renamed the Anglo-Iranian Oil Co. Ltd., brought an action against the master of the *Rose Mary*, its owners and the charterers in the Supreme Court of Aden, claiming delivery up to them of the oil or, alternatively, seeking a declaration that it was their property.

2. Judgment

The plaintiffs argued that the Iranian law was in gross breach of international law since it was contrary to the terms of the 1933 agreement and since Iran had failed to provide for prompt, adequate and effective compensation. They claimed that no court could give effect within its territorial jurisdiction to a foreign law which was contrary to the public policy of that territory, or recognize a foreign law which contravened international law (→ Recognition of Foreign Legislative and Administrative Acts; → Ordre public (Public Order)). The defendants relied *inter alia* upon the Iranian law and claimed that the Aden court had neither authority nor jurisdiction to impugn it.

The court in its decision of January 9, 1953 ([1953] 1 W.L.R. 246) dismissed the various lesser defences which included alleged duress in the docking at Aden, → estoppel, failure to exhaust local remedies (→ Local Remedies, Exhaustion of) and the status of oil as a foreign immovable (cf. → Singapore Oil Stocks Case). It found the offer of compensation suspect and derisory and had no trouble in characterizing the expropriation as confiscation. While accepting that English courts would refuse to invalidate the confiscation by a sovereign State of the property of its nationals (→ Nationality), it distinguished confiscation of the property of aliens (→ Aliens, Property). The court found that the expropriation had been unlawful under international law "as incorporated into the domestic law of Aden" and that it had the authority to enforce that law (→ International Law and Municipal Law). It ruled accordingly for the plaintiff company.

3. Evaluation

There can be little doubt that the Iranian expropriation had been contrary to international law. In the words of the court, the compensation offer consisted of "no more than a suggestion that at some future time the matter of compensation

may be considered", and thus was clearly inadequate. The question thus became whether the Aden court should give effect to a foreign law which contravenes international law.

The question raised is actually twofold. Does international law render a State incompetent to expropriate property save under the conditions that law prescribes or does it merely impose a subsequent obligation to pay compensation? In the case of the former, property rights in confiscated assets continue to exist, while in the latter international law accepts the divesting of rights *in rem* and creates a subsequent right *in personam*. In either case, are such rights directly enforceable in a foreign municipal court?

If international law protects foreign-owned acquired rights, it should render a State incompetent to expropriate property in a manner contrary to its provisions. Courts within the expropriating State may give effect to legislation enacted in violation of international law, but no court outside of that State's sovereign jurisdiction is bound to give extraterritorial effect to it if the legislation and the measures taken thereunder offend the principles of international law (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts).

In the interests of international → comity there may be a domestic rule of territoriality in public law by which courts will recognize such legislation as a valid exercise of → sovereignty (→ Acts of State). United States courts have adopted such a rule. There is no clear authority in English law, and the Aden court chose not to do so. But while on the face of it the court adopted the essentially monist doctrine of invalidity of the offending legislation, it in fact betrayed the dualist position that is the tradition of English law (but see also → Trendtex Banking Corp. v. Central Bank of Nigeria) and groped for a rule of municipal law to decide the issue. The court created from dubious precedent a principle of municipal law and an ambiguity as to whether the law was held invalid as a matter of public policy of the forum or as a matter of substantive validity of international law.

The soundness of the judgment and the willingness to accept international law as a source of public policy are to be commended, but the court left the major issue unresolved. Difficulties in the sphere of extraterritorial recognition of confiscatory legislation are evident in that the same Iranian law gave rise to similar litigation in Tokyo and in Venice (see O'Connell) and before the → International Court of Justice (→ Anglo-Iranian Oil Company Case), and each tribunal arrived at different, and unsatisfactory, results. In the 1970s, a parallel issue arose after Chile had expropriated foreign copper companies (→ Chilean Copper Nationalization, Review by Courts of Third States).

Anglo-Iranian Oil Co. Ltd. v. Jaffrate and Others (The Rose Mary), ILR, Vol. 20 (1953) 316–328.

D.P. O'CONNELL, A Critique of the Iranian Oil Litigation, ICLQ, Vol. 4 (1955) 267–293.

ROBERT C. LANE

SALE OF GOODS, UNIFORM LAWS

A. Historical Survey of Uniform Laws in this Area

There are two possible methods of unifying the law of international sales. The first is to unify the rules of conflict of laws, i.e. to establish uniform rules of → private international law with the effect that in a given factual situation the law of all the jurisdictions concerned will refer to the substantive sales law of the same particular legal system (→ International Law and Municipal Law). The second is to unify the substantive law regulating international sales in various legal systems, either by transforming an international convention into national law, or by establishing model laws which the contracting States to a convention then transform into national law (→ Unification and Harmonization of Laws).

1. Unification of Conflict of Laws

The Hague Convention on the Law Applicable to International Sales of Goods, concluded June 15, 1955 (UNTS, Vol. 510, p. 147), represents the most important attempt to unify the various principles of conflict of laws. According to the rules laid down by this Convention, priority was given to the law explicitly agreed upon by the parties involved in the particular transaction, and in cases where no such agreement was made, the domestic

law of the seller was held to be applicable (→ Hague Conventions on Private International Law).

At present, the Convention is in force for Belgium, France, Italy, Niger, Switzerland and the Scandinavian countries. The scope of the Convention (a revised version is currently in preparation) is restricted by the Declaration and Recommendation of the 14th Hague Conference (1980) relating to the scope of the Convention (see the Conference Acts and Documents, Vol. 1, p. 62), which permits the Convention's contracting States to enact special rules regulating the law of consumer sales. In order to promote the unification of the rules of the law of consumer sales, a draft of a Convention on the Law Applicable to Certain Consumer Sales was presented at the 14th Hague Conference; work on this draft is still in progress.

As far as the international sale of goods is concerned, the expected entry into force of the EEC Convention on the Law Applicable to Contractual Obligations, concluded June 19, 1980 (Official Journal, Vol. 23 (1980) L 266/1; ILM, Vol. 19 (1980) p. 1492), will probably result in considerable progress in the unification of the law of conflicts within the → European Economic Community.

2. *Unification of Substantive Law*

The aim of the unification of substantive law is to eliminate from the area of international sales law the problems and uncertainties of conflict of laws rules and to spare the parties to the sales contract the trouble of having to apply an unfamiliar legal system to their disputes. Only those unified legal standards which are the result of international → negotiations and agreement, which no longer reflect outdated norms and which meet the needs of modern trade, will facilitate and encourage international trade.

(*a*) *In federal States*

In → federal States with differing state laws, sales law was the object of the very first efforts towards unification. Examples of such efforts were the Swiss Code of Obligations (1881), the Sale of Goods Act of the British Commonwealth of Nations (1893) and the Uniform Sales Act (1906) in the United States; although these uniform sales laws were enacted in the state jurisdictions, they left untouched other widely differing areas of private law.

(*b*) *Among different sovereign States*

Here, two methods of unification are conceivable. The less ambitious method is to unify the law of international sales only; the more comprehensive way is to unify the substantive law governing both domestic and international sales.

It was the more comprehensive method that the independent German States of the 19th century adopted. In 1856, the legislative body of the German Confederation recommended the promulgation of a General German Commercial Code; as a result of that recommendation, a draft presented in 1861 was adopted in almost every German State. The Scandinavian countries proceeded in a similar fashion. From 1903 to 1905, delegates from Sweden, Norway and Denmark drafted a uniform law concerning the sale and barter of goods and chattels, which was introduced in the Scandinavian countries in an identical version (Sweden in 1905, Denmark in 1906, Norway in 1907 and Iceland in 1911). The Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (1930; LNTS, Vol. 143, p. 257; see → Bills of Exchange and Cheques, Uniform Laws) and the Geneva Convention Providing a Uniform Law for Cheques (1931; LNTS, Vol. 143, p. 355) represent the culmination of the efforts toward a comprehensive unification of substantive laws under the patronage of the → League of Nations.

(*c*) *Specific to international sales*

A general reform of all national sales laws regulating domestic and foreign trade appeared much too ambitious because of the traditional variations in the laws of sale in the individual countries. For this reason, efforts towards a unification of substantive law first began with the law of international sales.

(*i*) *Hague Uniform Sales Law*

At the request of the League of Nations, efforts towards the establishment of an international sales law were first made in 1930 at the Rome International Institute for the Unification of Private Law (UNIDROIT) and under the direction

of Ernst Rabel at the Kaiser Wilhelm Institute for Foreign and International Private Law in Berlin. A committee formed by leading European jurists from a number of countries presented drafts in 1935 and 1939, but the work was interrupted by World War II. In 1951, the Government of the Netherlands took the initiative in continuing the project; the resulting drafts were presented in 1956 and 1963. In 1964, a diplomatic conference in The Hague attended by 28 States passed two conventions relating to a uniform sales law, with the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) as annexes (UNTS, Vol. 834, pp. 107 and 169). Both Hague Conventions came into force in August 1972; by the end of 1984, they were in force in the following European countries: Belgium, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, the United Kingdom and San Marino. The only countries outside Europe to ratify the Conventions have been Gambia and Israel.

Since France has not ratified the Conventions, the objective of creating a uniform sales law at least for the founder States of the EEC has not been attained. The United States has also remained aloof so as to avoid endangering the success of the Uniform Commercial Code (1956) which has been adopted in almost every state of the Union at the time these Hague Conventions were originally signed (1964). The Scandinavian and Eastern European countries, while participating in the preparation of the Hague Conventions, failed to ratify them. The main drawback of the Hague Uniform Law on the Sale of Goods has been the indifference shown to it by the → developing States whose suspicions of the ULIS and ULFIS were based on their perception of these laws as the products of the European industrial countries and their representatives. The developing countries instead placed their hopes on activities of the → United Nations.

(*ii*) *United Nations Sales Law of 1980*

In 1969, the → United Nations Commission on International Trade Law (UNCITRAL) appointed a working group whose task was to examine whether a worldwide uniform law for international sales could be established. The UNCITRAL experts used ULIS and ULFIS as a basis for their deliberations. In 1976, the working group prepared a draft version (the Geneva draft); the Commission as a whole presented the Vienna draft in 1977 and the New York draft in 1978. On April 11, 1980, the 97th United Nations Diplomatic Conference in Vienna, attended by 62 States, promulgated the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Protocol amending the Convention on the Limitation Period in the International Sale of Goods of 1974 (ILM, Vol. 19 (1980) pp. 671 and 696; text of 1974 Convention, Vol. 13 (1974) p. 949).

The Vienna Convention, which is to replace the Hague Uniform Sales Law, to a large extent uses ULIS and ULFIS as models and summarizes the regulations they contain. Its goal is to establish general and simple rules which are easy to understand by means of substantive and theoretical alterations.

This UN Convention will apply to all sales contracts whose contracting parties have their place of business in different States. Unlike the rule in the Hague Convention, it is of no relevance whether the goods are carried from the territory of one State to the territory of another or not. In addition, the UN Convention will be applicable in cases where the rules of international private law refer to the application of the law of one of the contracting States; the contracting States may make a reservation to that provision and some have announced their intention to do so.

It does not apply, however, to the sale of goods for personal use, nor for use within the family or the household, unless the seller was not informed or did not have to be informed accordingly. It thus applies to commercial sales and to most of the contracts for work, labour and materials; it does not apply to consumer sales. Questions concerning the validity of contracts and usages, the effects of the contract on the property in the goods sold, as well as problems of damages for personal injury have not been considered. The rules of the Convention have to be classified as optional and, if there is no agreement to the contrary, as directly effective law.

In principle, the conclusion of a contract of sale does not require any specific legal form. Howev-

er, written form may be prescribed by the contracting States if an explicit reservation was made at the time of ratification.

Twenty-one States signed the Convention within the period for signature. These include most of the important member States of the EEC, the United States, some socialist countries and the People's Republic of China. By the end of 1984, a number of additional countries had acceded to the Convention (Argentina, Egypt, Syria) and several countries had already ratified it (France, Hungary, Lesotho). The Convention comes into force twelve months after the deposit of the tenth instrument of ratification which may be expected in the near future (→ Treaties, Conclusion and Entry into Force).

The international trade community thus now possesses a system of rules which has been developed through the cooperation of experts and representatives from all the important trading nations of the world and agreed upon at the international level. Even before its entry into force as international law, trading partners may stipulate its terms, laid down in the six official languages of the United Nations, on a voluntary basis by means of general contractual provisions recognized internationally by the governments of many States.

B. Current Legal Situation

The current legal situation is characterized by the fact that the Hague Uniform Sales Law now governs a considerable part of international trade within the EEC, unless the parties to the international sales contract have eliminated the Uniform Sales Law by agreement. The General Conditions of Delivery of Goods between Organizations of the Member Countries of the → Council for Mutual Economic Assistance (Comecon) (1968, amended in 1975 and 1979) regulate trade relations between the Comecon countries. In addition, there are many other rules applied in international trade, e.g. the International Rules for the Interpretation of Trade Terms (Incoterms) elaborated by the → International Chamber of Commerce.

1. The Hague Uniform Sales Law 1964

The Hague Uniform Sales Law comprises two conventions which separately and in the form of model laws regulate the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS). The reason for dividing this apparently coherent matter between two conventions was the desire to enable States, which were not prepared to agree with the unification of the law on the formation of contracts of sale, to accept the uniform substantive sales law.

(a) The Uniform Law on the International Sale of Goods (ULIS)

The courts of all contracting States are to apply the Uniform Sales Law directly (i.e. without an examination of preliminary questions regarding private international law) to all sales contracts which represent an international sale in the sense of the Uniform Sales Law. Such sales include contracts of sale and contracts for the supply of goods to be manufactured or produced, whenever the places of business of the parties involved are within the territory of different States, and whenever the goods sold in a particular transaction are to be carried from the territory of one State to the territory of another, or wherever offer and acceptance are to be declared within the territory of different States. However, each member State is free to declare at the time of the deposit of its instrument of ratification, or at the time of accession to the Convention, that it will apply the Uniform Law only in those cases where the parties to the contract of sale have their places of business or habitual residence in the territory of different signatory States, or in cases governed by a previously ratified Convention on conflict of laws in respect of the international sale of goods when that Convention requires the application of the Uniform Law, i.e. when it refers to the law of one of the contracting States. In cases of conflict, the principle of contractual autonomy prevails, as do usages. The Uniform Sales Law has an optional character: The parties to a sales contract are free to exclude the application of the Uniform Sales Law either wholly or in part. The Law does not apply to certain categories of sales as, for example, sales of ships, vessels and aircraft, or electricity. Regulations concerning the validity of the contract of sale, the effect which the contract may have on the property in the goods sold, and

the validity of the provisions of the contract or of any usage are not part of the Convention.

The Uniform Sales Law is governed by the principle that no specific form is required. The obligations of the seller and of the buyer are described in the simplest possible terms. Failure to fulfil these obligations allows the other contracting party to require performance of the contract, or to rescind the contract if the failure to fulfil amounts to a fundamental breach of contract; in addition, damages may be claimed. The combination of contract avoidance (by unilateral pronouncement *in rem* or, in a few cases, by act of law) and damages for a breach of contract follows the principles of French, Scandinavian and Anglo-American law. The most important concept is fundamental breach of contract. If the breach is not regarded as fundamental, the contract cannot be rescinded, and only damages or the right to a reduction in the purchase price may be claimed. Damages consist of a sum equal to the loss, including lost profit, suffered by the other party. Such damages may not exceed the loss which the party in breach could have foreseen at the time of the conclusion of the contract.

(*b*) *The Uniform Law of the Formation of Contracts* (*ULFIS*)

Party agreements and trade usages either prevail over the provisions of the ULFIS or are to be drawn upon as a supplementary source of law. The parties are entitled to exclude the application of the ULFIS explicitly or implicitly and to agree upon the application of a different law. The declarations of each party must be communicated to the other. The legal possibility of making a binding offer has been recognized.

The ULFIS regulates only the technical problems of consent, the validity of the individual acts of the parties (offer and acceptance) and the formation of the contract. Problems of mistake, legal capacity, representative authority or validity of contents do not form part of the Convention. As far as the conclusion of the contract is concerned, no specific form is required.

2. *Comecon General Conditions*

Since 1958, relations between the Comecon countries have been regulated by the General Conditions of Delivery of Goods between Organizations of Member Countries of the Council of Mutual Economic Assistance; the current version dates from 1979, amended by further uniform principles, such as the General Conditions of Installation and of Service for Machinery and Plant (1973). The legal character of these Conditions is highly controversial, but the economic organizations of the Comecon countries are bound to apply them. In the form of general conditions for sale and delivery, the Conditions are sometimes even proposed to contracting parties from non-member States as a basis for negotiation of contracts.

3. *Incoterms and Other Rules*

The International Rules for the Interpretation of Trade Terms (Incoterms), first issued by the → International Chamber of Commerce in 1936 and revised in 1953 and 1980, define the obligations of the seller and the buyer whenever clauses such as cif, fob, ex ship or ex works are used. Incoterms represent internationally recognized standard rules and constitute – due to this quality – a piece of substantive international sales law. Further rules relating to the application of clauses which have been put into practice were prepared by the United Nations Economic Commission for Europe (→ Regional Commissions of the United Nations). These rules cover such topics as the supply and erection of plant and machinery (1953), and consumer goods (1961).

C. Evaluation

1. *The Hague Uniform Sales Law*

After its entry into force, the United Nations Sales Law will supersede the Hague Uniform Sales Law, since the most important contracting States have already signed the UN Convention of 1980 and after its entry into force must denounce the Hague Conventions.

2. *UN Sales Law*

Judging from the number of States which have so far deposited their instruments of ratification or accession, it is conceivable that the UN Sales Law will come into force all over the world. Even if some parties decide to exclude the uniform law in individual cases, the uniform law will have its impact on the provisions stipulated in such cases.

This influence may be felt, for example, in the general conditions of exports and imports which will be based on that law. The principles of the UN Sales Law for the resolution of conflicts will evolve into rules generally accepted in international trade.

3. *Special Arrangements for Consumer Contracts and Product Liability*

In addition, an attempt must be made to develop uniform regulations for consumer contracts, which are not covered by the UN Sales Law. The framework for these efforts will be the further activities of either UNCITRAL or the Hague Conference (i.e. the 14th Hague Conference's 1980 draft of a convention of the law applicable to certain consumer sales).

The unification of the substantive law on product liability is another urgent task in the future evolution of the law. Attempts have been made by the → Council of Europe (European Convention on Products Liability in regard to Personal Injury and Death, concluded on January 27, 1977, not yet in force; ETS, No. 91) and by the EEC (Proposal of a Directive of the Council for the adoption of legal and administrative regulations on the liability for faulty products, September 26, 1979).

4. *Supplementary Provisions*

The Uniform Sales Law will be supplemented by the Unification of Agency Law (UNIDROIT Geneva Convention on Agency in the International Sale of Goods, concluded February 15, 1983; ILM, Vol. 22 (1983) p. 246). Under the auspices of UNIDROIT a draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods (1972, revised in 1980) is being considered.

United Nations, Register of Texts of Conventions and Other Instruments concerning International Trade Law, Vol. 1 (1971) 5–124.

United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March–11 April 1980, Official Records (1982) UN Doc. A/CONF.97/19.

K. ZWEIGERT and J. KROPHOLLER (eds.), Sources of International Uniform Law, Vol. 1 (1971) 41–216.

International Chamber of Commerce, International Rules for the Interpretation of Trade Terms (Incoterms 1980), ICC Publ. No. 350 (1980).

E. RABEL, Das Recht des Warenkaufs, 2 vols. (1936–1958).

R.H. GRAVESON, E.J. COHN and D. GRAVESON, The Uniform Laws on International Sales Act 1967, A Commentary (1968).

J. KROPHOLLER, Internationales Einheitsrecht (1975).

H.-J. MERTENS and E. REHBINDER, Internationales Kaufrecht, Kommentar zu den Einheitlichen Kaufgesetzen (1975).

H. DÖLLE et al., Kommentar zum Einheitlichen Kaufrecht, Die Haager Kaufrechtsübereinkommen vom 1. Juli 1964 (1976).

UNIDROIT, New Directions in International Trade Law, Second Congress on Private Law, September 1976 (1977).

C. SCHMITTHOFF, The Export Trade (7th ed. 1980).

E. VON CAEMMERER, Internationale Vereinheitlichung des Kaufrechts, Schweizerische Juristen-Zeitung, Vol. 77 (1981) 257–267.

F. EISEMANN and W. MELIS, INCOTERM Ausgabe 1980, Kommentar (1981).

P. SCHLECHTRIEM, Einheitliches UN-Kaufrecht, Das Übereinkommen der Vereinten Nationen über internationale Warenkaufverträge (1981).

J.O. HONNOLD, Uniform Law for International Sales under the 1980 United Nations Convention (1982).

R. HERBER, Wiener UNCITRAL-Übereinkommen über internationale Warenkaufverträge vom 11. April 1980 (2nd ed. 1983).

N. HORN and C.M. SCHMITTHOFF (eds.), The Transnational Law of International Commercial Transactions (1982).

N. GALSTON and H. SMIT (eds.), United Nations Convention on Contracts for the International Sale of Goods, Proceedings from the 1983 Conference held by the Parker School of Foreign and Comparative Law, Columbia University (1984).

GERT REINHART

SCHTRAKS V. GOVERNMENT OF ISRAEL

1. *Background*

The origins of the Schtraks affair lay in a quarrel between the parents and grandparents of the boy Yossele Schumaker. The parents, recent emigrants to Israel from the Soviet Union, had placed him under the care of his maternal grandparents for over a year while the Schumakers sought to re-establish their lives. Difficulties arose when the time came for the boy to be returned to his parents. The grandparents wished him to have an orthodox Jewish upbringing and feared the

parents would not ensure that he did. They refused to return the boy to his parents and eventually disobeyed an order of the Israeli Supreme Court to do so. The boy's grandfather was sent to prison. Shalom Schtraks, the boy's uncle, was sought in England by the Government of Israel for his part in the attempt to hide the boy's whereabouts from the authorities. He was wanted to stand trial in Israel on charges of perjury and child stealing. The affair was widely followed in Israel and was referred to in debates in the Knessett. Inevitably, it began to take on the dimensions of a political controversy over the role of religion in the State of Israel. Supporters of the Schtraks family asserted that the tenets of orthodox Judaism transcended the laws of the State of Israel. It was against this background that Shalom Schtraks was committed by a magistrate in England to await → extradition to Israel pursuant to the Extradition Acts, 1870 to 1935. Schtraks appealed to the divisional court of the Queen's Bench by way of a writ of habeas corpus in R. v. Governor of Brixton Prison, Ex parte Schtraks, (1963) 1 Q.B. 55. His appeal was dismissed, so he further appealed to the House of Lords in Schtraks v. Government of Israel, (1964) A.C. 556.

2. *The Decision*

In both instances, Schtraks's appeal was essentially based on two grounds. The first of these was rejected without difficulty. Schtraks contended that the Extradition Act 1870 (brought into force by the Israel (Extradition) Order 1960 following an → extradition treaty between the United Kingdom and Israel) would not apply to offences committed in → Jerusalem because the latter was not a "territory" within Art. 1 of the agreement with Israel and Israeli sovereignty over Jerusalem was not recognized by the Government of the United Kingdom (→ Israel: Status, Territory and Occupied Territories). While both courts accepted that, so far as the United Kingdom was concerned, Israel exercised only *de facto* authority over the city, it was sufficient for Israel to be exercising jurisdiction for the extradition agreement to apply (→ Jurisdiction of States). As Lord Parker CJ put it in the Divisional Court, the important consideration was whether "the writ of a contracting party runs in a particular area" ((1963) 1 Q.B. 74). The fact that the United Kingdom recognized no other *de jure* authority over Jerusalem persuaded both courts to deal with this ground of appeal in relatively short order.

Schtraks's second main ground of appeal provided the courts and later commentators with much to ponder; he contended the so-called political offences exception in section 3 of the Extradition Act 1870 ought to apply in his case, given the political furore which had arisen in Israel over the Schtraks affair. Section 3(1) provides:

> "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought in *habeas corpus* proceedings . . . that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."

The House of Lords was thus presented with a rare opportunity to consider the few available English municipal precedents and provide lower courts with an authoritative ruling on what constituted an "offence of a political character". In Re Castioni (1891) 1 Q.B. 199 the court adopted Stephen J.'s interpretation that fugitive criminals were not to be surrendered if their crimes were incidental to and formed part of political disturbances. Re Meunier, (1894) 2 Q.B. 415 firmly established the additional requirement that there be two or more parties in a State, each seeking to impose the government of its choice on the other. Offences committed in pursuance of this object were political offences, otherwise not. These clear 19th century guidelines were less than equal to the political challenges of the 20th century. By 1955, in R. v. Governor of Brixton Prison, Ex parte Kolczynski, (1955) 1 Q.B. 540, the court was able to identify an offence of a political character, even though no "political disturbance" was present in the case, nor were the fugitives contending for political power; they were merely mutineers fearing the prospect of being tried in Poland for their political views on the evidence of a political officer on board their ship.

In the Schtraks case, the House of Lords confirmed what might be called the modern view of

political offences which sees the fugitive at odds with the requesting State on some issue connected with the political control or government of the country. Analogies were drawn with political asylum (→ Asylum, Territorial), political prisoners and political → refugees, but the House of Lords was careful to circumscribe this approach. An offence would not necessarily be seen as political, as Viscount Radcliffe pointed out ((1964) A.C. 591), simply because it was committed for a political object or motive or in furtherance of a political cause or campaign. If the central government stood apart and enforced the criminal law that had been violated, the offence would have to be seen as merely criminal. Thus, in this case, Shalom Schtraks's appeal was dismissed and he was extradited to Israel.

3. Evaluation

The empirical progress of the common law, proceeding from case to case and eschewing unnecessarily wide statements of principle, is not without its critics. The Schtraks case illustrates the common law's capacity for renewal and adjustment. Like the earlier decisions on the political offences exception in England, the House of Lords would not be drawn on a definition, instead relying on analogy and illustration. An area of law originally developed by Victorian legalists in response to the rise of 19th century nationalism evolved to take account both of the totalitarian tendencies of many 20th century governments and the more even-handed efforts of liberal governments to stand apart from political extremists and enforce the criminal law.

C.F. AMERASINGHE, The Schtraks Case, Defining Political Offences and Extradition, Modern Law Review, Vol. 28 (1965) 27–45.

B.A. WORTLEY, Political Crime in English Law and in International Law, BYIL, Vol. 45 (1971) 219–253.

C.L. CANTRELL, The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland, Marquette Law Journal, Vol. 60 (1977) 777–824.

C. VAN DEN WIJNGAERT, The Political Offence Exemption to Extradition (1980) 111–121.

T. STEIN, Die Auslieferungsausnahme bei politischen Delikten (1983) 183–206.

JONATHAN S. IGNARSKI

SELF-DETERMINATION

A. Historical Background

The political origins of the modern concept of self-determination can be traced back to the American Declaration of Independence of July 4, 1776, which proclaimed that governments derived "their just powers from the consent of the governed" and that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it". The principle of self-determination was further shaped by the leaders of the French Revolution, whose doctrine of popular sovereignty, at least initially, required the renunciation of all wars of → conquest and contemplated → annexations of territory to France only after → plebiscites (→ Territory, Acquisition).

During the 19th century and the beginning of the 20th the principle of self-determination was interpreted by nationalist movements as meaning that each nation had the right to constitute an independent State and that only nationally homogeneous States were legitimate. This so-called principle of nationalities provided the basis for the formation of a number of new States and finally, at the end of World War I, for the → dismemberment of the Austro-Hungarian and Russian Empires. The principle of self-determination was also prominent in the unification processes of Germany and Italy, which to a large degree were based on national characteristics and in which plebiscites played a large part (→ Irredentism).

Self-determination further evolved when it was espoused by the socialist movement and the Bolshevik revolution. Defined and developed by Lenin and Stalin, the principle of self-determination was represented as one of international law. It should, however, be mentioned that the right of self-determination in Soviet doctrine exists only for cases where it serves the cause of class conflict and so-called socialist justice; it is only a tactical means to serve the aims of world communism and not an end in itself (→ Socialist Conceptions of International Law).

During World War I, President Wilson championed the principle of self-determination as it became crystalized in → Wilson's Fourteen Points. Although this proposal formed the basis

of the peace → negotiations with the Central Powers, self-determination was subsequently far from fully realized in the Paris Peace Treaties (→ Peace Treaties after World War I). It was, however, reflected in a number of plebiscites held by the Allies in some disputed areas and it was one of the basic components of a series of treaties concluded under the auspices of the → League of Nations for the protection of → minorities. Finally, in Art. 22 of the Covenant of the League of Nations, the → mandates system was devised as a compromise solution between the ideal of self-determination and the interests of the occupying powers. However, self-determination as a general principle did not form part of the Covenant and therefore was, for the duration of the League of Nations, a political rather than a legal concept. This was confirmed by the League's Council and its expert advisors in the Aaland Islands dispute (1920/1921) even though, in the particular circumstances in the case, autonomy rights were granted to the population concerned (→ Aaland Islands).

B. Development under the Aegis of the United Nations

1. Incorporation into the UN Charter

The principle of self-determination was invoked on many occasions during World War II. It was also proclaimed in the → Atlantic Charter of August 14, 1941, in which President Roosevelt of the United States and Prime Minister Churchill of the United Kingdom declared, *inter alia*, that they desired to see "no territorial changes that do not accord with the freely expressed wishes of the people concerned", that they respected "the right of all peoples to choose the form of government under which they will live" and that they wished to see "sovereign rights and self-determination restored to those who have been forcibly deprived of them". The provisions of the Atlantic Charter were restated in the Declaration by the → United Nations signed in Washington on January 1, 1942, in the Moscow Declaration of 1943 and in other important instruments of the time.

Ultimately, the provisions of the Atlantic Charter had a considerable influence on the work of the San Francisco Conference in 1945 where the concept of self-determination took shape and was incorporated into the → United Nations Charter. Article 1(2) states that it is one of the purposes of the United Nations to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace". In Chapter IX (International Economic and Social Co-operation), Art. 55 lists several goals the organization should promote in the spheres of economics, education, culture and → human rights with a view, as is noted in the introductory clause, "to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". The Charter also implicitly refers to the principle of self-determination in the part concerning colonies and other dependent territories. Art. 73 affirms that "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories . . ." (→ Non-Self-Governing Territories). Furthermore, Art. 76(b) provides that one of the basic objectives of the trusteeship system is to promote the "progressive development" of the inhabitants of the trust territories towards "self-government or independence", taking into account, *inter alia*, "the freely expressed wishes of the peoples concerned" (→ United Nations Trusteeship System).

In trying to assess the legal significance of these provisions it should not be assumed that the concept of self-determination has become a legally binding principle of conventional international law by the mere fact of its incorporation into the UN Charter. Although the provisions concerning non-self-governing and trust territories entail binding international obligations, the general principles of "self-determination" and of "equal rights" of peoples, which in the formula used by the Charter appear to be two component elements of the same concept, seem to be too vague

and also too complex to entail specific rights and obligations. In particular, the Charter neither supplies an answer to the question as to what constitutes a "people" nor does it lay down the content of the principle. In the absence of any concrete definition, it cannot realistically be interpreted, applied or implemented in connection with the highly various facts of international life and thus possesses primarily a very strong moral and political force in guiding the organs of the United Nations in the exercise of their powers and functions. This interpretation is supported by the fact that self-determination is conceived in the text of Art. 1(1) of the Charter as one among several possible "measures to strengthen universal peace" and, in order to fulfil its instrumental function, must therefore be of a highly flexible nature.

2. Development through UN Practice

The first significant contribution made by the United Nations in developing the concept of self-determination was the Declaration on the Granting of Independence to Colonial Countries and Peoples. In this Resolution 1514(XV), which was adopted by the → United Nations General Assembly on December 14, 1960 without dissenting votes, it was stated that all peoples have the right to self-determination. The administrative powers were called upon to take immediate steps to transfer without reservation all powers to the peoples in the trust and non-self-governing territories or all other territories which had not yet attained independence, "in accordance with their freely expressed will and desire". This Declaration represents the political and – in some observers' view – the legal basis for the → decolonization policy of the United Nations for whose implementation special institutions and procedures were created using plebiscites and elections as modes to determine the will of peoples. In Resolution 1541(XV) of December 15, 1960 the General Assembly also elaborated a list of principles which were to guide members in deciding whether or not particular territories qualified as territories to which Chapter XI of the Charter applied.

A further step in the development of the concept of self-determination by the General Assembly was the adoption of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights on December 16, 1966 (see → Human Rights Covenants). These two treaties which entered into force on January 3 and March 23, 1976 restate in their identically worded Art. 1 the right of all peoples to self-determination, as defined in the colonial declaration mentioned above, and call upon the "States Parties . . . , including those having responsibility for the administration of Non-Self-Governing and Trust Territories", to promote and respect this right. They also state that all peoples may, "for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law" (→ Natural Resources, Sovereignty over), and that in "no case may a people be deprived of its own means of subsistence". By being included in Art. 1 of the Covenants, the concept of self-determination as a whole was given the characteristic of a fundamental human right or, more accurately, that of a source or essential prerequisite for the existence of individual human rights, since these rights could not genuinely be exercised without the realization of the (collective) right of self-determination. In their general formulation the Covenants provide essential evidence of the meaning and content of the principle of self-determination even for States which are not parties to them.

In its Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by → consensus as the Annex to Resolution 2625(XXV) on October 24, 1970 (→ Friendly Relations Resolution), the General Assembly worked out the most authoritative and comprehensive formulation so far of the principle of self-determination. According to this document the principle of equal rights and self-determination of peoples, enshrined in the Charter of the United Nations, embraces the right of all peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development" as well as the duty of every State "to respect this right in accordance with the provisions of the Charter". It further added that the establishment of a

sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by the people constitute modes of implementing the right of self-determination, thus stressing, as the critical issue, the methods of reaching the decision and not the result.

C. Status, Scope and Content in Contemporary International Law

Both the United Nations and the majority of authors are alike in maintaining that the principle of self-determination is part of modern international law. There are indeed good reasons for recognizing its legal character, as after its mere inclusion in the UN Charter the principle has been confirmed, developed and given more tangible form by a consistent body of State practice and has been embodied among "the basic principles of international law" in the Friendly Relations Resolution. The point at issue seems to be today to what extent the principle operates as a legal right in contemporary international law and what other (more indirect) legal consequences might be attributed to this principle.

1. Self-Determination as a Binding Rule of International Law

The principle of self-determination is certainly binding upon the parties if they have adopted it as the basis or as a criterion for the settlement of a particular issue or dispute. In the peace treaties after World War I, and in the cases of → Kashmir (after 1948), the → Saar Territory (1955) and Algeria's struggle for independence, the principle of self-determination was chosen as a basis for negotiation, and in the Paris agreement terminating the → Vietnam War (1973) the parties expressly recognized the South Vietnamese people's right to self-determination. Apart from these sorts of conventional arrangement, self-determination, as a general principle of modern international law, seems to be applicable in three categories of cases.

First, the principle of self-determination includes the right of the people of an existing State to choose freely their own political system and to pursue their own economic, social and cultural development. As such the principle does not, in view of the primitive stage of organization of the world community, impose on all States the duty to introduce or maintain a democratic form of government, but essentially refers to the principle of sovereign equality of States and the prohibition of → intervention which are already part of international law (→ States, Sovereign Equality; → Non-Intervention, Principle of).

Second, the principle of self-determination might be considered to apply, as was suggested by the Committee of Rapporteurs in the Aaland Islands Case in 1921, in situations where the existence and extension of territorial sovereignty is altogether uncertain (e.g. → Palestine), and also, as an absolutely exceptional solution, when a State brutally violates or lacks the will or the power to protect human dignity and the most basic human rights; however, in such cases the assumption of a legal claim to self-determination only seems to be justified if a people conscious of its own identity and settling on a common territory is discriminated against as such and if no effective remedies exist in municipal and international law to adjust the situation (LoN Council Doc. B7/21/68/106 VII, pp. 22–23).

Third, self-determination – as a result of the subsequent practice of the United Nations concerning Chapters XI to XIII of the UN Charter – clearly emerged as the legal foundation of the law of decolonization. As expressly affirmed by the → International Court of Justice both in the → Namibia and → Western Sahara advisory opinions (ICJ Reports (1971) at p. 31, and ICJ Reports (1975) at pp. 31–33), it became applicable to non-self-governing territories, trust territories and mandates, notwithstanding the differences and qualifications of the respective constituent instruments. As such, it includes the right of the population of a territory freely to determine its future political status. Furthermore, the Friendly Relations Resolution recognized that the territory of a colony or other non-self-governing territory has, under the UN Charter, reached a status separate and distinct from the territory of the State administering it. It is generally concluded that, as a consequence of this qualification, the → use of force to prevent the exercise of self-determination of a colonial people has become unlawful, as has the assistance of third parties to the metropolitan powers in their effort to frustrate self-determination. On the other hand

it should be noted that armed support of colonial → liberation movements is not considered legal by a number of States and was not recognized as such, for lack of consensus, in the Friendly Relations Resolution (→ Armed Conflict; → Civil War).

It should be added that, apart from the law of decolonization with its special foundation in the UN Charter, the principle of self-determination does not seem to include a general right of groups to secede from the States of which they form a part. At first sight one might be tempted to interpret as an endorsement of such a right a passage of the Friendly Relations Resolution which states that the principle of self-determination does not authorize "any action which would dismember . . . independent States conducting themselves in compliance with the principle of . . . self-determination of peoples . . . and thus possessed of a government representing the whole people . . . without distinction as to race, creed or colour". However, the legal significance of this clause should not be overrated, as there is no other international document of this kind from which such a (possible and only limited) recognition of the legality of → secession could be deduced. In addition, State practice in general and particularly with regard to cases such as → Tibet, Katanga, Biafra and Bangladesh do not lend support to the thesis that a rule of customary international law has emerged according to which the principle of self-determination includes a right of secession and, as a consequence, the legality of → wars of national liberation and third party interventions on behalf of the secessionist movements. On the contrary, it seems to be sound to agree with a whole body of General Assembly resolutions which assume that the fundamental principles underlying the present international order such as → sovereignty, → territorial integrity and political independence preclude the existence of such a right. A general right to military interventions in aid of insurgents would also hardly be compatible with the primary purpose of the United Nations to maintaining international peace and security to which, pursuant to Art. 1 of the Charter, the principle of self-determination is subordinated. It therefore seems to be premature to recognize secession as an integral element of the right of self-determination at least as long as the basic uncertainties about its subject, content as well as the (internal and external) circumstances of its exercise prevail and as long as no methods and authorities are established for ascertaining legal entitlements of this kind in a given situation. However, it is suggested that as an effect of self-determination the traditional law of intervention has been modified in that military help to established governments which manifestly suppress a claim to self-determination is now to be considered illegal.

Another question concerns the self-determination of peoples or nations living in → divided States. It has been strongly advocated that a nation which has been divided into two States by outside interference and without the clear consent of the population still possesses the inherent right of self-determination including the right of reunification. Actual cases are always connected with far-reaching political and legal controversies.

2. *Self-determination and the Interpretation and Development of International Law*

Whereas the principle of → self-determination is too broad and ill-defined to constitute a general rule of international law permitting any immediate application to a variety of particular cases, it would, nevertheless seem inappropriate to restrict its legal significance to the categories of cases mentioned above. Two additional, "intermediate" functions need to be considered: the aid provided by the principle of self-determination in the interpretation of existing international law and its character as a basic source of legitimation for the development and alteration of international law.

(*a*) *The interpretative function*

An important function of the principle of self-determination stems from its inclusion among the purposes of the United Nations proclaimed in Art. 1 of the Charter. As such it appears as a guiding principle in clarifying the functions and powers of the organization and the rights and duties of its members. In some provisions the Charter refers either explicitly or implicitly to these purposes. So the terms of Art. 2(3) of the Charter, according to which all members are obliged to "settle their international disputes by

peaceful means in such a manner that international peace and security, *and justice*, are not endangered" (emphasis added) might be understood to refer, among other things, to the principle of self-determination. The same idea is more clearly expressed in Art. 14 of the UN Charter by virtue of which the General Assembly may "recommend measures for the peaceful adjustment of any situation . . . which it deems likely to impair the . . . *friendly relations* among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations" (emphasis added). Similarly the → United Nations Security Council is called upon in Art. 24(2) of the Charter to "act in accordance with the Purposes and Principles of the United Nations" in discharging its duties among which an important role is played by the → peaceful settlement of disputes regulated in Chapter VI of the UN Charter. Furthermore, Arts. 4 and 6 concerning the admission and expulsion of members might be interpreted in the light of the principle of self-determination. Besides these examples, the principle of self-determination should be considered as an essential guideline in determining the activities of the United Nations and its organs, among which the efforts of the → United Nations Secretary-General in offering his → good offices (e.g. the arrangement or supervision of a plebiscite in a boundary dispute) or in providing → conciliation and mediation seem to be especially relevant.

(*b*) *Self-determination as a guiding principle for the development of international law*

The principle of self-determination in its modern conception also appears as a principle of legitimacy underlying and inspiring the evolution of international law. In this sense, the UN General Assembly has tried to expand the scope of its immediate applicability outside the traditional context of decolonization by expressly recognizing the right of self-determination of the Palestinians and of the inhabitants of South Africa; this practice has, however, been opposed by a number of States. Self-determination is also proclaimed by the United Nations and especially by the developing countries as an essential feature of the emerging → international law of development and in particular in the establishment of a new → international economic order. In its economic context the principle is understood as the right of peoples to economic development and to full and effective exercise of State sovereignty, including, as a basic constituent, the right of any State to reintegrate its national wealth and resources into the national assets and to use them in the interests of the economic development and well-being of its people. Moreover, the fact that the international community recognized neither Southern Rhodesia before elections on the basis of one man–one vote (→ Rhodesia/Zimbabwe) nor the Bantustans, established on the territory of South Africa (→ South African Bantustan Policy) suggests the emergence of a new rule of international law which holds that a → State established in violation of the right of self-determination (and basic human rights such as racial discrimination) is a nullity in international law.

If finally, at the close of the age of colonialism, self-determination as a principle is to become truly universal in scope, it should be developed in the sense of a continuing process of internal self-government – i.e. democratic government and the protection of (ethnic) minorities within existing States. The United Nations would not be restricted by Art. 2(7) of the Charter (reserving certain matters within the → domestic jurisdiction of States) in the development of new rules of this sort, as the principle of self-determination has long ceased to be a matter solely within the domestic sphere. Its extension to peoples within States might, in a more integrated world community, contribute to the strengthening of universal peace and the safeguarding of respect for human rights as the basis of State sovereignty, thus fulfilling a more central function within the framework of principles in which it is placed by the UN Charter.

The Right to Self-determination – Implementation of United Nations Resolutions, Study prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1980), UN Doc. E/CN.4/Sub.2/405/Rev. 1.

The Right to Self-determination – Historical and Current Development on the Basis of United Nations Instruments, Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Pre-

vention of Discrimination and Protection of Minorities (1981), UN Doc. E/CN.4/Sub.2/404/Rev. 1.

G. DECKER, Das Selbstbestimmungsrecht der Nationen (1955).
H. RASCHHOFER, Das Selbstbestimmungsrecht, Sein Ursprung und seine Bedeutung (1960).
B. MEISSNER, Sowjetunion und Selbstbestimmungsrecht (1962).
P. KLUKE, Selbstbestimmung (1963).
K. RABL (ed.), Studien und Gespräche über Selbstbestimmung und Selbstbestimmungsrecht, 2 vols. (1964/65).
R. ARZINGER, Das Selbstbestimmungsrecht im allgemeinen Völkerrecht der Gegenwart (1966).
H.S. JOHNSON, Self-determination within the Community of Nations (1967).
B. MEISSNER and T. VEITER, Das Selbstbestimmungsrecht nach sowjetischer und westlicher Lehre (1967).
B. MEISSNER (ed.), Das Selbstbestimmungsrecht der Völker in Osteuropa und China (1968).
A. COBBAN, The Nation State and National Self-determination (2nd ed. 1969).
H. RASCHHOFER, Selbstbestimmungsrecht und Völkerbund, Das Juristengutachten im Aalandstreit vom 5. September 1920 (1969).
H. KLOSS (ed.), Beiträge zu einem System des Selbstbestimmungsrechts (1970).
R. EMERSON, Self-determination, AJIL, Vol. 65 (1971) 459–475.
H. VON MANGOLDT, Die West-Irian-Frage und das Selbstbestimmungsrecht der Völker, ZaöRV, Vol. 31 (1971) 197–245.
U.O. UMOZURIKE, Self-determination in International Law (1972).
S. CALOGEROPOULOS-STRATIS, Le droit des peuples à disposer d'eux-mêmes (1973).
H. CHOU-YOUNG, Das Selbstbestimmungsrecht als eine Vorbedingung des völligen Genusses aller Menschenrechte (1973).
W. HEIDELMEYER, Das Selbstbestimmungsrecht der Völker (1973).
E. KRISTOF, Die Lehre vom Selbstbestimmungsrecht in der Völkerrechtsdoktrin in der DDR (1973).
K. RABL, Das Selbstbestimmungsrecht der Völker (2nd ed. 1973).
A. RIGO SUREDA, The Evolution of the Right of Self-determination (1973).
K. DOEHRING, Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts, Referat und Diskussion der 13. Tagung der Deutschen Gesellschaft für Völkerrecht (1974).
L.C. CHEN, Self-Determination as a Human Right, in: Toward World Order and Human Dignity, Essays in Honor of Myres S. McDougal (1976) 198–261.
J.-F. GUILHAUDIS, Le droit des peuples à disposer d'eux-mêmes (1976).
H.O. SCHOENBERG, Limits of Self-determination, Israel Yearbook on Human Rights, Vol. 6 (1976) 91–103.
D. THÜRER, Das Selbstbestimmungsrecht der Völker; mit einem Exkurs zur Jurafrage (1976).
F. ERMACORA, Die Selbstbestimmungsidee, Ihre Entwicklung von 1918–1974 (1977).
E. OFUATEY-KODJOE, The Principle of Self-determination in International Law (1977).
T. VEITER, Nationalitätenkonflikt und Volksgruppenrecht im 20. Jahrhundert, Vol. 1, Entwicklungen, Rechtsprobleme, Schlußfolgerungen (1977).
L.C. BUCHHEIT, Secession: The Legitimacy of Self-determination (1978).
J. CRAWFORD, The Creation of States in International Law (1979).
D. RONEN, The Quest for Self-Determination (1979).
Y. ALEXANDER and R.A. FRIEDLANDER (ed.), Self-determination: National, Regional and Global dimensions (1980).
H. REINHARD, Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht (1980).
A. CASSESE, The Self-Determination of Peoples, in: L. Henkin (ed.), The International Bill of Rights (1981) 92–113.
Y. DINSTEIN (ed.), Models of Autonomy (1981).
E. MURLAKOV, Das Recht der Völker auf Selbstbestimmung im israelisch-arabischen Konflikt (1983).

DANIEL THÜRER

SEX DISCRIMINATION

1. Definition

In international law, sex discrimination encompasses any distinction, exclusion or restriction made on the grounds of gender which has the effect or purpose of impairing or nullifying the enjoyment of → human rights on a basis of equality between men and women.

2. Historical Beginnings

The approaches to this topic have mirrored the changing conceptions of sex roles in society over time. The initial concern in international law centred on measures aimed at protecting women in their traditional roles as wives and mothers. In time of → armed conflict, special protection was afforded to women and children (→ Civilian Population, Protection; → War, Laws of, History). It took many decades for the ideas of equality espoused by early feminists such as Mary Wollstonecraft in the 1790s and Flora Tristan in the 1830s to become incorporated in notions of human rights.

With the 19th century and the large-scale employment of women in industry, governments came under pressure to improve the often poor working conditions of women. In 1890, 15 European States meeting at Berlin declared it undesirable for girls and young women to work at night or in dangerous jobs. A follow-up conference held at Berne in 1905 led to the adoption in 1906 of the first international convention relating exclusively to women, prohibiting their employment at night (entry into force, 1913; see Troclet, pp. 29–47). The concern for protecting women was expressed in the → preamble to the Constitution of the → International Labour Organisation (ILO), created in connection with the → Versailles Peace Treaty in 1919. Two of the first ILO Conventions called for maternity protection and barred women from night work in industrial undertakings, respectively; as a result of the → Permanent Court of International Justice's Advisory Opinion on the Interpretation of the Convention concerning Employment of Women during the Night, a revised instrument on night work was adopted in 1934. The Versailles Treaty, while supporting the suppression of the → traffic in persons, also reflected ideas which went beyond protection: It called upon member States of the → League of Nations to provide equitable and humane working conditions for all workers – men, women and children – and to adopt the principle of equal pay, irrespective of sex, for work of equal value (Arts. 23 and 427; ILO Constitution, preamble).

Restrictive protective attitudes had entailed civil and political disabilities for women which several measures sought to reduce. The 1902 → Hague Conventions on private international law laid down rules concerning marriage, divorce and guardianship of minors and the Inter-American Convention on the Nationality of Married Women was adopted in Montevideo in 1933 at the behest of the Inter-American Commission on Women.

3. The Modern Period

World War II marked a turning point in the approach to human rights generally, and sex-based discrimination in particular. In 1944, the ILO's Declaration of Philadelphia proclaimed that social justice implied equality of opportunity, irrespective of race, creed or sex. The → United Nations Charter (1945) called for "universal respect for, and observance of, human rights and fundamental freedoms for all", without distinction as to sex, and referred to the "equal rights of men and women" (Preamble, Art. 55(c); see also Arts. 1(3), 8, 13(1)(b), 56 and 76(c)). These principles were reinforced in the → Universal Declaration of Human Rights (Preamble, Arts. 1 and 2), which also specifically guaranteed equal marital rights (Art. 16).

On June 21, 1946, the → United Nations Economic and Social Council established the originally 15, now 32 member Commission on the Status of Women, charging it, *inter alia*, with the promotion of women's rights in the economic, social, political and educational fields (see Council Res. 11(II)).

Conventions on particular manifestations of discrimination on the basis of sex, and sometimes other grounds as well, complemented the general principles of non-discrimination. In response to the exclusion of women from suffrage and public office in a number of countries, the → United Nations General Assembly adopted the Convention on the Political Rights of Women in 1952 (entry into force 1954). Concern over another problem, the automatic loss of a woman's → nationality upon marriage or its dissolution, led to the Convention on the Nationality of Married Women (1957, entry into force 1958). When the Supplementary Convention on → slavery was drawn up (1956, entry into force 1957), a prohibition was placed on any institution or practice involving bride purchase or wife transfer or inheritance (Art. 1(c)). ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value was adopted in 1951, followed by the more general Convention No. 111 on Discrimination in respect of Employment and Occupation in 1958. In 1960, the → United Nations Educational, Scientific and Cultural Organization adopted the Convention against Discrimination in Education (entry into force 1962), which calls for the elimination and prevention of sex discrimination in all aspects of education, but allows sex-segregated education under specified conditions (Art. 2(a)).

The International Covenant on Economic, Social and Cultural Rights and the International

Covenant on Civil and Political Rights (both of 1966, entry into force 1976) ensure the equal rights of men and women to enjoy the rights those instruments guarantee (Arts. 2 and 3 of each; see → Human Rights Covenants). Art. 7(a)(1) of the former recognizes, *inter alia*, a right to equal remuneration for work of equal value, and special protection for mothers during a reasonable period before and after childbirth (Art. 10(2)). The latter instrument affirms equal marital rights (Art. 23) and provides that "the law shall prohibit any discrimination and shall guarantee all persons equal and effective protection against discrimination on any grounds such as . . . sex" (Art. 26).

In 1967, the UN General Assembly unanimously proclaimed the Declaration on the Elimination of Discrimination against Women (Res. 2263(XXII)), which calls upon member States to abolish existing laws, customs, regulations and practices which effect such discrimination (Art. 2). It addresses the matters of educating public opinion to eradicate prejudice (Art. 3), political rights (Art. 4), nationality (Art. 5), marital and civil law rights (Art. 6), discriminatory penal laws (Art. 7), prostitution (Art. 8), education (Art. 9), and economic and social rights (Art. 10). The following year, the Proclamation of the International Conference on Human Rights at Tehran called for full implementation of the 1967 Declaration. Upon the recommendation of the Commission on the Status of Women, ECOSOC instituted a system of periodic reporting by States on action taken to fulfil the principles of the Declaration (Res. 1325(XLIV) of May 31, 1968) and the system was expanded in 1972 and 1975. Since 1983, the Commission has had a Working Group to consider communications which "appear to reveal a consistent pattern of reliably attested injustice and discriminatory practices against women" (Res. 1983/27 of May 26, 1983). The Commission is empowered to recommend action regarding them to ECOSOC.

In 1970, a study was initiated to determine the extent to which the rights covered by the 1967 Declaration were already embodied in international conventions. Upon completion of that report in 1972, it was proposed that drafting begin on a comprehensive convention on the elimination of discrimination against women. With input from other agencies, the Commission on the Status of Women prepared a draft which was submitted to the UN General Assembly in 1977. That body adopted the Convention on the Elimination of All Forms of Discrimination against Women by Resolution 34/180 of December 18, 1979 (hereafter, the 1979 Convention). It entered into force on September 3, 1981, upon the 20th ratification. The 1979 Convention established the Committee on the Elimination of Discrimination against Women, composed of 23 experts chosen by States, but serving in their personal capacity, for terms of four years (Art. 17). The Committee meets for up to two weeks each year to consider reports submitted by parties, generally every four years, on the measures adopted to give effect to the provisions of the Convention. The Committee reports annually to the UN General Assembly and may make suggestions and general recommendations based on information received from States parties, together with their comments, with a copy of the report to be transmitted to the Commission on the Status of Women. A role for → United Nations Specialized Agencies is also foreseen (Art. 22). The Committee adopted its rules of procedure at its first session in October 1982 (text in UN GA, 38th Sess., Supp. No. 45 (A/38/45)). Its secretariat is the Branch for the Advancement of Women of the Centre for Social Development and Humanitarian Affairs in the UN Office at Vienna.

4. UN Decade for Women

The adoption of the 1979 Convention was given impetus by the UN General Assembly's proclamation of 1975 as International Women's Year (Res. 3010(XXVII) of December 18, 1972), the focal point of which was a world conference held in Mexico City in June 1975. That conference adopted the Declaration of Mexico on the Equality of Men and Women and their Contribution to Development and Peace, the World Plan of Action and regional implementation plans. With the endorsement of the UN General Assembly and its proclamation of 1976–1985 as the United Nations Decade for Women: Equality, Development and Peace, a further world conference was convened in 1980 in Copenhagen to evaluate progress made towards the goals of International Women's Year (Res. 3520(XXX) of December 15, 1975). The 1980 Conference adopted the Programme of Ac-

tion for the Second Half of the UN Decade for Women, also noting that much remained to be done: "while [women] represent 50 per cent of the world adult population and one third of the official labour force, they perform nearly two thirds of all working hours, receive only one tenth of the world income and own less than 1 per cent of world property" (Report of the 1980 Conference, p. 8). A follow-up conference on progress during the decade was scheduled for 1985 in Nairobi. In 1983, the headquarters of the International Research and Training Institute for the Advancement of Women (INSTRAW), whose origins lay in the Declaration of Mexico, were inaugurated in Santo Domingo (see report to the UN GA, 38th Sess., A/38/406 of October 21, 1983).

5. *Regional Action*

Parallel to these developments, steps too numerous to mention here were being taken on a regional basis regarding the status of women (see documents in Taubenfeld and Taubenfeld). To date, the most substantial regional arrangements touching upon sex discrimination have been set up in the Americas and Western Europe (→ American Convention on Human Rights; → Council of Europe; → European Convention on Human Rights; → European Social Charter; → Organization of American States). The interpretation of Art. 119 of the Treaty of Rome regarding equal pay and of various related Council Directives of the → European Economic Community has generated considerable comment in the light of decisions by the → Court of Justice of the European Communities in a series of cases involving employment practices in the United Kingdom (for details see Landau).

6. *Current Legal Status*

While the 1979 Convention largely incorporates the statements of non-discrimination seen in earlier instruments, it moves beyond them to call for a series of affirmative actions to improve the status of women. Among the preconditions for this are the establishment of a new → international economic order and a change in the traditional roles of both men and women (Preamble). The Convention defines discrimination against women (Art. 1) and outlines the various steps States parties agree to undertake towards its elimination and the full development and advancement of women (Arts. 2 and 3). Temporary special measures undertaken by States to accelerate *de facto* equality are not considered to be discriminatory (Art. 4(1)). The parties agree to take steps to modify social and cultural patterns of conduct with a view to eliminating prejudices and practices based upon ideas of inferiority, superiority or stereotyped roles (Art. 5(a)). Measures to be taken in education are spelled out fully (Art. 10), and the various aspects of guaranteeing equal opportunity in employment and equality in social benefits are consolidated (Art. 11). Equal access to health care services (Art. 12), family benefits, financial credit and recreational and cultural activities is also to be assured (Art. 13). The Convention reiterates and expands the rights of women in political and public life (Art. 7). It addresses the special problems of rural women and recognizes their contribution in non-monetized sectors of the economy (Art. 14(1)). Steps should be taken, *inter alia*, to integrate them into development planning, cooperatives, community activities, and land reform programmes (Art. 14(2)(a)). Women's participation in international organizations is promoted (Art. 8). Finally, the parties agree to suppress all forms of traffic in women and exploitation of prostitution (Art. 6).

A new concept of the family is evident in the Convention. Both men and women are to have access to family planning services and information (Arts. 10(h), 12(1) and 14(2)(b)), and are to have the same rights to decide upon the number and spacing of children (Art. 16(e); → World Population). There is recognition of equal rights and responsibilities as parents (Art. 16(d)) and of the common responsibility of men and women in the upbringing of children (Art. 5(b)); this concept is also reflected in ILO Convention No. 156 on Workers with Family Responsibilities (1981), which was based on a 1969 Recommendation directed only towards women workers. States are to encourage the establishment of child care facilities (Art. 11(2)(c)). For the first time, women have equal rights with men with respect to the rights to choose a family name (Art. 16(g)), to confer nationality on children (Art. 9(2)) and to elect residence and domicile (Art. 15(4)). The

Convention also reaffirms women's rights contained in earlier conventions relating to nationality (Art. 9(1)) and marriage (Art. 16). Regardless of marital status, civil and legal capacities equal to those of men are guaranteed in Art. 15.

The 1979 Convention thus calls for thoroughgoing equality of rights and of treatment, except where temporary corrective action may be advisable or where women's child-bearing – as distinct from child-raising – function justifies special measures. This approach is reflected in articles relating to job rights' protection and to services or benefits in connection with pregnancy, confinement and the post-natal period (Arts. 11(2), 12(2); cf. "maternity" in Art. 4(2)). Protective legislation is to be reviewed periodically in the light of scientific and technical knowledge, with a view to revision, repeal or extension as necessary (Art. 11(3)). The older protective approach to women as a group, while certainly on the wane, is still present in international law. The ILO Conventions restricting women's employment at night and in underground work remain in force, despite several recent denunciations. Moreover, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict was proclaimed by the UN General Assembly in December 1974 (Res. 3318(XXIX)), at the time the 1979 Convention was being drafted.

7. *Evaluation*

The UN Decade for Women, building upon earlier developments, stimulated important rethinking on the steps necessary to eliminate sex discrimination (see Report of the 1980 Conference, pp. 7–14). Much of it has been reflected in the highly promotional 1979 Convention. The complex dynamics of the problem need to be given closer attention by the bodies called upon to decide issues involving sex discrimination, particularly in cases concerning ostensibly neutral policies and practices which in fact have a disproportionate impact on one gender. A comprehensive analysis of sex discrimination in all aspects of international and regional international law remains to be carried out. A still greater task lies in translating theoretical rights into daily realities.

Commission on the Status of Women, International Instruments and National Standards relating to the Status of Women, Report to the Secretary-General, UN Doc. E/CN.6/552 (1972).

Report of the World Conference of the International Women's Year, Mexico City, 19 June–2 July 1975 (UN Sales No. E.76.IV.1).

Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, 14–30 July 1980, UN Doc. A/CONF.94/35.

R.F. TAUBENFELD and H.J. TAUBENFELD, Sex-Based Discrimination, International Law and Organizations: International Treaties, Declarations and Other Acts concerning Sex-Based Discrimination and the Rights of Women in International Law (1980–), 5 vols.

United Nations, United Nations Action in the Field of Human Rights, UN Doc. ST/HR/1/Rev. 2 (1983) 81–124, 218–219, 311, 313, 325 and 331.

United Nations, Human Rights: A Compilation of International Instruments (1983), UN Doc. ST/HR/1/Rev. 2.

M.K. BRUCE, Work of the United Nations relating to the Status of Women, Revue des droits de l'homme, Vol. 4 (1971) 365–412.

K. BOALS, Women's Transnational Privileges and Disabilities, ProcASIL, Vol. 69 (1975) 107–113.

G.D. HARMBURGH et al., International Women's Year: Focus on Transnational Needs and Initiatives for Women, ProcASIL, Vol. 69 (1975) 1–39.

M.S. MCDOUGAL, H. LASWELL, and L.C. CHEN, Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination, AJIL, Vol. 69 (1975) 497–533.

Symposium, International Organizations: Achieving Human Rights of Women, Human Rights, Vol. 4 (1975) 125–216.

L.-E. TROCLET, La femme devant le droit social international (1975).

M. GUGGENHEIM, The Implementation of Human Rights by the United Nations Commission on the Status of Women: A Brief Comment, Texas International Law Journal, Vol. 12 (1977) 239–249.

N. BURROWS, The Promotion of Women's Rights by the EEC, Common Market Law Review, Vol. 17 (1980) 191–209.

C. TINKER, Human Rights for Women: The UN Convention on the Elimination of All Forms of Discrimination Against Women, Human Rights Quarterly, Vol. 3, No. 2 (1981) 32–43.

Y. KHUSHALANI, Dignity and Honour of Women as Basic and Fundamental Human Rights (1982).

A.E. MICHEL, Abortion and International Law: The Status and Possible Extension of Women's Rights to Privacy, Journal of Family Law, Vol. 20 (1982) 241–261.

N.K. HEVENER, International Law and the Status of Women (1983).

C.E. LANDAU, Recent Legislation and Case Law in the EEC on Sex Equality in Employment, International Labour Review, Vol. 123 (1984) 53–70.

ANNE M. TREBILCOCK

SLAVERY

1. Definitions

Since the conclusion of the 1926 Slavery Convention, the term "slavery" as used in international law has been defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" (Art. 1(1)). The "slave trade" includes all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him or her to slavery, or with the view to the person's being sold or exchanged, and it encompasses acts of trade or transport in slaves (Art. 1(2)). These definitions were incorporated into Art. 7 of the Supplementary Slavery Convention of 1956, which also extended to persons "of servile status" the international protections against "institutions or practices similar to slavery", such as debt bondage, serfdom, bride-purchase, inheritance or sale of wives, and child indenture (Preamble, Arts. 1 and 7(b)). While slavery concerns the status of an individual, the related but distinct phenomenon of → forced labour refers to a kind of involuntary work or service.

2. Historical Development

Slavery was practised by many early civilizations, with the frequent enslavement of → prisoners of war following a conquest. In Islam, slavery was an admissible consequence of holy war when the captives refused to adopt the Muslim religion. Regarding the law of war, Hugo Grotius could still write in 1625, "that which may be done to a slave with impunity according to the law of nations differs widely from that which natural reason permits to be done" (De juri belli ac pacis, Book III, p. 762; → War, Laws of; → History of the Law of Nations). In conjunction with the European explorations of Africa and the New World, slavery became a common practice. Pope Nicholas V issued a special bull granting King Alfonso V of Portugal the right to enslave "heathens" in regions of exploration in order to promote Christianity. From 1528 to 1685 the King of Spain granted *asientos* (fixed-term monopoly licences) allowing individuals to introduce African slaves to Spanish America; thereafter, the *asiento* was assigned by a → treaty between sovereign States. In the 17th century Britain came to dominate the "triangular trade" by which European manufactured goods and weapons shipped to Africa were exchanged for slaves who were packed into vessels destined for the New World, where commodities grown with slave labour were loaded for shipment to Europe. The profits thus accumulated provided an important impetus to the industrial revolution in Europe; between the 15th and the 19th centuries, at least 15 million Africans were enslaved for shipment to the Americas.

In the late 17th century, the Society of Friends (Quakers) and the Moravian Brethren, followed by the Puritans, first called for the abolition of the slave trade and eventually of slavery itself. Their influence in the New England colonies explains the emergence there of the first municipal court decisions emancipating slaves and the first legislation banning their importation (the British Crown overruled the latter). The philosophers John Locke, Jeremy Bentham, Edmund Burke and Adam Smith in England were joined by Montesquieu, Rousseau and Voltaire in France in condemning slavery and its trade. The French National Convention in 1794 abolished slavery and the slave trade in all French territories (reversed by Napoleon in 1802). Bolstered by successful slave revolts in Sainte Dominique (1797) and in Haiti (1804), English abolitionists in the Anti-Slavery Society (founded in 1787) successfully promoted an Act of Parliament which, *inter alia*, banned the import of slaves into any British territory and provided that a ship or vessel engaged in the slave trade could be seized or detained and condemned as prize (47 Geo. III c. 36, sess. I (1807); → Prize Law). The United States banned the import of slaves as of 1808, but illegal traffic continued to supply her Southern plantations.

The first treaty to condemn the slave trade in principle was signed by France and Great Britain in the Additional Articles to the Paris Peace Treaty of May 30, 1814 (CTS, Vol. 63, p. 193). British diplomats, under abolitionist and economic pressure, pushed hard at the → Vienna Congress (1815) for an international agreement outlawing the slave trade altogether. The outcome on February 8, 1815 was less ambitious: a → declaration by nine States calling for the "prompt suppression" of the slave trade, but without specifying any deadlines or means of en-

forcement (CTS, Vol. 63, p. 473). However, it constituted the first multilateral adoption of this humanitarian principle. In the Additional Article to the Second Paris Peace Treaty of November 20, 1815 Austria, France, Great Britain, Prussia and Russia agreed to renew their efforts towards abolition of the trade (CTS, Vol. 65, p. 257). The same powers later signed the Treaty of London on December 20, 1841, providing for the mutual right of visit and search (CTS, Vol. 92, p. 437; → Ships, Visit and Search). The application of these and similar bilaterally agreed provisions as well as the use of → mixed commissions (see Bethel) hindered the slave trade, but did not eliminate it. Slave holding was finally banned in all their possessions by Britain in 1833, France in 1848, Portugal in 1858 (calling for a gradual phase-out), the Netherlands in 1863, the United States in 1865 (as a result of the → American Civil War), Spain for Cuba in 1870 and Brazil in 1871.

As the Atlantic slave trade was waning, the Indian Ocean slave trade bringing Africans to the Near and Middle East began to expand. Bilateral treaties were not particularly successful in suppressing this trade. The → Berlin West Africa Conference (1884/1885) led to adoption of the General Act of Berlin, in which the 15 signatory States pledged to strive for the suppression of slavery in the Congo. Trading in slaves was declared to be forbidden by the principles of international law. These provisions paved the way for the conclusion of the General Act of the Brussels Conference relative to the African Slave Trade, signed on July 2, 1890 (CTS, Vol. 173, p. 293), which was the most comprehensive international treaty on the slave trade to date, comprised of 100 articles and ratified by all the European States, the Congo, Persia, Turkey, the United States and Zanzibar. The Act provided strong economic, military and legal measures to stop the slave trade, although it also explicitly recognized the status of domestic slavery. It prescribed detailed rules for ships' papers and for the use of a contracting party's flag by native vessels (for a dispute regarding Art. 32 of the Act, see → Muscat Dhows, The). Vessels could be stopped, searched, brought into port for examination and trial, and sequestrated (→ Sequestration). Liberated slaves were entitled to protection by the authorities of the signatory powers. Until the outbreak of World War I, an international bureau on Zanzibar collected information regarding suppression efforts. By virtue of its general pledge to suppress slavery and the slave trade, Art. 11(1) of the → Saint-Germain Peace Treaty (1919) has been widely viewed as having abrogated the Brussels General Act for those States signing the peace treaty. The Brussels Act had proved to be a "magnificent weapon against the slave trade" (Greenidge, p. 176).

The Covenant of the → League of Nations required States administering B → mandates to provide for the eventual emancipation of slaves, to suppress the slave trade and to prohibit forced labour (Art. 22). In 1924 the League established the Temporary Slavery Commission, which recommended that an international convention be concluded. On September 25, 1926 the Slavery Convention (LNTS, Vol. 60, p. 253) was approved by the League Assembly and signed by 36 States. Defining "slavery" and the "slave trade" for the first time in international law, the Convention entered into force on March 9, 1927. In 1932 the League Assembly established a permanent Advisory Committee of Experts which issued detailed reports from 1934 to 1938. Before the outbreak of World War II led to a suspension of its activities, the League had successfully brought pressure to bear on eight States to abolish the legal status of slavery (see Greenidge, pp. 187 and 189, and UN Doc. E/AC.33/2 (January 23, 1950)).

In 1949, the → United Nations General Assembly asked the → United Nations Economic and Social Council to study the problem of slavery (UN GA Res. 278(III) of May 13, 1949). ECOSOC then established an Ad Hoc Committee of Experts on Slavery which proposed that the → United Nations assume the powers and functions of the League under the 1926 Convention (done by a protocol opened for signature on December 7, 1953, UN GA Res. 794(VIII), which entered into force on July 5, 1955, for amended text of the Slavery Convention see UNTS, Vol. 212, p. 17), and that a supplementary convention covering practices analoguous to slavery be concluded (Report No. E/1988). The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and In-

stitutions and Practices Similar to Slavery was adopted in Geneva on September 7, 1956 (UNTS, Vol. 266, p. 3) with 40 votes in favour, 0 against and 3 abstentions, entering into force on April 30, 1957.

Over the years, a number of UN studies, surveys and reports on slavery have been prepared and examined by the General Assembly, ECOSOC, the → International Labour Organisation (ILO), the Commission on Human Rights, and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, which has had a permanent, five-member Working Group on Slavery since 1974 (→ Human Rights, Activities of Universal Organizations). The reports of Special Rapporteurs Mohamed Awad (E/4168 and Add. 1-5, issued in 1965 and E/CN.4/Sub.1/322, issued in 1971) and Benjamin Whitaker (E/CN.4/Sub.2/1982) are of particular note. Working Group and ILO reports indicate that slavery persists in some countries today.

In Resolution 1695(LII) of June 2, 1972, ECOSOC called on member States to ratify the 1926 and 1956 Conventions, to enact domestic legislation punishing those involved in slavery, the slave trade and related practices, to ratify ILO conventions on related matters, and to make available facilities for → refugees fleeing from → apartheid. ECOSOC's mandate to the Working Group on Slavery reflects the broad scope of concerns falling under the rubric of slavery in contemporary UN practice: "to review developments in the field of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of apartheid and colonialism, the traffic in persons and the exploitation of the prostitution of others" (ECOSOC Decision 16 (LVI) May 17, 1974; → Traffic in Persons).

3. *Current Legal Status*

International law has moved from regulating slavery and the slave trade to banning them altogether. In the Slavery Convention of 1926, the States parties (numbering 61 in 1982) have undertaken to prevent and suppress the slave trade and to bring about "progressively and as soon as possible" the complete abolition of slavery in all its forms in any territory subject to their jurisdiction (Art. 2). This pledge is reaffirmed by the Supplementary Convention of 1956 (ratified or acceded to by 96 States as of 1982) and is extended to additional practices similar to slavery (Arts. 1 and 12). In the 1926 Convention the parties agree to take all measures necessary to prevent compulsory or forced labour from developing into conditions analoguous to slavery and to minimize the use of such labour, towards its eventual abandonment (Art. 5). They also undertake to penalize infractions of laws enacted to give effect to the Convention (Art. 6), and the 1956 Treaty directly declares acts related to enslaving another person or to conveying slaves to be criminal offences under the laws of the parties (Arts. 3 and 6). Cooperation and communication regarding abolition efforts between the parties and with the United Nations are pledged (Art. 8). Disputes arising under the Convention are to be resolved by the → International Court of Justice (ICJ, Art. 10). The weakness of both the 1926 and the 1956 Conventions lies in their failure to provide for any standing supervisory machinery.

In the law of war, deportation to slave labour is now considered to be a → war crime, and enslavement to be a → crime against humanity (Control Council for Germany, Law No. 10, Art. II(b) and (c); → Nuremberg Trials).

Rules regarding slavery and the slave trade have also become an integral part of the international → law of the sea and of the air (→ Air Law). The States parties to the 1956 Slavery Convention have agreed to prevent ships and → aircraft authorized to fly their flags (→ Flag, Right to Fly) from transporting slaves, and to keep their ports, airfields and coasts from being used for the conveyance of slaves (Art. 3(2)). Slaves taking refuge on board any vessel of a State party thereby regain their freedom (Art. 4). These provisions are reiterated in Art. 99 of the 1982 Law of the Sea Convention, which adopted the wording of Art. 22 of the 1958 Convention on the High Seas. In Art. 110 the 1982 Treaty further provides a → warship on the → high seas with the right to visit and search a foreign ship reasonably suspected of engaging in the slave trade.

Just as importantly, slavery and the slave trade are now prohibited by a host of international and regional → human rights covenants and conventions. The Universal Declaration of Human Rights (→ Human Rights, Universal Declaration

(1948)) proclaims that "[n]o one shall be held in slavery or servitude", and prohibits slavery and the slave trade in all their forms (Art. 4). These same prohibitions are found in Art. 8(1) of the International Covenant on Civil and Political Rights (signed in 1966, in force since 1976). Regional human rights conventions contain similar bans (e.g. Art. 4(1) of the → European Convention on Human Rights (1950) and Art. 6(1) of the → American Convention on Human Rights (1969)). Further, the ICJ has described obligations placed upon States *erga omnes*, which derive in part from "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (→ Barcelona Traction Case, 1970 ICJ Reports (2nd Case), p. 32, para. 34). The predominant modern view has been to categorize the prohibitions on slavery and the slave trade as → *jus cogens*. The written law of nations, if not always its practice, has finally accorded with the dignity of free humankind.

E. DONNAN (ed.), Documents Illustrative of the History of the Slave Trade to America, 4 vols. (1930–1935).

R. W. BEACHEY, The Slave Trade in Eastern Africa: A Collection of Documents (1976).

H. FISCHER, The Suppression of Slavery in International Law, International Law Quarterly, Vol. 3 (1950) 28–51.

M. SCHREIBER, Convention supplémentaire relative à l'esclavage, AFDI, Vol. 2 (1956) 547–557.

G. FISCHER, Esclavage et droit international, RGDIP, Vol. 61 (1957) 71–101.

J.A. GUTTERIDGE, Supplementary Slavery Convention, 1956, ICLQ, Vol. 6 (1957) 449–471.

C.W.W. GREENIDGE, Slavery (1958).

L. BETHEL, The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the 19th Century, Journal of African History, Vol. 7 (1966) 79–93.

D.B. DAVIS, The Problem of Slavery in Western Culture (1966).

V.P. NANDA and M.C. BASSIOUNI, Slavery and the Slave Trade: Steps Toward Eradication, Santa Clara Law Review, Vol. 12 (1972) 424–442.

H. BERDING, Die Ächtung des Sklavenhandels auf dem Wiener Kongreß 1814/15, Historische Zeitschrift, Vol. 219 (1974) 265–289.

UNESCO, The General History of Africa: Studies and Documents, Vol. 2, The African Slave Trade from the 15th to the 19th Century (1979).

ANNE M. TREBILCOCK

STATE DEBTS

1. Notion

State debts in the broadest sense of the term are legal obligations of a State in regard to a domestic or foreign, private or public creditor. The term is generally used to describe financial liabilities of a government or another public person. State debts (public debts) can be classified in a number of different ways.

(a) Internal and external debts

If the State raises a credit on its own capital market, the legal relationship between the lender and the borrower is governed by a contract based on municipal law. A State may also raise a credit on international money markets, for example by emitting bonds on the capital markets of foreign countries or by contracting international loans (→ Loans, International). These → foreign debts may also comprise war debts and → reparations owed to other governments or they can result from international responsibility (→ Responsibility of States: General Principles), → expropriation and nationalization or confiscation. In many cases, external public debts are internationally regulated by debt agreements (see e.g. → Dawes Plan; → Young Plan; → London Agreement on German External Debts (1953)). Especially in cases of expropriation, nationalization or confiscation they may be regulated by → lump sum agreements (or settlements). International agreements on external State debts sometimes set up a national or international administration and control system (→ State Debts, International Administration and Control) or an international debt rescheduling.

(b) Long-term and short-term debts

Public debts can be classified simply as long-term or short-term debts, depending on the length of time from issue until repayment. Long-term debts play a more important role in practice; refinancing, however, today is often realized by short-term borrowing. A debt is generally described as being long-term from about six up to ten or even more years. Long-term State debts are in most cases evidenced by bonds which are offered for subscription to private or public investors. The older term "funded debt" was formerly

used to denote a debt whose interest was paid from special funds or from taxes. Today, a "funded debt" simply means a loan to be repaid within a time of one to ten years.

2. *Historical Evolution of Legal Rules*

Government borrowing began in the medieval and even premedieval times. The first State debts consisted of either the personal borrowing of the sovereign or forced loans. The evolution of public debts started in the cities of Genoa and Venice. The city governments borrowed money from the newly-established banks on a commercial basis. During that time, commercial activities of the State began to be distinguished from its public function as ruler (→ State Immunity). More precise legal rules only developed during and after the industrial revolution. State borrowing became an important factor of government financing when a modern monetary system and organized financial markets had developed. As early as 1691 the British Government raised a loan of £1 000 000 from taxes on beer and spirits. In 1789, the United States Federal Government funded the debts of the member States and other obligations into a single debt issue of $75 000 000. United States debts rose continuously, especially during wars, but they were repayed several times (e.g. 1835). For many years, the raising of public debts has been regarded as a normal revenue source within certain economic and legal limits.

3. *Current Legal Situation*

(*a*) *General legal situation*

In contrast to the formerly prevailing opinion, State debts today usually do not result from an act of sovereignty. A credit contract is in most cases, first of all, a normal private law contract between a lender and a borrower, even if the lender is a State (→ Private International Law). State debt problems of international public law can be the matter and regulated by bi- or multilateral treaties such as cession, devolution and recovery agreements, debt reschedulings, lump sum settlements or other arrangements.

A first formal international treaty on State debts was the → Drago-Porter Convention, i.e. the "Convention respecting the limitation of the employment of force for the recovery of contract debts". The Convention is one of the origins of todays general interdiction of force (Art. 2(4) UN Charter), prohibiting also any use of force in regard of State debts.

Some treaty stipulations as well as customary rules exist in the law of → State succession. The treaty stipulations can be found in the → Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983 (see also → Vienna Convention on Succession of States in Respect of Treaties of 1978). The 1983 Vienna Convention (not yet entered into force) will partly reform the customary rules. As to debts, the Convention refers only to debts between a predecessor State and a successor State and to some decolonization problems in this context, but not to general questions. Customary rules are still prevailing for the present and for more general issues.

The main international law problem in this context is the transition of debts. An important distinction of the customary law of State succession is that of financial debts and administrative debts. The financial category consists of the (external) loan debts. Administrative debts result from (all) other facts like domestic public act, civil service, contract of purchase etc. Financial debts are object of public international law as far as external obligations, debts owed to foreign governments or other foreign creditors are concerned. Transition of such financial debts depends above all on the continuance of the predecessor State. If it further exists, the predecessor remains the debtor of its financial debts. An international treaty such as a cession or devolution agreement may provide for another solution. In cases of continuance of the predecessor the customary principle, however, is that there is in general no succession in debts. Exceptions refer to "concerning debts", debts "in rem" or "secured debts" (*dettes hypothéquaires*). These are debts locally situated in the territory that changed sovereignty. Such territorial or local debts assumed by the predecessor State pass over to the successor. Other local debts, i.e. assumed by local entities are not transferred. The successor State has only to respect the lender's right and the borrower position of the local entity. If the predecessor has finished to exist, a more general transition takes place. All financial debts pass to the successor(s)

according to a traditional principle, to be questioned in the present period of excessive State indebtedness. In cases of plurality of successors the general financial debts have to be adequately distributed under the successors. "Administrative debts" are normally local debts, but in regard to citizens, formerly of the predecessor, now of the successor. Such succession questions are not problems of international public law. If however the creditors of administrative debts are foreigners, the debts are treated like financial debts and especially as "concerning" (etc.) debts. The successor State becomes debtor of administrative debts owed to foreigners and situated in the acquired territory, regardless whether or not the predecessor State still exists. A limitation in regard of the distinct cases has to be mentioned. Traditional law distinguishes between normal (financial or administrative) debts and "odious debts" (*dettes odieuses*). "Odious" are debts assumed for war financing or some comparable political purpose. "Odious debts" are excluded from transition; they come to end with the predecessor State. The related points can all be differently regulated by treaty.

Today, international problems of great practical importance are the problems of international solvency and even insolvency of States. During the last years, serious problems of this kind arose, mainly for developing countries and countries in Eastern Europe, out of the increasing of State indebtedness. A new instrument in this field is the international debt rescheduling. International practice has already created a generally applied procedure of multilateral debt restructuring and some substantial aspects for solution. In the procedure the International Monetary Fund (IMF) plays a more direct coordinating role for its (140) members. If a State, member of the Fund, cannot repay its debts, the IMF gives international liquidity to the debtor State ("fresh money"). The debtor State may also operate a "direct drawing" at the IMF, if the State needs it immediately. The terms and modalities of such credits are settled in "Stand-By-Arrangements" (Art. V(8)(a)(ii) revised IMF Statute). Similar credits are conceded by the World Bank and the Bank for International Settlements. These arrangements oblige the debtor State to a financial stabilization and restoration program. The debtor State has also to acknowledge strict priorities to all credits of the IMF, the World Bank and their special agencies. Thus, there seems to be no rule of international law forbidding to favour some credit more than another. The debtor State gets delays of (re-) payment. Its Stand-By-Arrangement with IMF is at once the basis of a general period of consolidation (for the debtor State). After the Stand-By-Arrangement the other creditors like the Western Industrial States (Club of Paris) or the Banks grant a restructuring of their credits; so the Stand-By-Arrangement is a necessary condition for the agreements with the other creditors. These agreements provide for the time of consolidation and for a → moratorium, some conversion and perhaps a reduction of the debts. The agreements do not produce preferences, as far as the debts owed to foreign governments or banks are concerned (in contrast to the debts owed to international organizations). Official creditors (Paris Club) are treated equal, bank creditors also, the principle for both being solidarity. Nevertheless, some exceptions are admitted, such as – once more – a category of "secured debts" or the distinction between (real) "State debts" and "régime debts". The point of distinction for the two last groups of debts is the real interest of the (debtor) State on the one hand and only the interest of a political régime on the other. The recent group of "régime debts" remembers the traditional category of "odious debts". In addition to the mentioned restructuring aspects different forms of debt reduction or mitigation are claimed by → United Nations Conference on Trade and Development for the poorest (debtor) countries. Whether the here discussed rescheduling procedure and restructuring aspects may be the outsets of new customary international law, appears rather questionable.

As far as the regulation of State debts is provided in formal → treaties under international law, the State cannot depart unilaterally from its treaty obligations (→ Pacta sunt servanda, but see also → Clausula rebus sic stantibus). Where no such formal treaty obligations (nor customary rules) exist, it is doubtful whether a State can modify its contract obligations unilaterally. This question was examined by the → Permanent Court of International Justice in the → Brazilian Loans Case and the → Serbian Loans Case; it

was not decided in the → Norwegian Loans Case before the → International Court of Justice. Even if the unilateral modification of a private law contract on State debts is not regarded as breach of an obligation under public international law, it can give rise to claims for compensation as a consequence of governmental interference in acquired rights (see also → Contracts between States and Foreign Private Law Persons).

(*b*) *Constitutional aspects of government borrowing*

In parliamentary constitutional systems, the function of parliament is to authorize the government to borrow money. Budgetary legislation is traditionally regarded as one of the most important functions of parliament. Only under special circumstances is the government entitled to raise a credit without the consent of parliament.

In a number of countries, the law of State debts is a special part of the constitutional law – often in addition to the parliament's authorizing function. Detailed substantive legal provisions may regulate public debts. Since the growth of State debts poses a great economic problem in many countries, more precise prescriptions concerning government borrowing may be necessary in the future.

Excessive public indebtedness and other conditions can cause, for the State, not only international, but also national insolvency or, at least, internal financial emergency situations, necessitating exceptional crisis measures. Constitutions, however, rarely provide the means to manage or settle such financial crises. In most countries, a national debt register has been introduced in order to keep a current control over State debts.

4. *Special Problems*

(*a*) *Inflation and unemployment*

Since public credits, like taxation, are generally regarded as a normal source of revenue and because credits have to be repaid, mostly with interest, the problem arises whether the State can incur debts without limitation. If there are no legal prescriptions with regard to credits, a government must at least take into account that a high level of State debts tend to increase inflation and the level of interest rates. In a good economic situation, the raising of new credits is less necessary because there is enough revenue from taxes. In periods of unemployment and depression, however, the State does often not hesitate to raise credits and to spend the money for employment programmes and other measures which may stimulate the economy. Theoretically, the periods of declining and increasing economic activity change within regular intervals. Following the economic theory of J.M. Keynes, the budget will therefore be balanced within a certain time. In practice, these good and bad economic periods do not appear at fixed intervals. During recent years, many industrial and even more → developing States have suffered from an increasing rate of unemployment and inflation at the same time. The problem therefore remains whether the State should prefer a permanent "deficit spending" or facilitate private investment without taking too many new loans.

(*b*) *Debt burden on future generations*

Advocates of public debts argue that the investments which will benefit later generations should not be paid for only by the present investors ("pay as you use"). That argument ignores the fact that future generations will also have to make long-term investments for their future generations. Moreover, later generations will suffer from the whole credit and interest burden. Even today the repayment of debts takes a great part of the budget in many countries. The transfer of debts from present to future generations alone can therefore not be regarded as a satisfying justification of government borrowing.

5. *Evaluation*

State debts are currently regarded as a normal source of revenue. Public credits generally appear as long-term loans with interest, and constitute an important factor of the national and international financial markets.

The economic problems of many debtor countries have increased when compared to former times. In 1982, the foreign debts of developing States, for example, reached the sum of about 600 000 million US dollars. The account of credit and interest repayment reached nearly 130 000 million dollars. A similar situation can be found in the countries of Eastern Europe: Credits of

60 000 million dollars had been granted to these countries by Western creditors as of 1982.

Since the economic situation of many countries is rather precarious, it is debatable whether the State has the right to raise new credits without limit. Many legal, economic, and political arguments for and against the current growth of indebtedness are being discussed on the national and international level. As there is a great transnational → interdependence between national economies, State debts will remain an international problem.

A.N. SACK, Les effets des transformations des Etats sur leurs dettes publiques (1927).
A. WATRIN, Essai de construction d'un contentieux international des dettes publiques (1929).
E.H. FEILCHENFELD, Public Debts and State Succession (1931).
D.P. O'CONNELL, Secured and Unsecured Debts in the Law of State Succession, BYIL, Vol. 28 (1951) 204–219.
R. TRIFFIN, Europe and the Money Muddle (1957).
H.-E. FOLZ, Staatsnotstand und Notstandsrecht (1962).
G. VAN HECKE, Problèmes juridiques des emprunts internationaux (2nd ed. 1964).
K. ZEMANEK, State Succession after Decolonization, RdC, Vol. 116 (1965 III) 181–300.
J. GOLD, Stand-By-Arrangements (1970).
J. LEVIN, The Management of Public Debt in Developing Countries, Finance and Development, Vol. 7 (1970) No. 2, 29–37.
F.-C. JEANTET, Emprunts français à l'étranger, La semaine juridique, Vol. 49 (1975) Doctrine, No. 2704.
J.M. BUCHANAN and R.E. WAGNER, Democracy in Deficit (1977).
G. PÜTTNER, Staatsverschuldung als Rechtsproblem (1980).
H.H. VON ARNIM, Grundprobleme der Staatsverschuldung, Bayerische Verwaltungsblätter, Vol. 27 (1981) 514–523.
K. VOGEL, Verfassungsgrenzen für Steuern und Staatsausgaben?, Festschrift für Theodor Maunz (1981) 415–428.
J. CALVERLY, Sovereign Debt Rescheduling, The Amex Bank Review, Vol. 4 (1982).
B.S. THOMAS, Internationalization of the Securities Markets: An Empirical Analysis, George Washington Law Review, Vol. 50 (1982) 155–190.
P.R. WOOD, Debt Priorities in Foreign Insolvency, International Financial Law Review, Vol. 1 (1982).
G. FRANKENBERG and R. KNIEPER, Rechtsprobleme der Überschuldung von Ländern der Dritten Welt, Recht der Internationalen Wirtschaft, Vol. 29 (1983) 569–580.
I. SEIDL-HOHENVELDERN, Das Wiener Übereinkommen über Staatennachfolge in Vermögen, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 34 (1983) 173–199.
G. ZIEGER, Probleme der Verschuldung östlicher Staatshandelsländer, AVR, Vol. 21 (1983) 239–272.
E. LÖSCHNER, Souveräne Risiken und internationale Verschuldung (1984).
A. NEWBURG and F. ZEHETNER, Some Issues Relating to the Restructuring of International Debt, ILA Monetary Law Committee Report to Paris Conference (1984).
F. ZEHETNER, Ansätze zu einem völkerrechtlichen Umschuldungsrecht?, Österreichisches Bankarchiv, Vol. 32 (1984) 212 et seq.
H.J. HAHN, Öffentliche Auslandsschulden und Völkerrecht, Festschrift für Carl Carstens (1984) 357 et seq.

HANS-ERNST FOLZ

STATE DEBTS, INTERNATIONAL ADMINISTRATION AND CONTROL

1. Notion

International administration and control of → foreign debts (→ State Debts) are a type of safety measure established by creditor countries normally in agreement with the debtor country. They were employed especially in the period prior to World War II. Debt administration is realized by a team of several representatives who generally possess diplomatic status. The international control of debts is in general created according to an international → treaty, but in most cases the debtor State has been practically forced to agree to an international control, for example as a result of → war. The purpose of both security methods is to warrant and organize the payment of foreign State debts (interest included). In many cases, the debtor State has had to pawn most of its financial income in favour of the international debt administration. Foreign debts may arise from international loans, war debts and → reparations, international responsibility, → expropriation or confiscation (→ Loans, International; → Responsibility of States: General Principles).

2. *Historical Evolution*

International debt institutions had their greatest importance between about the end of the 19th century and the end of World War II. Debt control was employed in Tunis, Egypt, Turkey, Serbia, Greece, China, the Dominican Republic, Morocco, Austria and Germany.

In 1869, France, Great Britain and Italy took part in the Commission financière internationale, which administered Tunisian revenues. The Commission was dissolved in 1884 after the establishment of the French → protectorate over Tunis.

Egypt had to agree to an international control in 1876. The Caisse de la dette publique was first governed by France, Great Britain, Italy and Austria-Hungary. From 1886, Germany and Russia also took part. The military occupation of Egypt by Great Britain led to several restrictions on the commission's competences. Britain kept the right to protect the creditors' interests until the Egyptian declaration of independence in 1922. A treaty between Egypt and Great Britain finally abolished Egypt's remaining financial restrictions in 1936.

In Turkey, Serbia and Greece, similar controlling institutions were established. The commissions in Greece and Turkey ended their work in 1924. The Yugoslavian debt administration was not cancelled until 1946 (→ Serbian Loans Case).

China agreed to an international debt administration for the redemption of its loan debts and other obligations which had arisen between 1895 and 1898. China's customs administration had already been controlled by foreign countries (cf. → Customs Law, International). China did not achieve full financial independence until 1944.

Between 1907 and 1940, a General Receiver of the Dominican Customs worked in the Dominican Republic as stipulated by an agreement. In Morocco, a *contrôle de la dette* was in operation until 1912, when France established its protectorate. A treaty between France, Spain and Morocco fixed the claims of the foreign creditors.

In 1922, the → League of Nations proposed the creation of a Control Committee in order to administer the repayments of a reconstruction loan which had been granted to Austria. This institution consisted of French, British, Italian, and Czechoslovakian representatives. In Germany, an international tax and customs control began operation in 1924 (→ Dawes Plan). It was abolished in 1930 by the → Young Plan.

3. *Current Situation and Evaluation*

Following World War II, the practice of the international administration and control of State debts became unusual, a direct foreign influence on State expenses and revenues being considered as in conflict with State → sovereignty.

On the other hand, the economic problems of many debtor countries have increased when compared to former times. It is of outstanding importance to find internationally agreed solutions for the problems involved. This should primarily be done by bilateral and multilateral treaties. Also the → International Monetary Fund has played and continues to play a great role.

If international administration and control has become unusual as a safety measure, there is today a new instrument in cases involving solvency problems of debtor States. A modern instrument to warrant and organize the payment of State debts is the debt rescheduling coordinated by the International Monetary Fund.

N.E. POLITIS, Les emprunts en droit international (1894).
G.S. FREUND, Der Schutz der Gläubiger gegenüber auswärtigen Schuldnerstaaten, insbesondere bei auswärtigen Staatsanleihen (1910).
K. STRUPP, L'intervention en matière financière, RdC, Vol. 8 (1925 III) 5–123.
A.N. SACK, Les effets des transformations des Etats sur leurs dettes publiques (1927).
E.H. FEILCHENFELD, Public Debts and State Succession (1931).
W. BRODBECK, Internationale Finanzkontrolle und ihre politischen Grenzen (1935).
H. COING, Staatsschuldenverwaltung, internationale, in: Strupp-Schlochauer, Wörterbuch des Völkerrechts (2nd ed. 1960/61).
W. FRIEDMANN, The Changing Structure of International Law (1964).
A.O. ADEDE, Approaches to Bilateral Loan Agreements between Developed and Developing States: Some Lessons from the Practice of Denmark, the United Kingdom and the United States, Dalhousie Law Journal, Vol. 5 (1979) 121–153.
C. LIPSON, The International Organization of Third World Debt, International Organization, Vol. 35 (1981) 603–631.
B.S. THOMAS, Internationalization of the Securities Markets: An Empirical Analysis, George Washington Law Review, Vol. 50 (1982) 155–190.

HANS-ERNST FOLZ

STATELESS PERSONS

1. Definition

Stateless persons are individuals not having a → nationality under the law of any State. Common to international legal writing, this definition has also been introduced into conventional international law such as the Convention relating to the Status of Stateless Persons of September 28, 1954 (UNTS, Vol. 360, p. 117). Art. 1 of this Convention defines a stateless person as one "who is not considered as a national by any State under the operation of its law".

The term "stateless person" is frequently given a broader scope by including both *de jure* (as defined above) and *de facto* stateless persons, i.e., persons having a nationality but "not enjoying the protection of a government" (draft resolution, Committee of the Whole, UN Conference on the Elimination or Reduction of Future Statelessness, UN Doc. A/CONF. 9/12. p. 19).

Statelessness may be original or absolute: A person may be stateless at birth because he does not acquire a nationality at birth according to the law of any State. Statelessness may also be subsequent or relative: Subsequent to birth, a person may have lost his nationality without acquiring another.

2. Causes of Statelessness

Statelessness is always attributable to municipal law and not to international law. International law generally accords States exclusive jurisdiction to legislate on nationality questions. No rules of general international law exist which impose a duty on States to confer their nationality. Hence, the exercise of → domestic jurisdiction may lead to negative conflicts of nationality laws, thus leaving individuals without any nationality.

(a) Individual statelessness

Cases of individual statelessness may arise from a lack of coordination of national legislations with regard to basic principles governing acquisition and loss of nationality. A child may be born in a strictly *jus sanguinis* country whose parents are nationals of a State adhering to the *jus soli* principle. Or he may be born to parents of different nationality, whose marriage is recognized as legally valid in his mother's country only; thus, in his father's country he may be deemed to be born out of wedlock and not entitled to his father's nationality, whereas in his mother's country acquisition of the mother's nationality may not be open to her legitimate children. Marriage may also be a cause of statelessness; the nationality law of one State may impose loss of nationality upon marriage to an → alien, whereas in the alien's country the automatic acquisition of its nationality upon marriage may not be provided for. In all such cases, statelessness is generally involuntary for the individual concerned. The same often applies to cases of individual denationalization (→ Denationalization and Forced Exile). Yet, statelessness may also occur voluntarily, e.g. the legislation of a given State may allow for unilateral renunciation of its nationality or may entitle an individual to a release without having regard to his future nationality.

(b) Mass statelessness

Mass statelessness mainly occurs in two situations. Firstly, it may be linked to territorial changes encouraging the predecessor State to denationalize the populations concerned, even though the successor State may not be willing to confer its own nationality and sometimes even may choose to expel parts of the population concerned (→ Population, Expulsion and Transfer). Secondly, mass statelessness may stem from mass denationalization through a State's legislative or executive action. Instances of the latter kind may be found in the Soviet decree of mass denationalization of December 15, 1921 (R.W. Flournoy and M.O. Hudson, A Collection of Nationality Laws (1929) p. 511), or in the national-socialist legislation to deprive German Jews of their nationality (11th Ordinance by virtue of the Reich Citizenship Law of November 25, 1941, Reichsgesetzblatt (1941 I) p. 722), or the Czechoslovak legislation to denationalize persons of German origin (Presidential Decree of August 2, 1945). Instances of the former kind may be found in the form of the emergence of newly independent States after World War I as well as in the recent process of → decolonization. In this connection the special case of the Bantustans declared independent from the South African Union should be mentioned. Since these entities have not gained any significant international → recognition as

States, the populations concerned find themselves in a situation in some respects similar to statelessness, if their South African nationality has been withdrawn (→ South African Bantustan Policy).

In international law perspective, however, it may be doubtful, whether the individuals affected in all these cases of mass statelessness are really *de jure* stateless. Quite a number of publicists of international law propound the existence of rules of general international law providing for the automatic change of a nationality in instances of territorial change. If such rules really existed, the individuals affected would possess either the nationality of the predecessor or that of the successor State and could not be deemed to be stateless. In the case of mass denationalization, on the other hand, there has been much discussion as to the consistency of such State action with international law. In some cases, State practice did not recognize Soviet and Nazi deprivations of nationality as valid under international law. The prevailing opinion and practice, however, seem to adhere to the principle that the nationality of a person must be determined in accordance with the domestic law of the State concerned and hence do not deny the validity under international law of arbitrary denationalizations. In any case, at least *de facto* statelessness exists.

3. *Evolution of Legal Rules*

The stateless person lacks all those rights which an individual possessing a nationality enjoys by virtue of that nationality. In general, he is not entitled to any → diplomatic protection whatsoever. He has no inherent right of sojourn in the State of his residence, and no right of return in case he travels. He does not benefit from treaties stipulating advantages for nationals. He may be expelled from the State of his residence if another State allows him to enter (→ Aliens, Expulsion and Deportation). He merely enjoys the → minimum standard of → human rights in force for the State concerned. As regards → private international law, difficulties may arise from the fact that domestic law usually determines the applicable law in considering the nationality of the relevant person. Statelessness, therefore, is undesirable from the point of individuals, States and the international community as a whole because it may lead to friction between States. Hence, there are numerous endeavours to cope with statelessness using a twofold approach. On the one hand, there are attempts to reduce or even to eliminate statelessness. On the other, there are efforts to improve the situation of stateless persons.

(*a*) *Elimination of statelessness*

Since statelessness results from domestic law, the most direct way to reduce or eliminate it leads through the province of domestic nationality laws. An early example of this course is a Swiss law of 1850 providing for the acquisition of nationality by stateless persons. More recently, the Basic Law of the Federal Republic of Germany of 1949 prohibits in Art. 16 any denationalization and excludes any loss of → German nationality if involuntary statelessness would ensue. However, domestic action of this kind is an imperfect mechanism towards the elimination of statelessness because of both the limited scope of such legislation and the limited number of States who choose to act in this way. Since the turn of the century, therefore, the need to cope with the problems of statelessness on the international level has been recognized.

Until World War I, most of the effort was undertaken by private associations and scholarly societies. In 1895 and 1896, the → Institut de Droit International agreed upon principles that States should apply for the reduction of statelessness in certain cases. In the inter-war period, this Institute again addressed the matter with resolutions in 1924 and 1928. Only then did intergovernmental activity begin to concentrate on statelessness. Following different initiatives by the → League of Nations, a Conference on the Codification of International Law in 1930 adopted the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (LNTS, Vol. 179, p. 89), designed to reduce statelessness in cases of expatriation, marriage and adoption. Yet, the major causes of statelessness at that time remained untouched, i.e., statelessness stemming from territorial changes or mass denationalization. The same applies to the Protocol adopted at the same time relating to a Certain Case of Statelessness. The Conference, instead, recommended "that States should, in the exercise of their power of regulating questions of nationality,

make every effort to reduce so far as possible cases of statelessness, and that the League of Nations should continue the work which it has already undertaken for the purpose of arriving at an international settlement of this important matter".

The → United Nations has continued the efforts to reduce statelessness. Art. 15 of the 1948 Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality" (→ Human Rights, Universal Declaration); precisely which State was liable to confer its nationality and the meaning of the word "arbitrarily" were, however, not determined. Considering the problem of statelessness, the → United Nations Economic and Social Council resolved (Res. 319(B)(XI) Section III, August 11, 1950) "that the International Law Commission prepare . . . the necessary draft international convention or conventions for the elimination of statelessness". The → International Law Commission elaborated two draft conventions for the elimination and for the reduction of statelessness respectively. Upon recommendation by the → United Nations General Assembly, State conferences were held in 1959 and in 1961 which decided to work on the Draft on the Reduction of Future Statelessness, thus setting aside the project of eliminating statelessness. The Convention on the Reduction of Statelessness was adopted on August 30, 1961 (UN Doc. A/CONF. 9/15) and entered into force on December 13, 1975, but has been ratified by only a few countries thus far.

Despite the Convention's careful approach, which intended to avoid the imposition of too rigid an obligation on the States parties, the low number of ratifications may be due to provisions limiting the deprivation of nationality. Though largely restraining cases of loss of nationality leading to statelessness, the Convention qualifies the provision that a contracting State "shall not deprive a person of its nationality if such deprivation would render him stateless" by the proviso that such deprivation will be admissible if the person concerned, "inconsistently with his duty of loyalty to the Contracting State", *inter alia* "has conducted himself in a manner seriously prejudicial to the vital interests of the State" (Art. 8). Deprivation of nationality on racial, ethnic, religious or political grounds, however, is completely prohibited (Art. 9; → Discrimination against Individuals and Groups; → Racial and Religious Discrimination). The Convention furthermore stipulates that in cases of transfer of territory the successor State should at least confer its nationality to persons affected who would otherwise become stateless (Art. 10). To reduce original statelessness, the Convention also provides that a child who is born on the territory of a Contracting State and who would otherwise be stateless at birth, should be granted that State's nationality either at birth, by operation of law, or upon application if a series of rather restrictive conditions are met which the State may introduce into its national legislation (Art. 1). In addition, provision is made for a number of situations where either the father's or the mother's nationality should be conferred to avoid original statelessness.

Finally, it is noteworthy that according to the Convention a body shall be established "to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority" (Art. 11). By Resolution 3274(XXIX) – and Resolution 31/36 – the General Assembly provisionally entrusted the UN High Commissioner for Refugees with these functions (→ Refugees, United Nations High Commissioner), thereby guaranteeing international protection otherwise not available to the stateless person. This protection may, however, be excluded by reservation (→ Treaties, Reservations). All the above provisions reported apply only to *de jure* statelessness. As to *de facto* stateless persons, the Conference merely resolved to recommend that they "should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality".

Another United Nations initiative resulted in the adoption of the Convention on the Nationality of Married Women of January 29, 1957 (UNTS, Vol. 309, p. 65). Under its provisions "neither the celebration nor the dissolution of a marriage . . . shall automatically affect the nationality of the wife". Many States have become parties to this Convention.

A further convention designed to reduce cases of statelessness was adopted on September 19,

1973 by the → International Commission on Civil Status. According to that convention the child whose mother possesses the nationality of a contracting State acquires at birth that State's nationality if he otherwise would be stateless. For the application of this provision, a child whose father has → refugee status is to be considered as not possessing the latter's nationality; thus, situations of *de facto* statelessness are included within the scope of the convention. Reservations have, however, been made with regard to this provision.

(*b*) *Mitigation of effects of statelessness*

In the absence of domestic and international measures to eliminate statelessness, the efforts to mitigate at least its consequences remain important. Since many of these consequences flow from domestic legislation, remedies are to a large extent at the disposal of States. A number of countries have done much in this respect – in particular for special groups of stateless persons.

On the international plane, again, it was up to private associations and learned societies to take the initiative. In 1892 the Institut de Droit International recommended that a State must not forbid entrance to or sojourn in its territory to those, who have become stateless upon losing the nationality of the State affected. Further recommendations concerned admission and expulsion. Progress was, however, only achieved during the inter-war period when the unprecedented number of people uprooted as a result of the war and later developments called out for urgent international action.

In 1926 the Conference on the International Régime of Passports recommended that certain facilities for travelling should be granted to "persons without nationality" and requested the League of Nations to prepare a draft arrangement (LoN Official Journal, Vol. 8 (1926) p. 1095; → Passports). Further activities, especially by the League of Nations, focused on the particular group of stateless persons called refugees (→ Refugees; League of Nations Offices). The Convention relating to the International Status of Refugees of October 28, 1933 (LNTS, Vol. 159, p. 199) should be mentioned here.

After World War II, the United Nations resumed the efforts to cope with the refugee problem (→ International Refugee Organisation). Most important is the Convention relating to the Status of Refugees of July 28, 1951 (UNTS, Vol. 139, p. 137; supplemented by a protocol of March 31, 1967, UNTS, Vol. 606, p. 267). The *ad hoc* Committee of the United Nations Economic and Social Council which had drawn up the 1951 Convention also elaborated a protocol relating to the status of stateless persons, aiming at the applicability of a number of provisions of the 1951 Convention to stateless persons not having the status of refugees (UN Doc. A/1908). Upon action by the General Assembly, a State conference for the revision and adoption of that protocol was convened. This conference adopted the Convention relating to the Status of Stateless Persons on September 28, 1954, which applies to *de jure* stateless persons, except those who are protected by United Nations organs or agencies other than the UN High Commissioner for Refugees. Also excepted are persons who in their country of residence have the rights and obligations attached to the possession of the nationality of that country, or who have committed particularly serious crimes. Generally, the Convention is modelled on the 1951 Refugees Convention. Accordingly, the provisions concerning the prohibition of discrimination, national treatment in religious questions, exemption from exceptional measures against nationals of a foreign State, general juridical status, gainful employment and welfare are nearly identical. The same applies to the provisions on the issuing of identity papers and travel documents, fiscal charges, transfer of assets, and expulsion. Unlike the 1951 Convention, however, the Convention on the Status of Stateless Persons does not prohibit the imposition of penalties of expulsion in cases of illegal entry into the country of residence. And there is no provision stipulating cooperation with United Nations organs as in Art. 35 of the 1951 Convention; in other words, international protection is excluded.

4. Evaluation

Even though according to some writers the problem of statelessness has been reduced after World War II, it remains a matter of international concern and is far from being resolved (cf. the Report on International Provisions protecting the Human Rights of Non-Citizens by Baroness Elles

(1980) E/CN. 4/Sub. 2/392/Rev. 1=UN Publ. E. 80 XIV. 2). This is not only due to the revival of denationalization and expatriation practices and to the number of situations giving rise to mass → emigration, but also to the fact that the great majority of States are not prepared to do more than work on the reduction – instead of the elimination – of statelessness. In addition, only Western States seem to be seriously concerned to reduce statelessness; the 1961 and 1973 Conventions are in force only for some ten Western or Western-oriented States. As regards the 1954 Convention relating to the Status of Stateless Persons, the number of ratifications and accessions barely exceed 30. Only the 1951 Convention concerning the Status of Refugees has become more effective, as nearly 90 States are bound by it. Without exception, no Communist country has entered into any of these Conventions.

A.P. MUTHARIKA, The Regulation of Statelessness under International and National Law (1977, with later additions) [loose-leaf].

J.-P.-A. FRANÇOIS, Le problème des apatrides, RdC, Vol. 53 (1935 III) 283–376.

N. ROBINSON, Convention relating to the Status of Stateless Persons: Its History and Interpretation (1955).

A.N. MAKAROV, Die Staatenlosigkeit im internationalen und innerstaatlichen Recht, Friedens-Warte, Vol. 56 (1961–1966) 357–375.

S. TORRES BERNARDEZ, La Conférence des Nations Unies pour l'élimination ou la réduction des cas d'apatridie dans l'avenir, AFDI, Vol. 8 (1962) 528–556.

P. VAN KRIEKEN, The High Commissioner for Refugees and Stateless Persons, NedTIR, Vol. 26 (1979) 24–36.

P. WEIS, Nationality and Statelessness in International Law (2nd ed. 1979).

D.J. WALKER, Statelessness: Violation or Conduit for Violation of Human Rights, Human Rights Quarterly, Vol. 3 (1981) 106–123.

HANS VON MANGOLDT

TAXATION, INTERNATIONAL

A. Definition of International Taxation. – B. Sources: 1. International Law. 2. Relationship to Municipal Law. 3. Application of Legal Norms. – C. Jurisdiction to Tax: 1. Persons Subject to Tax: Criteria: (a) Nationality. (b) Domicile; residence: (i) Natural persons. (ii) Legal persons. (c) Disposal over tax sources. 2. Taxable Income and Property: (a) World-wide taxation. (b) Domestic taxation. (c) Other taxes. 3. Conflict of Tax Jurisdictions. – D. Tax Restrictions: 1. Abuse of Rights. 2. International Consideration. 3. Minimum Contacts. 4. Proportionality. – E. Tax Avoidance: 1. International Tax Planning. 2. Tax Havens. 3. Tax Emigration. 4. Base Companies: (a) Deferral principle. (b) Legal problems. (c) Legislative control. 5. Transfer pricing: (a) Definition. (b) Legislative control. – F. Tax Cooperation: 1. Revenue Exception Rule. 2. Double Taxation Agreements. 3. General Cooperation: (a) Broad disclosure. (b) Information exchange. (c) Prospects. – G. Activities of International and Regional Bodies: 1. League of Nations. 2. United Nations. 3. OEEC/OECD. 4. Council of Europe. 5. Andean Pact. 6. Comecon. 7. International Fiscal Association.

The modern State requires huge financial resources for performing its tasks. If not running production facilities by publicly owned enterprises, it can obtain the necessary funds only by taking a share of the revenues of private economic activity, by taxing. In an economic system dominated by the private sector, taxes are the basis of a steady financial flow for the State. Tax systems also serve other purposes including the redistribution of wealth and the steering of economic development. Even State-economy systems make use of taxes in order to participate in the economic sectors which remain private. "The right of the State to levy taxes constitutes an inherent part of its sovereignty; it is a function necessary to its very existence" (Mexico/USA General Claims Commission, October 8, 1930 – George W. Cook v. United Mexican States, RIAA, Vol. 4, p. 593 at p. 595). Moreover, every State determines how and on which economic activity it levies taxes, as a matter of exclusive → domestic jurisdiction (→ Sovereignty).

A. Definition of International Taxation

A distinctive feature of modern economic activity is that it is not restricted to the territory of one State. The import and export of goods and services, international mobility of labour and capital, and → foreign investments raise issues of international economic law and also of the → jurisdiction of States in regard to tax matters (→ Capital Movements, International Regulation; → Economic Law, International; → Migrant Workers).

The law of international taxation comprises all legal rules which, as special norms distinct from

purely domestic cases, deal with all tax cases having extraterritorial aspects. Thus the law of international taxation is generally viewed as covering the taxation of transactions outside the territory of a State which are connected with transactions inside the State (e.g. taxation by State B of the construction of a generating station in State A by an enterprise of State B, where the component parts are also produced) as well as taxation of transactions within a State with relation to foreign countries, particularly taxation of the economic activities of → aliens, whether resident or not (e.g. taxation of the enterprise in State A; → Aliens, Property). Such activities can be taxable under the law of several States which autonomously determine the scope of their respective jurisdiction. The problems resulting therefrom are dealt with by the law of → double taxation. The question of an international organization's power to tax falls outside the scope of this article (→ International Organizations, Financing and Budgeting).

B. Sources

1. International Law

International taxation law derives from the sources of international law. According to one opinion (Debatin), international taxation is restricted to legal norms of strictly international character: general principles of international law and special treaty law as contained in double taxation agreements (→ Treaties). Debatin distinguishes the law of international taxation from the external tax law of each State, i.e. the national rules for cases of international taxation. Such a scheme, however, arbitrarily separates things which are closely connected. Thus relief from double taxation can be granted with the same effect by a foreign tax credit on the basis of an international agreement as by national tax law. There is no reason to attribute the one case to international taxation and the other not.

2. Relationship to Municipal Law

Another view (Bayer) speaks only of the national law of international taxation which contains the rules of international law transformed into national tax and other law. This view is too narrow; it excludes the international law not yet transformed into national law and an international tax case might then be governed by several different laws of international taxation.

According to Bühler and Schulze-Brachmann, international taxation comprises the rules governing the conflict of several national tax law systems. The object of international taxation is the determination of the law of these States whose tax laws are applicable to a concrete economic transaction. A large part of the law of international taxation is concerned with the applicability of national tax law, but every State determines by itself whether its tax laws are applicable or not. In contrast to → private international law, international taxation law knows only unilateral rules of the conflict of laws. These rules are closely connected with substantive rules concerning special treatment of international taxation differing from national treatment. Thus, it does not seem advisable to separate rules of conflict of laws and substantive rules.

3. Application of Legal Norms

The law of international taxation is therefore formed by all legal norms which deal with the application of national tax laws as well as with all substantive rules of tax law which contain special treatment for cases of international taxation, irrespective of whether these rules flow from international or municipal sources. In practice, however, in most cases the various theoretical approaches do not arrive at different results. International taxation is always concerned with questions as to whether and how the tax law of a State is to be applied to an international tax case, whether or not relief from double taxation is possible, how national tax administrations cooperate in such cases, and so forth.

C. Jurisdiction to Tax

In general, jurisdiction to tax is based on → territorial sovereignty (Knechtle) and personal jurisdiction. Although a State is undoubtedly entitled to levy taxes within its own territory, it is not allowed to enforce its tax law within the territory of another State without the consent of the latter. At the same time a State may levy taxes on its citizens living abroad as is the practice, for example, of the United States. The practice of States in the field of tax law, however,

does not follow the acknowledged criteria of sovereignty, but has developed autonomous concepts and terms to justify levying taxes on various economic transactions.

1. *Persons Subject to Tax: Criteria*

Taxes are payments which natural or legal persons owe to States or other entities entitled to levy taxes. Taxes create a legal tie between a person as debtor and a community as obligee. As criteria for such legal relationship States use → nationality, domicile and the power of disposal over a tax source. A basic distinction must be made between natural and legal persons.

(*a*) *Nationality*

A few States (e.g. the United States and the Philippines) tax their citizens wherever they reside. The overwhelming majority of States, however, exempt their citizens living abroad and levy taxes only in some special cases such as that of diplomats in foreign countries.

Individuals and corporations treated as taxable by the criteria of nationality or domicile are often called "tax nationals", theoretically a resident alien is taxed as a citizen.

(*b*) *Domicile; residence*

Most States consider taxes as the *quid pro quo* for the benefits of the services they render and thus impose an obligation to contribute on the beneficiaries. Whereas citizens living abroad have only the advantage of → diplomatic protection, aliens residing in a country receive the benefits of State services in full. Thus States consider the economic allegiance entailed in domicile as the decisive factor for imposing taxes (principle of territoriality).

(*i*) *Natural persons*

States regularly levy taxes on income and property of all persons having domicile within their respective territories. The definition of domicile thereby derives either from the general notion of domicile in the law of that country (e.g. the United Kingdom) or is expressed by special tax law terms (e.g. the Federal Republic of Germany). In a very general way a person has domicile where he or she possesses a home or accommodation. Besides this objective element, the subjective intention of the person to make use of this home (*animus manendi*) is also required. Every State autonomously defines "domicile" with effect for the applicability of its tax law. In view of the lack of a generally accepted concept, one person can be domiciled in several States.

As another territorial basis of jurisdiction States use the criterion of ordinary residence, frequently meaning residence of more than 183 days per year in a given country. Stays of shorter duration are treated in very different ways. The same is true for long interruptions, holidays and involuntary stays due to hospitalization or imprisonment. As a result, a natural person may have several domiciles and several ordinary residences in different States; however, domicile in one State and residence in another occurs more frequently than several residences.

(*ii*) *Legal persons*

The legal designation of companies, corporations and other legal entities poses questions of general international law (→ Barcelona Traction Case; → Enemies and Enemy Subjects). Tax law again follows its own path in deciding whether a corporation is taxable or not.

Modern tax systems differentiate taxation of individuals and taxation of corporations by subjecting the latter to direct taxation even though they are under the control of natural persons. Every State autonomously decides whether a company is a corporation for tax purposes or not. No rule requires one State to recognize the home country's qualification of a company for purposes of its own tax law.

The residence of a corporation could be determined by its place of incorporation, by residence according to its charter, or by the location of its management. Consideration of who financially controls the corporation is not applied in tax law because this would be contrary to the underlying theory of separate taxation of corporations. The proposition that a corporation's residence is determined by the place of incorporation was rejected in Calcutta Jute Mills Co. v. Nicholson (1 T.C. 83 (1876)). This seems to be the common opinion in contemporary international taxation. Some tax laws (e.g. German) hold the seat of a company, as determined in the charter of a cor-

poration, as sufficient to treat the corporation as subject to taxation.

All States deem a corporation to reside where it really and effectively pursues its business activities. This is done in the place where the controlling power and decision-making authority is situated and exercised (Union Corporation, Ltd. v. I.R. Comrs. (1952) 34 T.C. 271; German Abgabenordnung, sec. 10). This "place of management" is the most suitable place for taxation since, because of this place, the economic allegiance of a corporation to a country is especially close. The control exercised by shareholders does not amount to management in most cases. If in a special instance a State treats a foreign company as a municipal one under its tax law because of the domicile of the company shareholders in its territory, this is not tantamount to the application of the control theory but rather results from the shareholders behaving as actual managing directors. Residence of a corporation is therefore more a question of facts than of law.

(c) *Disposal over tax sources*

In the absence of any of the forementioned criteria, a natural or legal person may be subject to the tax law of a country if disposing of any income deriving from sources within the country or of any property located in the country (principle of territoriality or source principle). The jurisdictional basis in these cases is not found in personal circumstances such as nationality or residence; rather, the tax is collected from earnings flowing from that country and wealth situated in that country. The relation between person and country is objective rather than subjective. The national character of property or of a source of income is determined by many criteria, owing to their different natures.

Real estate, agricultural and forestry enterprises, as well as incidental rights and earnings from their letting and leasing are treated as a domestic tax source if situated within the territory of the country. On the other hand, entry in a public register may lead to a fictitious *situs* of ships (→ Flags of Convenience), → aircraft, trademarks, patents, titles, obligations, etc. within the country of registry. The exercise of rights and use of titles, though registered in a foreign country, constitute a domestic tax source. Claims against debtors are qualified as domestic if the debtor is treated as a tax national according to his or her domicile. Earnings of self-employed persons and from paid employment are treated as domestic income if the activity takes place within the country. The realizing of the results of services within a country is also deemed a sufficient basis to qualify the service as a domestic one.

An enterprise represents a combination of various productive factors: labour, capital, patent rights, etc. Business activities would provide various criteria for determining domestic character if each productive factor were taken on its own. Thus, international practice has developed a scheme for qualifying business activities as domestic only in the case where additional elements are connected with the disposal of the various domestic factors. Most States require a permanent establishment – "a fixed place of business through which the business of an enterprise is wholly or partly carried on" (Art. 5 OECD-Model). Agents with authority to conclude contracts in the name of the enterprise are treated as the equivalent of a permanent establishment to the extent that they carry out essential functions of the enterprise. The concept of permanent establishment is so elastic that the different tax systems are forced to explain the blanket term by further definitions and examples. As an example, according to municipal law, a building site or construction project might constitute a domestic permanent establishment if it lasts more than a certain number of months; some tax laws even treat as domestic a building site of just one day. Different criteria for the jurisdictional basis can also lead to one activity being qualified at the same time as domestic by different States, e.g. an author writes a book in country A, which is edited and published in country B.

2. *Taxable Income and Property*

In former times all citizens were subjected to an equal capitation or citizen tax. Today taxable persons are taxed in respect of their disposable wealth, the taxable object. A State possesses jurisdiction to enforce its tax laws only with respect to objects which are situated within its territory; it might, however, for the purpose of measuring the account of its tax take into account objects situated outside its territory. If a State

levies taxes only on objects situated within its territory one speaks of domestic taxation based on the principle of territoriality of taxes; if it levies taxes also taking into account objects situated outside its territory, one speaks of world-wide taxation.

(*a*) *World-wide taxation*

If the basis of tax jurisdiction is nationality and/or domicile, western industrialized States generally use world-wide taxation of income and property (also known as unrestricted tax liability). According to the ability-to-pay principle, it is argued that it does not make any difference whether a person receives income from inside or outside a country.

Taxation of tax nationals differs in many ways from taxation of non-resident persons ("tax aliens") disposing of domestic tax sources. Nevertheless this does not amount to the type of discrimination which is prohibited by many trade agreements and treaties on settlement and residence stipulating equal treatment of aliens and nationals as well as by Art. III of the → General Agreement on Tariffs and Trade (GATT). Different treatment is not connected with nationality but with a varying degree of economic involvement in the economic system of a country. The differentiation is not arbitrary because the necessity of global taxation is conditioned upon the fact that tax administrations can only supervise such elements which are situated in their respective countries. Furthermore, restricted tax liability might lead to taxation more favourable to the taxpayer than unrestricted liability, especially under a progressive tax rate. Nevertheless it is true that in recent times there has been a growing tendency to levy taxes on tax aliens on a world-wide basis, at least in measuring the tax rate.

(*b*) *Domestic taxation*

If taxes are based on the source principle, most States restrict taxation to domestic sources, disregarding foreign income and property. This combination of tax base and tax object is called restricted tax liability. In most countries this form of taxation has developed into a special form of income and property taxation not applying the usual principles of modern income taxation. Thus, personal circumstances such as marital status, number of children, personal expenses, etc. are not taken into account. Dividends from a corporation received by a person not residing in the same country are generally subject to a global withholding tax. The peculiarities of restricted tax liability can reach such an extent that unrestricted and restricted tax liability differ totally, with restricted liability assuming the character of an impersonal tax (see Bayer).

Latin American States favour the principle of source as the sole criterion for the competence to tax (Declaration of Montevideo (1956); Andean Pact Model, Art. 4; → Andean Common Market). Numerous States do not levy taxes on real estate situated outside their territories even if the owner is domiciled in the country (territoriality principle). Some tax only domestic profits of corporations or earnings deriving from business activities (e.g. Brazil). In recent times, however, a growing number of States of the Third World have come to adhere to the principle that territoriality should be understood as a priority and not as an exclusive criterion.

If not taxing on a world-wide basis, any tax system has to discern domestic and foreign profits and properties. A permanent establishment of an enterprise can make profits only as part of the whole enterprise and in so far as it contributes to the profit of the enterprise, but it is difficult to determine the correct contribution of the establishment. In practice today, the direct method prevails, attributing to a "permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment" (OECD-Model 1977, Art. 7, sec. 2). The indirect method applies some quota figures, such as the number of employees, level of investment, and capital turnover to the profits of the enterprise, to determine the profit attributable to the establishment.

(*c*) *Other taxes*

Modern tax systems recognize various kinds of taxes in addition to taxes on income, profits and property. These taxes are connected with the purchase and obligation of goods and services. Turnover taxes, luxury taxes and excise taxes

might be mentioned. In international taxation these taxes are of minor importance, since they are levied only upon transactions taking place in the respective national territory. When goods are exported, turnover tax follows the so-called destination principle, according to which the exporting country exempts the goods from tax and the importing country charges a special tax to bring the goods onto the same level as goods produced in that country (GATT, Art. III). Within the → European Economic Community (EEC) the system of turnover taxes has been harmonized by various directives (→ Unification and Harmonization of Laws).

3. *Conflict of Tax Jurisdictions*

The multitude of bases for the exercise of tax jurisdiction concerning taxable persons and objects inevitably results in some overlapping jurisdiction in nearly every international tax case. As examples: several States treat a person subject to unrestricted tax liability; one country levies taxes on income or property on a personal basis subject to unrestricted tax liability, while another country levies taxes according to the source rule subject to restricted tax liability; several States apply their tax laws under restricted tax liability; or (although rare) there is no State which holds particular income or property taxable under its tax law. The resulting differences in taxation may distort international economic relations, leading States to act unilaterally or seek relief bilaterally.

D. Tax Restrictions

1. *Abuse of Rights*

It is often discussed whether the practice of States in international taxation matters as shown above is compatible with international law and whether States are free to expand their tax jurisdiction. Some authors dealing with this question argue that minimum contacts must exist between the country and the taxpayer lest taxation be an → abuse of rights (Rudolf). But there is no known case in which a court has condemned the extension of tax jurisdiction as a violation of international law. Thus other authors argue that "no rules of international law exist to limit the extent of any country's tax jurisdiction" (Norr). On this question, account must be taken of State practice and *opinio juris* as far as it is expressed, as well as → general principles of law.

2. *International Consideration*

A State acting on a basis of uncontested jurisdiction to tax may nevertheless exercise its rights in a way that affects other States, depriving them of the possibility to use their jurisdiction to tax (e.g. if a State levies a source tax of 80 per cent, the State of domicile then practically cannot levy any additional tax). Thus, the principles of tax jurisdiction represent acknowledged guidelines by which States are to refrain from injuring other States. If a State exceeds these principles or if it applies measures which come close to such an excess, it is under an obligation to take into account the justified interests of other States. This "principle of international consideration" may be based on the prohibition of abuse of rights or on → comity, as has often been stressed by the International Fiscal Association (especially in London in 1975) as a general principle of international taxation.

3. *Minimum Contacts*

A State may levy taxes on foreign persons even where minimum contacts do not exist, but it may not be able to collect on its tax claim unless other countries allow for execution (→ Recognition of Foreign Legislative and Administrative Acts). If there is any physical presence or attributable wealth in a country, one must distinguish between two problems: Does any kind of contact serve as a sufficient basis to apply the tax laws? What are the restrictions in regard to taxing domestic sources?

Taxation on a world-wide basis is not contested if based on personal jurisdiction (Cook v. Tait, 265 U.S. 47 (1924); State Taxation of Foreign Source Income, Hearings on H.R. 507 before the House Committee on Ways and Means, 96th Congress, 2nd Session (1980) p. 308). Concerning taxes imposed on domestic tax sources of a non-resident alien, the question may arise whether those taxes may be levied at a rate corresponding to the world-wide principle. Aside from tax administrations' problems and possible discriminatory effects, there are theoretically no problems under international law because the minimum contacts are normally given, and such rates would

equalize non-resident aliens to resident aliens. But if such a system allocates corporate profits which are not earned by it to the domestic source or applies rates which come up to the value of the investment, then such a tax may come close to being a confiscation (→ Expropriation and Nationalization).

4. *Proportionality*

The United States Supreme Court, in the case Japan Lines v. County of Los Angeles (99 S.Ct 1813 (1979)), held that containers used in international transport and belonging to a Japanese corporation could not be taxed by an American state. The court stated that such taxation would conflict with the federal → foreign relations power (→ Federal States). It did not discuss, however, whether the required minimum contacts existed in this case, which suggests that it would probably uphold a similar federal tax. The court declined to rule on the "home port doctrine", according to which an ocean-going vessel may be taxed only by its home port's country and is immune from tax in a non-domiciliary State.

Another question is how to tax tourists (→ Tourism) or other persons who stay only temporarily without further economic interests within a country. It is undoubtedly in conformity with rules of international law that such persons are subject to turnover taxes and other indirect taxes. A question remains whether a country may tax tourists on income and property in their home countries. Is transit a sufficient basis for such general taxation? The theory of minimum contacts does not answer this question. In practice, States have never taxed transient visitors personally. But whether this practice is an expression of *opinio juris* is open to discussion. Chrétien and Norr deny the existence of a corresponding rule of international law.

These uncertainties may easily be explained. Demanding a sufficiently close contact for each kind of tax would amount to application of the rule of → proportionality, a rule uncertain in itself and suitable only in cases of great arbitrariness.

E. Tax Avoidance

1. *International Tax Planning*

In an international economic order based on freedom of the movement of goods, capital, services and persons, individuals and corporations may seek advantages in making use of the different levels of taxation in the various countries. International tax planning may exploit the many loopholes so as to avoid all elements which incur taxation and to realize all benefits which grant tax relief or lower taxes. Furthermore, tax administrations have few opportunities to investigate beyond their borders. Therein lies a temptation for taxpayers to resort to illegal practices.

2. *Tax Havens*

In international tax planning, about fifty countries play an active role as they, in general, have a very low tax level, do not tax individuals, leave foreign earnings free of tax, and dispose of a good banking system without exchange restrictions and of discrete tax administration. A country characterized by all or some of these features is called a tax haven, but almost every country may become a tax haven for particular types of income or activities. The most important tax havens are Bahamas, Bermuda, Liechtenstein, Luxembourg, Netherlands Antilles, Seychelles, Singapore and Switzerland. Another question exists as to what extent a country may attract foreign capital, companies and persons by granting tax advantages, but international law does not contain any restriction with regard to such behaviour.

3. *Tax Emigration*

Giving up links such as nationality, domicile, or place of management results in abandoning world-wide taxation by the respective country. What remains is the taxation of the domestic sources as restricted liability. If a person changes domicile from country A to country B, A does not levy a tax on profits earned in other countries. If there are no other sources in A, the person is no longer subject to taxation. Artists, professionals, pensioners and others can evade high domestic taxation by transferring their domicile, e.g. to Liechtenstein, Monaco or Switzerland, provided that they do not dispose of domestic tax sources by transferring their property out of the country. Corporations may obtain the same effects by transferring the place of management. This, however, very often is accompanied by economic disadvantages. States take the following countermeasures against tax emigration: denial of official permission for the transfer of domicile, place

of management, etc.; levying tax on the emigration itself; taxing the transfer of assets and taxing citizens living abroad on the basis of their nationality. Each of these measures, on the other hand, is plagued with drawbacks and loopholes (e.g. a citizen may renounce his citizenship).

4. *Base Companies*

(*a*) *Deferral principle*

Modern tax systems discern strictly between taxation of corporations and their shareholders. Profits made by the corporation are subject to a special tax. If these profits are distributed to the shareholders, they are taxed again as earnings of the shareholders. If the corporation, for tax purposes, is domiciled in country A and the shareholders are resident in B, taxation of the corporation's profits is deferred as long as they are not distributed. International groups of enterprises with wholly-owned subsidiaries may make use of this deferral principle in founding, in a tax haven, a subsidiary which holds the shares of the other firms and receives the distributions of profits, thus accumulating money in a low-tax country and becoming the financing centre of multinational enterprises. In practice, for example, an English company wishing to do business in Germany through a subsidiary would set up a corporation in Liechtenstein which holds the shares of the German subsidiary so that the German business involvement would be "based" in Liechtenstein.

(*b*) *Legal problems*

The effect of base companies seen from the point of view of States taxing on a world-wide basis is that these States are barred from taxing foreign profits and properties of their "tax nationals". They naturally seek to seize the profits of the base companies. One way to achieve this aim could be to pierce the veil of the legal personality of the base company and to attribute the profits directly to the shareholders. Under international law such action would be permissible because the legal personality for tax purposes is based on the respective national law and not on international law. Objections could be raised to any action against the shareholder, considering that any way of taxing the profits of a foreign corporation undistributed in the country of the shareholders would amount to coercion upon the shareholder to compel distribution. A country can succeed by using this manner of enforcement of its law outside its territory by means of "private execution" against the shareholder (Rehbinder) in a situation in which it never could execute its own law. But because the action of the State is directed only against a person subject to its jurisdiction, the indirect effects in another country are not contrary to international law. The principle of international consideration, however, precludes a general "piercing the corporate veil" because corporations based ordinarily on the legal order of a country would be dealt with as if they did not exist independently of shareholders or management, and because new problems in international economic relations would arise.

(*c*) *Legislative control*

If a base company is formed exclusively for the purpose of evading taxes and if it has no economic functions in itself, then special measures might be taken against it. A base company might not be recognized if it exists in a purely formal way, e.g. as a "letter box company". Under these circumstances, a country may consider the economic substance as superior to the legal form and treat the base company as non-existent. But this general means of interpretation does not suffice to handle all forms of base companies, and States have therefore enacted special legislation to combat the use of base companies.

In 1962 the United States enacted as subpart F of the International Revenue Code the legislation concerning the "controlled foreign corporation" according to which the undistributed profits of base companies are allocated to the American shareholders under special conditions, the most important being that the foreign company is controlled by American taxpayers and that the base company has profits only from "passive" activities. Active business such as trading, production, services, insurance, etc. are exempted from the permitted allocation. Other countries have followed more or less along the same lines: Federal Republic of Germany (Außensteuergesetz, 1972 Section 7 et seq.), Japan (Tax Reform Law of 1978), France (Loi de finance, 1980, Art. 70), and the United Kingdom (bill in preparation, 1984). Whether anti-base-company legislation has been successful is debatable. The fact that the number

of base companies has not diminished despite this legislation would indicate otherwise.

5. *Transfer Pricing*

(*a*) *Definition*

Exchange of goods and services between the members of multinational enterprises is transacted by transfer prices, i.e. intra-group prices which do not necessarily result from the free play of market forces but are determined by the economic policy of the management of the group. Using this means, a group may measure prices so that profits accrue in a country where they are taxed at the lowest rates. The simplest example is the delivery of a product at an exorbitant price, the delivering company gaining the whole profit (or conversely: delivery at a price just equalling the costs, leaving the profit with the receiving company). Similar effects can be achieved by transfer pricing for licencing, lending money, delivery of commodities and all sorts of exchanges between related companies of a group of enterprises.

(*b*) *Legislative control*

States counteracting transfer pricing do not accept the prices agreed upon by the company, but presume prices which would be agreed on "if the conditions made between the two enterprises had been those which would have been made between independent enterprises" (Art. 9 OECD-Model), the so-called "dealing at arm's length prices". The problem is, however, that many of the intra-group exchanges have no free-market equivalents. States therefore have developed various methods to determine a fictitious market price.

If each country concerned applies a different method, it is quite likely that they may reach different results and that a profit may be taxed twice. The OECD Council recommended on May 16, 1979 that member States take into account the considerations and methods set out in a report of the Fiscal Committee (Transfer Pricing and Multinational Enterprises (1979)). Furthermore, Art. 9, section 2 OECD-Model provides for a corresponding adjustment of profits if a contracting party corrects transfer pricing. But this article contains no obligation to make a corresponding adjustment, but at the most a *pactum de consul-tendo*. Efforts within the EEC have never gone beyond drafts. As international action was not successful, States took over the initiative.

In 1968 the United States Department of the Treasury issued regulations to section 482 of the Internal Revenue Code containing detailed rules for determining the arm's length price. It is still open whether this approach will be accepted as the basis for the growth of → customary international law or its principles will become part of international agreements. But an increasing number of national rules will inevitably lead to the need for international rules.

F. Tax Cooperation

1. *Revenue Exception Rule*

"No country ever takes notice of the revenue laws of another" (Lord Mansfield in Holman v. Johnson, 98 E.R. 1120 (K.B. 1775)). This sentence expresses a long standing maxim of international taxation. Levying taxes does not constitute a common interest of the international community as is the case for example with the struggle against crime or the protection of the environment. Thus traditionally administrations have refused to cooperate in the field of taxation even if tax claims were decided by an independent tribunal. Even more, there was no exchange of information relevant to taxation in another country. Sometimes, providing such information to a foreign tax administration is prohibited as a crime (e.g. Swiss Criminal Code, Art. 273).

This "revenue exception rule" in international administrative cooperation has undergone substantial change during the last few decades. Administrations nowadays cooperate in various fields, although always based on → reciprocity. This presupposes a factual situation in which both sides gain advantages by cooperating. Cooperation between tax administrations is restricted to groups of countries with corresponding interests (e.g. industrialized States) and does not generally take place between industrialized and → developing States.

2. *Double Taxation Agreements*

Contracting parties to double taxation agreements stipulate to cooperate as far as necessary for their implementation, including the restricted

disclosure of necessary information, such as on taxes actually paid for purposes of granting a tax credit.

To resolve differences of interpretation and application of a tax agreement, the → League of Nations in 1926 proposed a conciliating commission and, in case of failure of conciliation (→ Conciliation and Mediation), the right to seise the → Permanent Court of International Justice. But States did not accept this proposal, preferring the "mutual agreement procedure" within tax treaties, according to which the tax administrations concerned may reach an understanding on interpretation and application of the treaty.

The legal nature of the mutual agreement procedure is open to question. Positive results from this procedure constitute executive agreements based on the authorization of the tax treaty (e.g. OECD-Model 1977 Art. 25). The effect of the mutual agreement procedure on municipal tax law is a problem often discussed. In practice, most States (but not, for example, Italy) give the procedure a higher ranking than even unappealable court decisions. This violation of the principle of *res judicata* is astonishing because the mutual agreement procedure represents an internal administrative procedure without the participation of taxpayers. This and other deficiencies have led to several alternative proposals. One possible method would be to give independent third persons or tax experts a role in the mutual agreement procedure, thus developing this procedure in the direction of international → arbitration (see EEC draft; Lindencrona and Mattson). Another way could be to institute a prejudicial procedure to solve differences in interpreting the treaty. Proposals for the erection of an International Tax Court have been repeatedly made, but have never had any chance for realization.

3. *General Cooperation*

(*a*) *Broad disclosure*

The aspiration of tax laws to extraterritorial application is opposed by the restricted administrative powers of investigation. Administrative aid based on reciprocity would be an effective means for realizing such tax claims (→ Administrative, Judicial and Legislative Activities on Foreign Territory; → Administrative Law, International Aspects).

During recent times contracting parties to double taxation agreements have stipulated not only administrative assistance for the application of the convention but also the implementation of domestic tax laws concerning taxes covered by the convention.

(*b*) *Information exchange*

Information between tax administrations may be exchanged on request by one side, automatically according to special arrangements concerning one or more categories of information, or spontaneously if one administration requires information which it deems to be of interest to the other administration (→ Legal Assistance between States in Administrative Matters). Two legal questions relate to the general exchange of information. First, under international law, is a country obliged to give requested information? The answer will depend on the contents of any existing treaties between the States. Secondly, may an administration give information if no relevant treaty rule exists? If information is given spontaneously, no questions of international law are raised. Domestic law determines whether the administration is entitled to give information to foreign administrations. The EEC has published a draft directive for harmonizing general exchange of information within the Community. The OECD and the → Council of Europe are preparing drafts of a multilateral agreement.

(*c*) *Prospects*

The trend is towards increasing administrative cooperation beyond double tax agreements. The Scandinavian countries have already concluded a comprehensive multilateral agreement on administrative assistance in tax matters. Very informal contacts among the tax administrations of OECD member States also take place ("Interfisc"), and in 1981 the OECD published a "Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims".

G. Activities of International and Regional Bodies

1. *League of Nations*

Upon the recommendation of several conferences organized within the → International

Chamber of Commerce, the → League of Nations in the 1920s had several reports drawn up on double taxation and tax evasion. A report submitted in October 1928 contained model agreements of bilateral treaties on direct taxes, inheritance taxes and administrative assistance. In 1929 the League established the Fiscal Committee which continued the studies at ten sessions. The result of these deliberations was a draft model tax treaty submitted by Mexico in 1943 which stressed the rights of the country where a tax source is situated, and a second model drawn up in London 1946 which stressed the rights of the country where the taxpayer is resident. These opposing models marked the basic difference between industrialized and developing States which still dominates tax relations between these countries.

2. *United Nations*

By Resolution 1273(XLIII) on August 4, 1967 the → United Nations Economic and Social Council requested the → United Nations Secretary-General to set up a group of experts on tax treaties between developed and developing countries. This group, established in 1968, consisted of the same number of representatives of industrialized and developing countries. After several reports the Group of Experts submitted "Guidelines for Tax Treaties between Developed and Developing Countries", which became "familiarized" in the "Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries" (UN Doc. ST/ESA/94 (1979)), stressing the source principle.

3. *OEEC/OECD*

In 1956 the Organisation for European Economic Co-operation (OEEC), the predecessor of the OECD, established a Fiscal Committee which elaborated the "Draft Double Taxation Convention on Income and Capital" (1963, revised 1977) to serve as a basis for concluding double taxation agreements between member States. This draft emphasized the position of the State of domicile and therefore met with problems when OECD members wished to conclude treaties on this basis with developing States.

4. *Council of Europe*

The Council of Europe organized a colloquium (March 5 to 7, 1980) on international tax evasion; the OECD had already put this question on the agenda by a recommendation of its Council (September 21, 1977). Both organizations combined their efforts to prepare a draft convention on assistance in tax matters, a topic dealt with also by the Group of Experts convened by the → United Nations.

5. *Andean Pact*

In 1971 the Andean Model Convention for the avoidance of double taxation between member countries of the Andean Common Market and countries outside the region was formulated. This model emphasized the position of the source principle which enables developing countries to levy satisfactory taxes in the fields of plant building and → technology transfer.

6. *Comecon*

In 1977 and 1978 two multilateral tax treaties were concluded within the framework of the → Council for Mutual Economic Assistance (Comecon) but due to the subordinate role of taxation in socialist economies these treaties are of minor importance.

7. *International Fiscal Association*

In 1938 the International Fiscal Association, (IFA), a → non-governmental organization, was founded to unite tax administration officials, taxpayers and their advisers, and academics. At yearly conventions, the IFA discusses questions of international taxation and issues recommendations which have greatly influenced the development of international taxation.

League of Nations, Economic and Financial Commission, Report on Double Taxation (1923).

League of Nations, Technical Experts, Double Taxation and Tax Evasion Report and Resolutions, Doc. F.212-C 115 M.55.1925.I (1925).

League of Nations, Governmental Experts, Double Taxation and Tax Evasion Report, Doc. C.562.M.178.1928.II (1928).

P. VERLOREN VAN THEMAAT, Internationaal Belastingrecht (1946).

M. CHRETIEN, A la recherche du droit international fiscal commun (1955).

M. NORR, Jurisdiction to Tax and International Income, Tax Law Review, Vol. 17 (1962) 431–462.

O. BÜHLER, Prinzipien des Internationalen Steuerrechts (1964).

The Taxation of Enterprises with Permanent Establishments Abroad, Cahiers de droit fiscal international, Vol. 58 A (1973).

L. FISCHER and P. WARNEKE, Grundlagen der Internationalen betriebswirtschaftlichen Steuerlehre (2nd ed. 1974).

J.F.A. JONES (ed.), Tax Havens and Measures against Tax Evasion and Avoidance in the EEC (1974).

J.M. MÖSSNER, Der Begriff des Internationalen Steuerrechts in der neueren Literatur, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 25 (1974) 255–287.

Allocation of Expenses in International Arm's Length Transactions of Related Companies, Cahiers de droit fiscal international, Vol. 60 B (1975).

W. RUDOLF, Über territoriale Grenzen der Steuergesetze, in: Recht und Wirtschaft in Geschichte und Gegenwart, Festschrift für J. Bärmann (1975) 769–786.

A.A. KNECHTLE, Grundfragen des Internationalen Steuerrechts (1976).

W. KUMPF, Steuerliche Verrechnungspreise in internationalen Konzernen (1976).

OECD, Fiscal Committee, Model Double Taxation Convention on Income and Capital (1977).

P. FONTANEAU, The Notion of Tax Domicile and its Effect on the Taxation of Foreign Investments, International Lawyer, Vol. 12 (1978) 413–421.

B. GROSSFELD, Multinationale Kooperation im Internationalen Steuerrecht, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 18 (1978) 73–165.

R.P. SOKOL, French Taxation of Inter-Company Transfer Agreements: Article 57 v. Section 482, IntLawyer, Vol. 12 (1978) 639–648.

S.S. SURREY, United Nations Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries, Harvard ILJ, Vol. 19 (1978) 1–220.

C.T. EBENROTH, Die verdeckten Vermögenszuwendungen im transnationalen Unternehmen (1979).

OECD, Committee on Fiscal Affairs, Transfer Pricing and Multinational Enterprises (1979).

R. VALDES COSTA, Estudios de derecho tributario internacional (1979).

R.A. DACHS, Enforcement of Foreign Tax Judgments in the United States: The Queen ex rel. British Columbia v. Gilbertson, Journal of International Law and Economics, Vol. 14 (1980) 281–300.

H. DEBATIN, Entwicklungsaspekte des internationalen Steuerrechts, Recht der Internationalen Wirtschaft, Vol. 26 (1980) 3–10.

International Fiscal Association, Recourse to Tax Havens, Use and Abuse (1980).

International Tax Avoidance, Vol. A/B (1980).

E.A. OWENS, International Aspects of U.S. Income Taxation, 3 vols. (1980–1981).

P. POSTLEWAITE, International Corporate Taxation (1980).

Rules for Determining Income and Expenses as Domestic or Foreign, Cahiers de droit fiscal international, Vol. 65 B (1980).

W. RYSER, Introduction au droit fiscal international de la Suisse (1980).

A. STORCK, Ausländische Betriebsstätten im Ertrag-und Vermögenssteuerrecht, Taxation of Foreign Permanent Establishments (1980).

G. TIXIER, G. GEST and J. KEROGUES, Droit fiscal international, Pratique française (2nd ed. 1980).

J.C. ATIK, The Problem of Reciprocity in Transnational Enforcement of Tax Judgments, Yale Journal of World Public Order, Vol. 8 (1981) 156–170.

B. BRACEWELL-MILNES, The Economics of International Tax Avoidance, Political Power versus Economic Law (1981).

K. GUSTAFSON, Proposed Congressional Limitations on State Taxation of Multinational Corporations, Georgia Journal of International Law, Vol. 2 (1981) 343–363.

International Bureau of Fiscal Documentation, International Tax Avoidance and Evasion, Colloquy of the Council of Europe, Strasbourg 1980 (1981).

G. LINDENCRONA and N. MATTSON, Arbitration in Taxation (1981).

R. MACDANIEL and H. AULT, Introduction to U.S. International Taxation (2nd ed. 1981).

J. MARTIN and D. WILSON, Comparative Analysis of Systems of Domestic Taxation of Controlled Foreign Corporations, Vanderbilt Journal of Transnational Law, Vol. 14 (1981) 99–170.

Mutual Agreement – Procedure and Practice, Cahiers de droit fiscal international, Vol. 66 A (1981).

OECD, Fiscal Committee, Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims (1981).

P. POSTLEWAITE and M.P. COLLINS, International Individual Taxation (1981).

A. SPALL, International Tax Evasion and Tax Fraud: Typical Schemes and the Legal Issues Raised by Their Detection and Prosecution, Lawyer of the Americas, Vol. 13 (1981) 325–359.

J.F. SPIERDIJK, Transfer Pricing and Multinational Enterprises (1981).

K. VOGEL (ed.), Steueroasen und Außensteuergesetze (1981).

C.R. IRISH, Tax Havens, Vanderbilt Journal of Transnational Law, Vol. 15 (1982) 449–510.

H.-W. BAYER, Die unbeschränkte und die beschränkte Einkommenssteuer – ein Vergleich, in: Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler (1983) 59–73.

V. KLUGE, Das Internationale Steuerrecht der Bundesrepublik (2nd ed. 1983).

J.M. MÖSSNER, Die internationale Steuerflucht, Staatsfinanzierung im Wandel, in: Verhandlungen auf der Jahrestagung des Vereins für Sozialpolitik, Köln 1982 (1983) 817–839.

Tax Avoidance and Tax Evasion, Cahiers de droit fiscal international, Vol. 63 A (1983).
W. RITTER, Das Prinzip Rücksicht, Betriebs-Berater, Vol. 39, No. 18 (1984) 1109–1115.

JÖRG MANFRED MÖSSNER

TECHNICAL AID *see* Economic and Technical Aid

TECHNOLOGY TRANSFER

1. Notion

In a broad non-legal sense the concept of technology transfer includes any type of disclosure of practical information that may be used for economic purposes by a recipient or beneficiary State. More narrowly, technology transfer may be dealt with as a separate legal area and the concept may be legally applied to define certain rights and obligations. In this sense, transfer of technology is generally understood to include transactions whereby patented or unpatented technical knowledge or trademarks, or rights regarding the use of such subject-matter, are transferred from one party to another (→ Industrial Property, International Protection; → World Intellectual Property Organization). Thus, trademarks, which do not in themselves embody technology, are normally subject to transfer of technology regulations. On the other hand, certain transactions are not legally considered to involve transfer of technology, even though in fact they do achieve that result. These include the circulation of books, periodicals and other published information, as well as the movement of persons from one country to another when this is not part of a technical assistance operation or other similar transactions. These also extend to the importation of capital goods or other elements embodying novel technology and direct → foreign investments which imply that foreign technology is imported into the host country as part of the foreign capital assets or managerial skills which make up those investments.

A comprehensive idea of transfer of technology in its legal sense may be obtained by listing the different types of transactions included in that concept. For example, the Draft International Code of Conduct on the Transfer of Technology prepared within the → United Nations Conference on Trade and Development (UNCTAD; → Codes of Conduct), lists the following transfer of technology transactions:

"(a) The assignment, sale and licencing of all forms of industrial property including patents, inventors' certificates, utility models, industrial designs, as well as trademarks, service names and trade names;

(b) The provision of know-how and technical expertise in the form of feasibility studies, plans, diagrams, models, instructions, guides, formulae, basic or detailed engineering designs, specifications and equipment for training, services involving technical advisory and managerial personnel, and personnel training;

(c) The provision of technological knowledge necessary for the installation, operation and functioning of plant and equipment, and turn-key projects;

(d) The provision of technological knowledge necessary to acquire, install and use machinery, equipment, intermediate goods and/or raw materials which have been acquired by purchase, lease or other means;

(e) The technological contents of industrial and technical co-operation arrangements."

The concept of technology transfer is frequently narrowed to include only transactions of an international character, i.e. those in which transferor and transferee belong to different countries or in which, even though both operate in the same jurisdiction, the technology has been previously acquired abroad by the transferor. This limitation of the scope of the concept of technology transfer or at least of the transactions which are subject to specific transfer of technology regulations is practically necessary in the case of international rules, whether these result from multilateral or bilateral agreements, but also extends to regulations enacted by specific countries. The reason for this focusing of transfer of technology regulations on international transactions is that the purposes of these regulations are closely connected to the relations between foreign transferors and local transferees.

2. Evolution of Legal Rules

Three main lines of development may be found in the legal regulation of technology transfer. The first

one is based on antitrust law (→ Antitrust Law, International). Transfer of technology transactions are among the business arrangements which may fall under antitrust rules. In fact, they create legal issues of their own, because of the conflict between antitrust rules, intended to prevent the concentration or extension of market power, and industrial property laws, which grant the legal foundation and justification for market domination based on industrial property rights. From this angle, the historical evolution of antitrust rules applicable to transfer of technology transactions has consisted, basically, in determining which restrictive business practices related to such transactions are not allowed under antitrust provisions. Different approaches may be followed in this regard. One possibility is to include in the antitrust statutes special rules applicable to transfer of technology transactions; this approach is rarely chosen, since it would require relatively complex rules requiring frequent change, thus requiring a legal structure quite distinct from that generally followed by antitrust laws. A second possibility, followed particularly in the United States, is to allow the courts to draw the limit between legal and illegal provisions in transfer of technology transactions, striking a balance between antitrust and industrial property rules. A third approach, followed by the → European Economic Community, for example, is to issue special regulations, sometimes applicable to only certain types of transfer of technology transactions such as patent licences, determining, under the broad rules included in the general antitrust statutes, the validity of different types of clauses and practices included in or related to transfer of technology transactions.

A second line of development in the field of the legal regulation of transfer of technology consists of the so-called direct regulation statutes. These, which are in effect in most Latin American countries, in other → developing States (Nigeria and the Philippines, for example) and also in some industrialized countries (Japan, Spain, Portugal, Yugoslavia) are exclusively focused on transfer of technology transactions. Even though some of these statutes have been enacted as regulations pursuant to antitrust laws, their methodology and contents differ significantly from those of orthodox antitrust enactments. The basic regulatory mechanism is a screening procedure by means of which a local administrative authority controls the terms of licence and know-how importation agreements. This procedure leads to the objection or rejection by the administrative agency of transactions including restrictive business provisions, as defined in the regulations. The royalties and other payments derived from the contracts are also subject to control, and the intervening agency is also granted broad powers to reject applications for contracts which it considers are excessively burdensome for the national economy or the transferee. The screening authority may also examine the technological aspects of the transactions, for purposes of evaluating the economic effects of the contract. The procedure leads to the approval and registration of the agreement – which is necessary for the contract to be legally valid and binding for the parties, for the remittance of payments to the transferor, and for the deduction of such payments from the transferee's taxable income. This approach began with several Japanese regulations enacted in the 1960s, particularly the Japanese Antimonopoly Act Guidelines for International Licencing Agreements of May 24, 1968, and took its present structure with several Latin American statutes, especially the Andean Code, of December 30, 1970 (→ Andean Common Market), Argentine Law No. 19, 231 (1971), the Mexican Law of December 28, 1972 on the Registration of Contracts and Agreements regarding the Transfer of Technology, and the Brazilian Normative Act No. 15 of September 11, 1975.

A third line of development in the field of technology transfer regulation comprises the rules enacted within international frameworks. In fact, some of the rules described in the two previous lines of development would also fall under this third group, but are excluded from it since they follow the methodology of domestic antitrust or direct regulations. Thus, the European Economic Community rules on international transfer of technology transactions do not differ significantly from other antitrust rules applicable to such transactions, and the direct regulations resulting from the Andean Code (Decision 24 (1970) of the Commission established under the Cartagena Agreement) differ from local regulations only in that the Andean Code sets out the basic principles to which member countries must adjust their own laws.

Within the purely international transfer of

technology rules – those which do not follow one of the previously described regulatory approaches – several types should be distinguished. Some are included in bilateral agreements and are ancillary to the main provisions of these agreements. For example, → foreign aid agreements may include rules on the supply of technology by the donor nation, → double taxation agreements may include clauses specially applicable to transfer of technology transactions, and agreements on → economic and technical aid may include provisions determining how the flow of technology between the countries involved shall take place. However, the purpose of these bilateral agreements and of their provisions related to technology transfer are not regulatory, and their significance in this area is limited.

Still more relevant are the multilateral instruments and negotiations in the field of transfer of technology and other related areas. Thus, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, approved by the → United Nations General Assembly on December 5, 1980 (Res. 35/63), opens the possibility of a much wider international enforcement of antitrust rules, including those applicable to transfer of technology transactions, and weakens the arguments that may be raised against the extraterritorial enforcement of antitrust statutes, particularly when they apply to conduct having effects on the country which enforces such statutes (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). Similarly, the → Charter of Economic Rights and Duties of States may have an impact on the permissible scope of antitrust and direct regulations of transfer of technology transactions. Of special significance is the International Code of Conduct on the Transfer of Technology, being drafted within the framework of UNCTAD, which is intended to establish an international legal basis for the regulation of transfer of technology. More generally, the contemporary → international law of development provides a basis for bilateral arrangements, particularly between developing States and industrialized countries, and for local regulations applicable to international transactions.

3. Current Legal Situation

The direct regulation of the transfer of technology in developing States is effected through legal instruments specifically devised to control international technology transfers, unlike general antitrust laws. The principal elements of the screening procedure provided by direct regulations are the following:

(a) Subject matter of the procedure. Transfer of technology regulations apply, in most countries where they have been enacted, to legal acts by means of which natural or legal persons domiciled outside the host country assign or licence rights in technology or trademarks to persons domiciled in that country. The fact that the transaction is gratuitous or part of a wider contractual framework does not affect the requirements of approval and registration. Both patented and unpatented technical knowledge are subject to this requirement.

(b) Approval and registration procedure. The parties to a transaction subject to transfer of technology laws may submit executed contracts to the authorities or propose drafts for discussion with the latter. In practice, the parties tend to present applications for the registration of executed contracts. In these cases, the contract must be submitted within a specified period of time from its date of execution.

The authorities have broad powers to propose amendments to the transactions submitted for registration, but may not change unilaterally the terms of the proposed contracts; the amendments have to be accepted by the parties. In some cases, the authorities are not allowed to accept certain types of provisions, regardless of the overall advantages which the transferee and the host country may derive from the proposed transactions.

The screening authorities are in charge of revising the legal, economic and technological aspects of international licencing operations. Regarding the legal aspects, the agencies' control is generally restricted to matters dealt with in the transfer of technology regulations. The legal control is not extended to matters related to the validity of the contract under other provisions, unless the illegality is obvious or may have effects on the clauses directly controlled by the regulations. Consequently, approval and registration of a transfer of technology agreement do not imply that it is valid under other statutes. As to the economic aspects of transfer of technology operations, the screening agencies must generally evaluate the economic impact of the transaction on the transferee, as well as the effects of the operation on

the local economy as a whole. This second aspect, however, can only be taken into account in a very limited way, either because of the lack of manpower and information, or because of the delay and cost that a detailed evaluation of each transaction would involve. The technological evaluation may be directed to issues such as the availability of similar technology in the host country, the possible obsolescence of the know-how involved, or the effects of the transaction on the local technical level, research and environment. This part of the procedure is limited by the practical impossibility of analyzing all the different types of technology imported into a given country, each requiring specialized knowledge about its functions and effects for the purposes of a proper evaluation, and by the limited disclosure of non-patented technology in the negotiation and screening procedures.

(c) Restrictive business provisions. Transfer of technology regulations include rules authorizing or requiring the rejection of registration applications for contracts which include restrictive clauses, in other words those which prevent, damage or hinder the technological development of the transferee, limit its entrepreneurial freedom or imply an abuse by the technology transferor. In addition, the authorities may reject approval applications on the basis of the negative economic effect which may be attributed to a transaction because of the restrictive provisions it includes.

Even though the prohibitions included in transfer of technology statutes are in many cases similar to those derived from antitrust laws, the purposes and functions they are directed to are not the protection of competition in the host country, but rather improving the transferee's bargaining position, promoting local technological development and protecting the balance of payments of the importing country, among other goals. A closer parallel may be found between the restrictive business practices provisions included in transfer of technology statutes and the rules applicable to abuses of dominant position. Transfer of technology regulations may be viewed as a legal mechanism directed to preventing the negative effects which result from the dominant positions held by foreign transferors in the technology markets. Instead of investigating the market situation in each case, the regulations are drafted on the legal assumption that the foreign technology supplier holds a dominant position in the relevant technological field, whether by means of patents or because of possession of trade secrets. However, while the provisions which prohibit the abuse of dominant position are essentially directed to the prevention of its extension to other markets and to limiting the anti-competitive aspects of the conduct of enterprises not exposed to substantial competition, transfer of technology statutes aim at improving the benefits transferees derive from licencing operations, even if no anti-competitive effects may result from such operations.

(d) Obligations of the transferor. Some transfer of technology regulations require that registered contracts include certain minimum obligations and liabilities bearing on the transferor, particularly on the matter of warranties and personnel training.

(e) Control of parent-subsidiary operations. Transfer of technology laws show a tendency to impose more stringent controls on parent-subsidiary transactions than on contracts between parties dealing at arms' length.

(f) Control of capitalization of technology. Many of the countries which have enacted transfer of technology regulations also impose controls on foreign capital investments (→ Investment Codes). These two regulatory systems are frequently coordinated by means of provisions which limit the possibility of capitalizing intangible assets, or which require special procedures for the valuation of technology contributed to a business association's capital, or regarding the approval of intangible assets investments, to be registered as foreign capital.

(g) Duration. Transfer of technology regulations include rules which limit the duration of registrable transactions and which restrict the transferee's obligations after the contracts's termination.

(h) Applicable law and jurisdiction. Certain provisions are intended to make the local law and jurisdiction applicable to matters connected with regulated transfer of technology transactions (→ Private International Law).

4. Evaluation

A broad overview of the rules currently applicable to international transfer of technology transactions indicates a division between developing countries, which have tended to enact direct regulations applicable to such transactions, and industrialized nations, which are inclined to follow an antitrust approach to this matter. This division, based on ideological grounds and on the different

effects which different countries try to achieve on the basis of their position in the international technology markets, has created a difficult obstacle to the international regulation of these markets, particularly by means of agreements and other instruments encompassing developed and developing nations. The main effort in this field, the Draft International Code of Conduct on the Transfer of Technology, has faced, so far without success, this division between the different groups of States involved. Even if this code of conduct is approved, the differences between the regulatory system and philosophy prevailing in these groups are likely to persist.

The success, in terms of their functions and purposes, of antitrust and direct transfer of technology regulations depends on the circumstances prevailing in the country where they are applied. Antitrust rules can only be effective in a country where the courts, the administrative authorities and the business community have a clear and strong notion of the value of competition, and where such competition is possible in view of the economic structure of the country. Direct transfer of technology regulations can achieve their explicit ends only in countries in which most economic relations with foreign parties are closely regulated by the government, particularly by means of controls on direct foreign investments, exchange operations and the import and export of goods and services.

Draft International Code of Conduct on the Transfer of Technology as of 6 May, 1980, UN Doc. TD/CODE/TOT/25.

M. CHALIFOUR, Le régime fiscal des transferts internationaux de technologie (1976).

Régimen de la Transferencia de Tecnología en los Países de América Latina, Instituto para la Integración de América Latina (1977, updated).

W. KEWENIG, Technologietransfer aus völkerrechtlicher Sicht, in: W. Kewenig (ed.), Völkerrecht und internationale wirtschaftliche Zusammenarbeit (1978) 71–147.

J. ALVAREZ SOBERANIS, La Regulación de las Invenciones y Marcas y de la Transferencia de Tecnología (1979).

G. CABANELLAS, The Argentine Transfer of Technology Law, An Analysis and Commentary, The Hastings International and Comparative Law Review, Vol. 3 (1979) 29–103.

W. FIKENTSCHER and H.P. KUNZ-HALLSTEIN, Technologietransfer an Entwicklungsländer und Kartellrecht, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (1979) 437–443.

C.M. CORREA, Regímenes de Control de la Transferencia de Tecnología en América Latina (1980).

W. FIKENTSCHER, The Draft International Code of Conduct on the Transfer of Technology (1980).

C.M. CORREA, Transfer of Technology in Latin America, A Decade of Control, Journal of World Trade Law, Vol. 15 (1981) 388–409.

C.M. CORREA, La Regulación de las Cláusulas Restrictivas en los Contratos de Transferencia de Tecnología en el Derecho Latinoamericano, Revista del Derecho Comercial y de las Obligaciones, Vol. 14 (1981) 183–258.

G. CABANELLAS, Antitrust and Direct Regulation of International Transfer of Technology Transactions (1984).

GUILLERMO CABANELLAS

TORTURE

1. Definition

Although torture is proscribed by conventional, customary and general principles of → international law, the definition of the term "torture" is not entirely clear. According to Art. 1 of the new United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984 (UN Doc. A/RES/39/46, Annex) the term "torture" means

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity",

but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. A similar definition is contained in the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or

Punishment (UN GA Res. 3452 (XXX) of December 9, 1975, Annex, Art. 1).

At the regional level the → European Commission of Human Rights first elaborated a slightly different definition of torture under Art. 3 of the → European Convention on Human Rights of 1950 (ECHR); according to Art. 3, no one "shall be subjected to torture or to inhuman or degrading treatment or punishment". In the Greek Case the Commission held torture to be an instance of inhuman and degrading treatment. Inhuman treatment is conduct that "deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable" (Yearbook of the ECHR, Vol. 12 (1969) p. 186). Degrading treatment occurs if conduct "grossly humiliates before others or drives . . . [the individual] to act against his will or conscience". Finally, torture is "inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and . . . is generally an aggravated form of inhuman treatment".

The question of justification arose in the Northern Ireland Case. There the Commission held that the prohibition under Art. 3 was absolute, finding that there can never be under the Convention or under international law justification for actions in breach of that provision (Yearbook of the ECHR, Vol. 19 (1976) p. 752; cf. → Terrorism). In the context of this case the question of the definition of torture was also examined by the → European Court of Human Rights. The opinion of the Court in its Judgment of January 18, 1978 did not specifically adopt the definition advanced by the Commission in the Greek and Northern Ireland Cases, but rather the subsidiary definition of the UN Declaration against Torture. For the Court the distinction between torture and other inhuman or degrading treatment is principally "a difference in the intensity of the suffering inflicted" (Series A 25, p. 66).

Concerning the so-called "five interrogation techniques" in the Northern Ireland Case, which consisted of hooding, wall-standing, subjection to noise, deprivation of food and water and deprivation of sleep, the Commission held unanimously that the combined use of these techniques for interrogation constituted torture (Yearbook of the ECHR, Vol. 19 (1976) pp. 792 et seq.), whereas the majority of the Court held that the individual use of the five techniques did not constitute a practice of torture but was only inhuman treatment within the meaning of Art. 3 of the Convention (Series A 25, p. 67).

2. *Historical Evolution and Current Legal Situation*

The proscription of torture in the sphere of international law initially evolved in the field of → humanitarian law in armed conflict. Art. 4 of the Hague Regulations respecting the Laws and Customs of War on Land (Annex to Convention IV of 1907; → Hague Peace Conferences of 1899 and 1907; → Land Warfare) merely stipulates that → prisoners of war must be humanely treated. This provision developed into a rule of customary law prohibiting torture against prisoners of war on the basis of → reciprocity.

Very much as a response to the atrocities of World War II, both treaties and → declarations in the sphere of → human rights have established essentially the same legal norm as regards the prohibition of torture. The prohibition of torture is embodied in the Universal Declaration of Human Rights (Art. 5; → Human Rights, Universal Declaration (1948)), the American Declaration of the Rights and Duties of Man (1948; Art. 26), the UN International Covenant on Civil and Political Rights (Art. 7; → Human Rights Covenants), the European Convention on Human Rights (Art. 3), the → American Convention on Human Rights (ACHR) (Art. 5), the → African Charter on Human and Peoples' Rights (Art. 5; → Human Rights, African Developments) as well as in the four → Geneva Red Cross Conventions of August 12, 1949 (Conventions I to IV, Art. 3; Conventions I and II, Art. 12; Convention III, Arts. 13 and 17; Convention IV, Art. 32). Even though some of these treaties permit derogations from some protected human rights in cases of extreme threats to the internal order of the State, the right not to be subjected to torture is one from which no derogation is permissible (UN Covenant, Art. 4, ECHR, Art. 15, ACHR, Art. 27).

The prohibition of torture has also been reiterated in a number of unanimous UN resolutions (→ International Organizations, Resolutions), including the 1975 Declaration referred to above. This Declaration deals with torture in the context of criminal law and calls upon each State to

establish an effective national system to prohibit and punish torture. According to this instrument torture is an offence against human dignity, while more recent draft conventions on the subject, such as the Inter-American Juridical Committee's Draft Convention Defining Torture as an International Crime (Art. 1; ILM, Vol. 19 (1980) p. 619) or the International Association of Penal Law's Draft Convention for the Prevention and Suppression of Torture (Art. 1, Revue internationale de droit pénal, Vol. 48 (1977) p. 267), define torture as a crime (→ International Crimes).

In Resolution 32/62 of December 8, 1977 the → United Nations General Assembly requested the United Nations Commission on Human Rights to draw up a draft convention on torture and other cruel, inhuman or degrading treatment or punishment in the light of the principles embodied in the aforementioned Declaration on Torture. In 1984 the Commission transmitted its draft to the General Assembly which adopted it on December 10, 1984 as the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (UN Doc. A/RES/39/46, Annex). It will take effect after ratification by 20 nations. The Convention provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in its territory. It states that no exceptional circumstances whatsoever may be invoked as a justification of torture and that no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. The agreement also provides for the establishment of a Committee against Torture consisting of ten experts, whose function it is to supervise the observance of the State Parties' obligations under the Convention.

The uniform treaty condemnation of torture, the unanimity in the opinion of scholars and the various efforts to improve the protection of the individual against torture provide a strong indication that the proscription of torture is not merely a part of customary international law but that it has become → *jus cogens* (O'Boyle), a conclusion which has recently been confirmed by the Swiss Federal Supreme Court in its decision of March 22, 1983 (Europäische Grundrechte Zeitschrift, Vol. 10 (1983), p. 253 et seq.). This conclusion is further supported by the fact that no State asserts a right to torture its nationals or foreigners and that the municipal law of nearly all countries of the world proscribes torture either explicitly or implicitly.

Today protection from torture seems to be one of those fundamental human rights to which all individuals are entitled, regardless of their → nationality. Protection against torture is an obligation of States towards the international community as a whole. Hence protection from torture is one of these "basic rights of the human person" which create obligations erga omnes, i.e. rights that "... all States can be held to have a legal interest in their protection", as the → International Court of Justice pointed out in its judgment in the → Barcelona Traction Case (ICJ Reports 1970, p. 32).

On June 30, 1980 the United States Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala (630 F.2d 876) ruled that torture by government officials is a violation of international law and that foreign torturers found in the United States may be sued there regardless of where the violation occurred. This decision seems to be the first one in which a municipal court has unilaterally declared itself to have jurisdiction over civil actions based on torture which occurred in a foreign State.

United Nations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, Annex.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GA Res. 3452(XXX), 9 December 1975.

Draft American Convention for the Prevention and Suppression of Torture, OEA/SER.L/V/II.48, Doc. 27, December 14, 1979.

Memorandum for the United States submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala, ILM, Vol. 19 (1980) 585–611.

Amnesty International, Report on Torture (2nd ed. 1975).

G.I.A.D. DRAPER, The Juridical Aspects of Torture, Acta Juridica (Cape Town), Vol. 1 (1976) 221–232.

M.O'BOYLE, Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom, AJIL, Vol. 71 (1977) 674–706.

The Prevention and Suppression of Torture, Revue internationale de droit pénal, Vol. 48 (1977) Nos. 3 and 4.

S. ACKERMAN, Torture and Other Forms of Cruel and Unusual Punishment in International Law, Vanderbilt Journal of Transnational Law, Vol. 11 (1978) 653–707.

B.M. KLAYMAN, The Definition of Torture in International Law, Temple Law Quarterly, Vol. 51 (1978) 449–515.

M. LIPPMAN, The Protection of Universal Human Rights: The Problem of Torture, Universal Human Rights, Vol. 1 (1979) 25–56.

R. MARAN, Against Torture – Three Spheres of Law, Human Rights Review, Vol. 4 (1979) 85–97.

A. RIKLIN (ed.), Internationale Konventionen gegen die Folter, Conventions internationales contre la torture, International Conventions against Torture (1979).

R.J. SPJUT, Torture under the European Convention on Human Rights, AJIL, Vol. 73 (1979) 267–272.

International Commission of Jurists, Torture, How to Make the International Convention Effective (2nd ed. 1980).

Symposium – Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on Filartiga v. Pena-Irala, Georgia Journal of International and Comparative Law, Vol. 11 (1981) 305–341.

P.J. DUFFY, Article 3 of the European Convention on Human Rights, ICLQ, Vol. 32 (1983) 316–346.

J.A. FROWEIN and R. KÜHNER, Drohende Folterung als Asylgrund und Grenze für Auslieferung und Ausweisung, ZaöRV, Vol. 43 (1983) 537–565.

F. HASSAN, A Conflict of Philosophies: The Filartiga Jurisprudence, ICLQ, Vol. 32 (1983) 250–258.

ROLF KÜHNER

TRADE *see* World Trade, Principles

TRAFFIC IN PERSONS

Traffic in persons is the modern term adopted for an international delict known earlier as the white slave traffic (*traite des blanches*, *Mädchenhandel*). The gravamen of this offence consists in the procuring, enticing or leading away of women or children, regardless of colour, for immoral purposes abroad, although the modern offence would not exclude men.

The measures which have been adopted over the years to suppress the traffic have all sought to minimize the "internationalization" of prostitution and to coordinate the efforts of national authorities to deal with those who in various ways profit from the commercial exploitation of prostitution across national → boundaries.

The last quarter of the 19th century witnessed the flowering of a certain approach to long-standing social or moral ills which in Great Britain was exemplified by the social crusades of the Salvation Army and the activities of Josephine Butler. Mrs. Butler had earlier won recognition as the leading opponent of the Contagious Diseases Act of 1886 which had provided for the official inspection in garrison towns of common prostitutes suspected of having venereal infections. Her fame at home encouraged her to press for international action against state-licenced prostitution and its associated ills. The International Abolitionist Federation was formed in 1875 with these aims in mind and the early campaign for international measures to suppress the white slave traffic can largely be seen as a logical extension of the international abolitionist movement (→ Slavery). By 1899, the International Bureau for the Suppression of Traffic in Women and Children was established to concentrate more narrowly upon the activities of traffickers and a suitable legislative response by governments.

As a result of the sustained pressure by vigorous national movements in Europe and the Americas, the Paris Agreements for the Suppression of the White Slave Traffic were signed in 1904 and 1910 by 14 States, confirming the results of the 1902 Paris Conference (LNTS, Vol. 1, p. 83). The 1904 Agreement provided for national authorities to coordinate the exchange of information relating to traffic in women and to keep watch on ports and railway stations as well as laying down measures relating to the detection of offenders and the → repatriation of their victims. The 1910 Agreement lowered the age of majority of girls for the purpose of the Agreements to 20 years and extended protection to women of full age who had been abducted for immoral purposes by fraud, violence, threats, abuse of authority or any other means of constraint. The 1910 Agreement also established the duty to punish traffickers and laid down administrative measures to facilitate legal cooperation between States (→ Sex Discrimination).

After World War I the continuing concern of the international community in this field was enshrined in Art. 23(c) of the Covenant of the → League of Nations, which specifically charged the League with general supervision over the

execution of the Agreements. An advisory committee was established and a Special Body of Experts issued a lengthy report in 1927 based on investigations carried out in 119 cities in 28 countries which remains a model of its kind. In addition to these activities, two further Agreements were concluded under the aegis of the League. The 1921 Convention for the Suppression of Traffic in Women and Children (LNTS, Vol. 9, p. 415) referred to children of either sex and – successfully – invited other States to ratify the earlier Agreements. Finally, the 1933 Convention for the Suppression of Traffic in Women of Full Age (LNTS, Vol. 150, p. 431) was concluded to cover even cases of "consensual" trafficking. Throughout the generally successful stewardship of the League of Nations, the tendency was to extend and widen the law and practice relating to this area, and to solicit information and regular reports from the contracting parties with a view to monitoring the nature and extent of trafficking.

After World War II, the → United Nations assumed the functions formerly exercised by the League of Nations under the Conventions of 1921 and 1923 (UN GA Res. 126(II), adopted October 11, 1947) and under the Paris Agreements of 1904 and 1910 (UN GA Res. 256(III), adopted December 3, 1948). The new organization also inherited a draft convention which had been drawn up before the war to sharpen the available international measures against the exploitation of prostitution. This draft formed part of an extensive new composite convention which sought to replace all the preceding instruments in this area. The 1950 Convention for the Suppression of Traffic in Persons and the Exploitation of Prostitution of Others (UNTS, Vol. 96, p. 271) provided for the punishment of traffickers, *souteneurs* and brothel-keepers irrespective of the consent of the person involved or the presence of a financial motive, the adoption of the abolitionist approach to prostitution (i.e. no State registration or supervision of prostitutes), recognition of foreign convictions, → extradition or trial of offenders (*aut dedere aut punire*), and other measures designed to facilitate legal and administrative assistance between States to protect the victims of traffickers. The abolitionist philosophy underlying this Convention as well as its inclusive territorial clause inhibited the wider support it might otherwise have attracted. At the time of writing (1984), although some 53 States have ratified the Convention, hardly any industrialized countries are included in this figure.

It has been under such handicaps that the United Nations has attempted to follow the lines laid down by the League of Nations. It continues to circulate questionnaires annually to member States under the auspices of the → United Nations Economic and Social Council (ECOSOC) and the Commission on Human Rights, with rather inchoate results since few States respond regularly and in sufficient detail for the exercise to be of great value. Numerous resolutions have been passed within the United Nations calling on States to ratify the 1950 Convention, and the → International Labour Organisation has played its part in seeking practical measures to protect individuals from exploitation by traffickers. A summary of the work and measures undertaken by the United Nations and its various Specialized Agencies and subsidiary bodies is contained in a recent ECOSOC report by Jean Fernand-Laurent (UN Doc. E/1983/7, March 17, 1983). According to this report and information supplied by → Interpol, trafficking in persons, far from being an issue of mere historical importance, continues on a substantial scale via well-established international networks. If this is so, it may be that the United Nations will yet be called upon to emulate the work of its predecessor in offering pragmatic solutions to an international problem which cannot be solved by national measures alone.

League of Nations, Report of the Special Body of Experts on Traffic in Women and Children, Parts I and II (1927).

United Nations, Department of Economic and Social Affairs, Study on Traffic in Persons and Prostitution (1959).

R.F. TAUBENFELD and H.J. TAUBENFELD, Sex-Based Discrimination, International Law and Organizations: International Treaties, Declarations and Other Acts concerning Sex Discrimination and the Rights of Women in International Law, Vol. I (1978) 1–62.

Economic and Social Council, Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (E/1983/7) (1983).

H. SCHMITZ, Das internationale Verbrechertum und seine Bekämpfung (1927) 8–49.

H.W. HARRIS, Human Merchandise: A Study of the International Traffic in Women (1928).

C. VITTA, La défense internationale de la liberté et de la moralité individuelle, RdC, Vol. 45 (1933) 557–666.
J. GRUMBACH, La répression de la traite des femmes (1940).
R.E. ASHER, The United Nations and Promotion of the General Welfare (1957) 543–545.
K. BARRY, Female Sexual Slavery (1981).

JONATHAN S. IGNARSKI

TRANSNATIONAL ENTERPRISES

1. Notion and Terminology

The attempts by the United Nations Commission on Transnational Corporations to formulate a → code of conduct for transnational corporations also included work towards a definition of such phenomena. Since 1974 this endeavour has been pursued on a universal basis, but has proved to be one of the most difficult and politically controversial issues.

The numerous criteria which were suggested included a given minimum number of foreign subsidiaries, a minimum content of foreign activities, a minimum size in terms of annual sales or the number of employees, the international composition of management, the type of corporate strategy pursued, and even the number of national stock exchanges on which the shares of a particular enterprise were quoted. At the outset of the Commission's work it was, however, felt that a broad definition without quantitative criteria should serve as a basis for further deliberations. Accordingly, the Commission chose as the starting point for future work on the issue a definition proposed by the "Group of Eminent Persons", a group of 20 independent experts appointed in 1973 on the recommendation of the → United Nations Economic and Social Council (ECOSOC); this definition described "multinational corporations" as "enterprises which own or control production or service facilities outside the country in which they are based" (UN Doc. E/5500/Rev. 1, p. 23). At the same time, another of the suggestions made by the experts to replace the term "multinational" by "transnational", was adopted by the Commission. Whereas, after 1974, the former term disappeared from the → United Nations language, it is still used synonymously with "transnational" by organizations outside the United Nations and also in the literature on the subject.

On the other hand, no definition of transnational enterprises was deemed necessary in the 1976 OECD Guidelines for Multinational Enterprises (→ Organisation for Economic Co-operation and Development), while in the → European Communities' Multinational Undertakings and Community Regulations of 1973 "multinational undertakings" were also broadly defined as "undertakings with production facilities in at least two countries".

To this day, the definition of the notion of "transnational enterprises" remains a major unresolved issue. Nevertheless, the latest version of the Draft Code of Conduct on Transnational Corporations contains the following criteria which may safely be regarded as common ground:

> "The term 'transnational corporation' . . . means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others."

No agreement has yet been reached on the nature of ownership: While the Western industrialized States and many → developing States favour including State-owned or mixed entities, this view is not shared by the socialist countries, mainly on the ground that in this field the activities of private entities were originally the basic *raison d'être* for the United Nations and its subsidiary organs (→ United Nations Commission on International Trade Law; → United Nations Conference on Trade and Development; → United Nations Industrial Development Organization); furthermore, in being motivated by profit maximization, transnational enterprises were not under the effective control of governments and national authorities. The market economy countries, however, argued that some 600 "Soviet ambit enterprises" are presently operating in

OECD countries in a manner which is essentially indistinguishable from that adopted by "private" enterprises; no cogent reason, therefore, exists why State-owned entities should, for instance, enjoy → State immunity in all their activities abroad. Consequently, it was argued, the principle of universality ought to be applied to them in any future code.

2. *History*

Transnational enterprises are not the product of 19th century capitalism, still less the post-World War II period, but can be traced back to the Middle Ages at least.

Towards the end of the first millennium, the investments of foreigners in the countries of the "old world" enjoyed virtually no legal protection (→ Aliens, Property); local sovereigns also claimed *jus litoris*, enabling them to take possession of all merchandise salvaged from any shipwreck off their coasts. The home States of merchants were often neither able nor willing to press claims on behalf of their nationals against a foreign power (→ Diplomatic Protection). The conduct of foreign trade was full of risks for individual merchants, and unions of merchants soon formed for that purpose. The German Hanse constituted the most important example of its kind. Merchants from various German cities joined together in a private organization which, for almost 500 years, commercially integrated trade in western, northern and eastern Europe, including the Russian principalities. The word "Hanse" in ancient Gothic meant armed crowd and reflects the abundant risks faced by merchants at that time. The Hanseatic merchants' most important trading posts were situated in London and in Novgorod.

In southern Europe, similar initiatives were undertaken by the merchants of Venice, Genoa and other cities in northern Italy and trading bonds were established with the Byzantine emperors and local rulers along the coast of north Africa and in Holy Land.

Besides the Hanseatic and Italian merchants chivalrous orders were also engaged in international trade and commerce during the middle ages and thus may likewise be regarded as early predecessors of modern transnational enterprises. The most outstanding example was the wealthy Order of the Templars which, *inter alia*, exercised control over finance and banking in many European States until, by the famous Papal bull of Clement V *Vox in excelso* (1312), the Order was abolished and its property transferred to the Order of St. John (→ Malta, Order of).

The law governing the treatment of → aliens gradually developed through trading and trade → concessions, by virtue of which foreign merchants were placed under the special protection of sovereigns and were allowed to carry out trade unhindered. Often merchants were granted trading posts which were exempted from local jurisdiction; sovereigns began to waive *jus litoris* and later based their relationships with foreign merchants on elaborate and detailed agreements rather than the unilateral grants of earlier times often embodied in a very short document. Inter-State trade agreements (→ Commercial Treaties) regulating the status of the nationals of the parties frequently came into use becoming – along with concessions – the principal devices for the progressive development of the law of aliens.

While the medieval predecessors of transnational enterprises primarily took the form of organizations rather than of individual companies, the picture changed with the age of discovery: giant enterprises emerged whose activities had a considerable influence on the economy and politics of the then-known world. The most remarkable of these were owned by the *Großkaufleute* from Augsburg in Bavaria, such as the Fuggers, Welsers, Paumgartners, Höchstetters and Pimels who, at the beginning of the 16th century, *inter alia*, held the world monopoly in copper, a crucial commodity for the arms production at that time; financial contributions paid to various electors by the Fuggers in 1519 led to the election of Charles V as Roman Emperor, and twelve years later to his brother's accession to the Roman throne as Ferdinand I. By virtue of the Emperor's concessions granted on March 22 and April 1, 1528, the Welser company was granted the administration of the Spanish overseas province of Santa Marta (now Venezuela). The postal enterprise of Thurn and Taxis which set up a communication system covering virtually all countries of central and western Europe emerged at the same time; until its nationalization by Prussia in 1867, it func-

tioned on the basis of more than one thousand agreements with some 50 States.

From the 17th century onwards, the celebrated "chartered company" emerged as a new variation of the transnational enterprise. Following the Welser model, such companies were also entrusted with public functions, ranging from the capacity to enter into → treaties with indigenous potentates (→ Indigenous Populations, Treaties with) to powers to acquire territory, wage war and make peace. They primarily served the colonial interests of the governments backing them. The most prominent examples were the English (later: British) East India Company, the two Dutch Companies (East and West India Companies), the Hudson Bay Company and the Congo Company. Some of these companies, such as the British East India Company, themselves even became sovereigns over specific territories.

In the first half of the present century, the international oil industry provided the economic basis for the formation of transnational enterprises which today are the largest industrial corporations of the world. According to the most recent UN publication (Transnational Corporations in World Development, Third Survey, p. 357), the largest ten include (with annual sales in 1000 million US dollars in brackets): Exxon Corporation (110), Royal Dutch/Shell Group of Companies (77), Mobil Oil (63), General Motors (57), Texaco Inc. (51), British Petroleum Corporation (48), Standard Oil of California (40), ENI and Ford Motor Company (37 each), and Gulf Oil Corporation (28).

The United Nations has been active in this field since the early 1970s. By Resolution 1721(LIII) of July 28, 1972 ECOSOC requested the → United Nations Secretary-General to establish a study group of "eminent persons" to study the role of multinational corporations, their impact on the process of development and their implications for international relations. This group of 20 experts met in 1973 and 1974 and submitted its report on May 22, 1974 (UN Doc. E/5500), recommending, *inter alia*, that the United Nations should establish a permanent commission, supported by a research centre. The Commission and the Centre on Transnational Corporations were accordingly established by ECOSOC Resolutions 1908(LVII) of August 2, 1974 and 1913(LVII) of December 5, 1974. Since 1976 an Intergovernmental Working Group has made an attempt to elaborate a code of conduct for transnational corporations. It should also be noted that the → International Labour Organisation and the OECD have been concerned with problems of transnational enterprises, as have certain → non-governmental organizations such as the → International Chamber of Commerce.

3. *Current Problems Arising from the Activities of Transnational Enterprises*

The conclusions hitherto reached through the studies made by the United Nations and its subsidiary organizations may be summarized as follows:

(*a*) *Points of critique*

The major point of critique relates to interference with the internal affairs of host countries. Furthermore, transnational enterprises very often do not closely observe the national law of the countries in which they are operating but instead follow their own corporate strategy; this may lead, in turn, to detrimental effects on the host State's economy if tax laws are violated (tax evasion through practices such as "transfer pricing"), if restrictive business practices are used, e.g. by setting up monopolies or cartels (→ Antitrust Law, International), if national development plans are neglected, and so forth. Transnational enterprises are, furthermore, often accused of unfair practices in the exploitation of non-renewable natural resources to the disadvantage of host governments (→ Natural Resources, Sovereignty over); they are also blamed for the outflow of capital and the failure to reinvest profits in host countries (→ Investment Codes; → Foreign Investments), and for the lack of adequate attention to consumer and environmental protection.

(*b*) *Positive aspects*

King Erik of Norway in his trading concession of 1296 (Fischer (ed.), Vol. 2, p. 481) justified the admission of Hamburg merchants to his territories and the grant of extensive privileges to them by referring to their ability "to ameliorate the country through trade". This reasoning still holds true today: there can be no doubt that transnational

enterprises have the economic power and resources to act as effective instruments for the development of host countries and can play a major role in shaping a new → international economic order (→ International Law of Development). In particular, they have positive effects on the balance of payments if their activities include the establishment of production facilities in the host country; at the same time, the labour situation is improved and a reduction of unemployment may follow. The increase of the host State's income through taxes, the transfer of technology through joint ventures with local firms (→ Technology Transfer) and, in general, the contribution to international economic cooperation and integration (→ Interdependence) made by transnational corporate activities are further positive aspects.

4. Special Legal Problems

In principle, transnational enterprises "are born, live and die" under the municipal law of some State (→ International Law and Municipal Law). When doing business abroad, the conduct of each subsidiary is governed like any other private person, by the host State's local law and, indirectly, by the international law of aliens. Controversial issues include: the home State's right to exercise diplomatic protection which, according to Latin American concepts of international law, may be waived by the individual enterprise concerned (→ Calvo Doctrine, Calvo Clause); the question of extraterritorial application of national laws resulting in concurrent jurisdiction over entities of transnational corporations by two or more States (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts); the issue of non-discrimination treatment by host States *vis-à-vis* treatment accorded to domestic enterprises; and that of → expropriation and nationalization. On the last-mentioned issue basically two positions can be distinguished: the "international" position, restricting the host State's right to nationalize foreign property only "in the public interest" and against "prompt, adequate and effective compensation", and requiring the taking into account of the national law but also of international law and contractual arrangements, and the "national" position, claiming an unlimited right of the host State to nationalize foreign property in accordance with its national law, and to have disputes over the amount of compensation settled by national bodies only.

As regards the settlement of disputes between transnational enterprises and host countries, the Latin American countries and some other developing States as well as most socialist countries take the view that only municipal courts of the host State are competent to deal with such matters, while the OECD members and also a number of developing countries stress the importance of international devices for the settlement of such disputes, as are offered by *ad hoc* tribunals (e.g. → LIAMCO-Libya, Petroleum Concessions Arbitration (1977)), by the International Chamber of Commerce, and by the facilities of the International Centre for the Settlement of Investment Disputes (→ Investment Disputes, Convention and International Centre for the Settlement of), the competence of which has been accepted by more than 80 States. By having access to such international institutions, transnational enterprises may obtain, for instance via internationalized contracts, a restricted international legal personality (→ Subjects of International Law; → National Legal Persons in International Law), as has been confirmed by the Texaco-Calasiatic/Libya Arbitration of 1977 (→ Libya-Oil Companies Arbitration).

5. Evaluation

Whereas the early 1970s were characterized by a generally hostile attitude towards transnational enterprises, this situation has slightly changed a decade later. The world-wide economic recession, a pronounced decline in the growth of world trade and the enormous increase of → foreign debts incurred by developing States has led to a more favourable attitude towards transnational enterprises based in developed market economies, whose capital investment is regarded as necessary in overcoming the economic difficulties of many States. In addition, the increasing number of transnational enterprises based in developing States and investing in other developing countries has led to a degree of "south-south" cooperation and to a decline in xenophobic attitudes towards foreign enterprises.

Nevertheless, in spite of a large common ground on legal issues, including the commitment

to combat bribery and extortion, the protection of the environment and the prohibition of restrictive business practices many crucial issues such as the nationalization of foreign property remain to be solved. Although since the early 1980s nationalizations have occurred only rarely, a legal resolution of this whole issue would be very useful. How far the various codes of conduct constitute a step forward in this direction remains to be seen.

Multinational Corporations in World Development (1973) UN Doc. ST/ECA/190.

The Impact of Multinational Corporations on Development and on International Relations (1974) UN Doc. E/5500/Rev.1.

P. FISCHER (ed.), A Collection of International Concessions and Related Instruments 12 vols. (1976–).

Research on Transnational Corporations. Commission on Transnational Corporations (1976) UN Doc. E/C.10/12/Add. 1.

Transnational Corporations in World Development: A Re-Examination (1978) UN Doc. E/C.10/38.

P. FISCHER and T.W. WÄLDE (eds.), A Collection of International Concessions and Related Instruments, Contemporary Series, 4 vols. (1981–).

National Legislation and Regulations Relating to Transnational Corporations (1983) UN Doc. ST/CTC/26.

United Nations Commission on Transnational Corporations, Draft Code of Conduct, UN Doc. E/C.10/1982/6; ILM, Vol. 22 (1983) 177–206.

Transnational Corporations in World Development, Third Survey (1983) UN Doc. ST/CTC/46.

K.R. SIMMONDS (ed.), Multinational Corporations Law, The U.N. and Transnational Corporations, 3 vols. (1983) [looseleaf].

E. PENROSE, The Theory of the Growth of the Firm (1959).

A. MILLER, The Corporation as a Private Government in the World Community, Virginia Law Review, Vol. 46 (1960) 1539–1572.

G. BANNOCK, Die unersättlichen Giganten. Das Zeitalter der Großkonzerne (1972).

H. HAHLO, J. SMITH and R. WRIGHT, Nationalism and the Multinational Enterprise (1973).

J. AARTS, Antitrust Policy versus Economic Power (1975).

N.S. FATEMI, Multinational Corporations (1976).

B. GOLDMANN, Les entreprises multinationales, AnnIDI, Vol. 57 I (1977) 226–386, Vol. 57 II (1977) 192–263.

L. WILDHABER, Multinationale Unternehmen und Völkerrecht, in: International-rechtliche Probleme multinationaler Korporationen (1977) 1–71.

D.A. IJALAYE, The Extension of Corporate Personality in International Law (1978).

T. WÄLDE, Der UN-Verhaltenskodex für transnationale Unternehmen: Schritte zu einem Weltwirtschaftsrecht, Recht der Internationalen Wirtschaft, Vol. 24 (1978) 285–290.

P. FISCHER, Bemerkungen zur Lehre von Alfred Verdross über den "quasi-völkerrechtlichen" Vertrag im Lichte der neuesten Entwicklung, in: Ius humanitatis, Festschrift zum 90. Geburstag von Alfred Verdross (1980) 379–401.

P. FISCHER, Das transnationale Unternehmen in der Völkerrechtsgeschichte, in: Völkerrecht und Rechtsphilosophie, Internationale Festschrift für Stephan Verosta (1981) 345–370.

A. MULLER, Compensation for Nationalization: a North-South Dialogue, ColJTransL, Vol. 19 (1981) 35–78.

R. HIGGINS, The Taking of Property by the State: Recent Developments in International Law, RdC, Vol. 1976 (1982 III) 263–392.

C.D. WALLACE, Legal Control of the Multinational Enterprise (1982).

P. FISCHER, Die Heiligkeit der Verträge im Zeitalter Machiavellis, in: Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen, Festgabe für Wolfgang Preiser (1983) 45–61.

PETER FISCHER

UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST

The → refugees from → Palestine who were left in urgent need of humanitarian assistance upon the establishment of Israel as a → State, on May 14/15, 1948, continue with their descendants to receive international assistance under the aegis of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The mandate of the international relief programme, laid down by the → United Nations General Assembly late in 1948 with the hope of a speedy termination, has been repeatedly renewed up to the present time, when over two million refugees are registered with UNRWA. The Agency still relies for its income and resources on voluntary contributions from governments, other → United Nations bodies and other international and national organizations.

The relief requirements of the Palestine refugees were brought to the attention of the General Assembly in 1948 by the UN Mediator on Palestine (see Doc.A/648, September 16, 1948;

and Doc.A/689/Corr.1/Add.1, October 18, 1948). A temporary relief project under the control of a UN Director of Disaster Relief was able to provide valuable humanitarian services. The General Assembly authorized an advance of $5 million towards the creation of a voluntary fund to be used to provide immediate relief to 500 000 refugees over a nine-month period up to August 31, 1949, and created the position of the Director of United Nations Relief for Palestine Refugees (UNRPR), with responsibility for administering the fund (see General Assembly Res.212(III), November 19, 1948). Contributions were requested from all States, the → United Nations Specialized Agencies, the → Red Cross and → non-governmental organizations.

It was soon recognized that continuing → relief actions were necessary to prevent starvation and to further conditions of peace and stability in the region. UNRWA was created by General Assembly Resolution 302(IV) of December 8, 1949, to replace UNRPR, to carry out a direct relief and works programme and to prepare for the time when international assistance would no longer be available. Some $33 million were required for the programme, of which about two-thirds were to be allocated for direct relief during 1950.

The Director of UNRWA, responsible to the General Assembly, was appointed by the → United Nations Secretary-General in consultation with the Advisory Commission of State representatives established by the Assembly. As of March 23, 1962 the title of Director was changed to Commissioner-General.

No express powers or authority were conferred upon the Agency at its creation. UNRWA's legal capacities derive from the → United Nations Charter, as a subsidiary organ under Art. 22; from the 1946 Convention on the Privileges and Immunities of the United Nations (→ International Organizations, Privileges and Immunities); and from particular agreements concluded between the Agency and governments concerned. UNRWA negotiated agreements with several governments in the region, in order to facilitate its operations, including the free movement of personnel, supplies and vehicles (e.g. UNTS, Vol. 120 (1952) p. 277; Vol. 121 (1952) p. 107; Vol. 620 (1969) p. 183).

The area of UNRWA operations includes Jordan (782 000 registered refugees in 1984), Lebanon (256 000) and Syria (235 000), as well as the Israeli-occupied territories (Gaza Strip, 411 000; West Bank, 351 000). UNRWA's mandate requires its headquarters to be located within its area of operations. Since 1978, following evacuation from Beirut because of the security problems there, the headquarters have been divided between Vienna and Amman. The UN General Assembly has decided that the headquarters should be relocated in Beirut as soon as the security situation so permits (→ International Organizations, Headquarters).

Palestine refugees within the concern of UNRWA were defined for operational purposes as persons whose normal residence was Palestine for a minimum of two years preceding the Arab-Israeli → war of 1948 and who, as a result of that conflict, lost both their homes and means of livelihood. To be eligible for assistance from the Agency, refugees, and their descendants born after May 14, 1948, were to be registered with UNRWA, be living in the area of its operations and be in need. This working definition was intended to be interpreted flexibly. Following the 1967 Arab-Israeli war, assistance was provided to non-eligible persons displaced as a result of the conflict, in accordance with a decision of the Commissioner-General which was subsequently approved by the General Assembly (Res. 2252 (ES-V) of July 4, 1967). In the conflicts during the early 1980s it was again considered to be unjustifiable to confine UNRWA's relief services to registered refugees only. Humanitarian assistance is therefore provided on an emergency basis to other persons in need in the area.

Refugees registered with UNRWA and receiving its assistance are in practice excluded from the competence of the United Nations High Commissioner for Refugees (UNHCR, see Statute, para. 7(c); → Refugees, United Nations High Commissioner). An exclusion similar to that contained in the UNHCR Statute is also found in the 1951 Convention Relating to the Status of Refugees (see Art. 1(D)). Thus, a lacuna exists inasmuch as UNRWA possesses no mandate in the field of protection.

Within a few years after the creation of UNRWA the number of refugees registered with the Agency had doubled to over one million, of

whom about half were children under the age of 15. UNRWA's functions were primarily to supply food rations on a large scale, to administer the camps, to prevent serious epidemics and to provide education and training. For a short period emphasis was placed on projects of a developmental nature such as public works and rehabilitation, with a view to achieving a greater degree of self-reliance and reducing dependence on external aid, without prejudice to claims to eventual → repatriation. However, developmental efforts proved more costly and problematical than simple relief assistance. This vicious circle, together with the political factors involved as well as the natural increase in the numbers of refugees, contributed to the failure of attempts to reduce expenditure.

UNRWA has faced continuous budgetary deficits since its creation, while also experiencing serious difficulties resulting from the → armed conflicts in the region. A number of States regularly vote for the continuation of the Agency but make little or no financial contribution to its work. Some States call first for a start to the implementation of UN resolutions on repatriation or compensation, while others maintain that, so long as a need for humanitarian assistance exists, UN members hold joint responsibility for providing UNRWA with the support required.

At present some 764 000 persons, or 35 per cent of the total registered population, live in 61 camps administered by UNRWA. The Agency provides services to the refugees whether they live in camps or not. In recent years UNRWA's annual income has been around $180 million, nearly all of which derives from governmental sources, including UN agencies and inter-governmental organizations. The largest single contributor is the United States, with a direct annual donation of $67 million. Other principal contributors, but with much smaller amounts, include Canada, the Federal Republic of Germany, Japan, Norway, Saudi Arabia, Sweden, Switzerland, the United Kingdom and the → European Economic Community.

UNRWA's activities reflect a continuing shift in priorities from the provision of emergency relief and basic humanitarian assistance to health and education programmes. Food rations were issued until September 1982, when over 830 000 persons or 43 per cent of the registered population were receiving them. Contributors have since been encouraged to make their donations not in kind but in cash, which can be used for the higher priority programmes. Although the general ration has been discontinued, emergency food aid continues to be provided and food supplies are also provided through various special feeding programmes.

In 1983 the UN General Assembly voted to extend UNRWA's mandate until June 30, 1987, and other resolutions relating to the Agency and Palestine refugees were adopted (see A/RES/38/83 A to K). Like other resolutions prolonging UNRWA's mandate, that of 1983 stipulated that the extension is made without prejudice to the rights of the Palestine refugees to return to their homes or receive compensation if they so prefer. These resolutions have also regularly expressed regret that the UN Conciliation Commission for Palestine has failed to make progress towards realizing those rights. In 1983 the General Assembly also called upon Israel to compensate UNRWA for the loss and damage caused to its property and facilities resulting from the 1982 Israeli invasion of Lebanon. The Agency has not reported any progress with regard to previous claims lodged against Israel arising out of the 1967 hostilities, or with regard to certain claims against the Jordanian Government.

In 1984 UNRWA concluded a convention with the European Economic Community to last for three years, providing for cash contributions towards the Agency's education programme and establishing a framework for food aid to hardship cases, training centres and the supplementary feeding programme (EC Official Journal 1984 No L188/17). Following the suspension of the general ration programme in 1982, relief work has concentrated on assisting the poorest refugees. The total budgeted expenditure for 1985 amounts to some $258 million of which education services account for some 66 per cent, against 22 per cent for health and 10 per cent for relief. In these fields and in its areas of operation UNRWA has become an established institution on which the refugees depend for services which would normally be provided by national governments.

Although UNRWA's purposes and activities are humanitarian, the Agency is also a factor in the region's politics. A curtailment of UNRWA's

welfare and education programme would inevitably have repercussions because of the nature of the Agency's operations for both the refugees and their host countries. UNRWA serves the Palestine refugees on behalf of the United Nations pending a more permanent solution to the region's wider problems, which the Agency itself is not called upon to resolve. In this respect, UNRWA may be compared to many other international humanitarian organizations which in their particular fields are charged only to alleviate symptoms and not to tackle basic causes.

Annual Report[s] of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, UN GA Official Records, Supp. (until 1961).

Annual Report[s] of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, UN GA Official Records, Supp. (1962, Supp. 14; since 1963, Supp. 13).

L.W. HOLBORN, The Palestine Arab Refugee Problem, International Journal, Vol. 23 (1967) 82-96.

E.H. BUEHRIG, The UN and the Palestine Refugees (1971).

D.P. FORSYTHE, UNRWA, the Palestine Refugees, and World Politics, 1949–1969, International Organization, Vol. 25 (1971) 26-45.

W. DALE, UNRWA, A Subsidiary Organ of the United Nations, ICLQ, Vol. 23 (1974) 576–609.

J.F. DEFRATES, 25 Jahre UNO-Hilfe für Palästina-Flüchtlinge, Vereinte Nationen, Vol. 23 (1975) 142–148.

A.H. EL-FARHAN, The United Nations Relief and Works Agency for Palestine Refugees in the Near East – UNRWA: The Adaptation of the Organization to its Environment, Thesis, New York University (1979).

P. MACALISTER-SMITH, International Humanitarian Assistance (1985) 45–48.

PETER MACALISTER-SMITH

UNITED STATES–IRAN AGREEMENT OF JANUARY 19, 1981 (HOSTAGES AND FINANCIAL ARRANGEMENTS)

1. Historical Background

The → declarations made by the Government of Algeria on January 19, 1981 concerning the commitments and settlement of claims by the United States and Iran with respect to the crisis arising out of the detention of 52 United States nationals in Iran (ILM, Vol. 20 (1981) p. 223) marked the resolution of the conflict that had been precipitated by the taking of American → hostages on November 4, 1979. In response to that event the Government of the United States had taken various steps to seek the release of the hostages and to protect its economy from the effects of the rupture of normal trade relations with Iran.

(a) Steps before international bodies

Efforts of the United States to secure the return of the hostages through the → good offices of the → United Nations Secretary-General or through action of the → United Nations Security Council failed. The Security Council passed two resolutions (Nos. 457 (1979) and 461 (1979)), considering the capture and detention of the hostages a violation of the international law relating to → diplomatic agents and missions and calling for their release (→ Diplomatic Agents and Missions, Privileges and Immunities; → Internationally Wrongful Acts). A resolution imposing → sanctions, however, was vetoed by the Soviet Union. On November 29, 1979 the United States filed an application with the → International Court of Justice and requested → interim measures of protection. In the → United States Diplomatic and Consular Staff in Tehran Case the Court ordered the release of the hostages in both an order of December 15, 1979 indicating provisional measures and in a partial judgment of May 24, 1980. Iran, however, failed to comply. A United States action of → self-help, taken in the intervening period, aborted (→ Humanitarian Intervention).

(b) Internal measures

At the same time the United States took a number of internal measures designed to exert economic pressure on Iran and to protect the American economy against threatened Iranian counter-measures (→ Economic Coercion). The most important of these actions was the freezing of Iranian assets by Executive Order 12170 issued on November 14, 1979 (ILM, Vol. 18 (1979) p. 1549). This order, based primarily on powers

granted by the International Emergency Economic Powers Act, "blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States" (→ Jurisdiction of States). The Secretary of the Treasury was placed in charge of the execution of that order and under that authority issued the Iranian Assets Control Regulations (ibid.). These regulations prohibited United States financial institutions, including domestic private banks and their foreign branches or subsidiaries, to honour the withdrawal of deposits of Iranian governmental agencies or the call of letters of credit issued to such agencies. In addition, such deposits and other property of Iran or its governmental agencies in the United States were conditionally subjected to prejudgment attachment by American creditors. As a result Iran or Iranian governmental agencies became defendants in nearly 500 law suits, the majority of which were accompanied by attachments.

(c) *Settlement negotiations*

During the late summer of 1980 Iran became disposed toward a settlement of the hostage crisis which had resulted in economic difficulties and disapproval on the part of the international community. Several channels for the conduct of negotiations were opened. One consisted in contacts between United States and Iranian banks and their legal counsels; another, and more important one, resulted from the willingness of the Algerian Government to act as intermediary and the acceptance of its good offices by the two States. On November 2, 1980 the Islamic Consultative Assembly of Iran, the Majlis, established four conditions for the return of the hostages and communicated them to the United States through the Algerian ambassador. Although these conditions exceeded the terms which the United States felt able to grant, it offered to engage in further negotiations on that basis. The United States Secretary of State delivered the United States response to the Algerian Government in Algiers on November 10, 1980. After additional proposals and counterproposals, the United States formulated a proposal which delineated the terms which, with certain modifications required by Iran, were incorporated in the Algerian Accords. Upon positive reaction from the Iranian Government, the United States negotiator and his team returned to Algiers on January 7, 1980. There, with the help of the Algerian officials, the final details of the implementation of the agreements were worked out. On January 12, 1980 the Majlis authorized the → arbitration of the claims provided by the accords and, on January 19, the basic instruments were initialled by the United States plenipotentiary, after the Iranian Minister of State for Executive Affairs had initialled the two declarations for Iran in Tehran.

2. The Accords

The Algerian Accords consist of three documents: the General Declaration, the Declaration Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, and the Undertakings of the Governments of the United States and Iran with respect to the General Declaration.

In addition to these three political documents two additional technical agreements were concluded on January 20, 1981, one designated as the Escrow Agreement, detailing the powers and responsibilities of the Central Bank of Algeria as escrow agent provided by the General Declaration, and the other as the Technical Arrangement, specifying the rights and duties of the Bank of England acting as depositary of the funds to be transferred to the account of the escrow agent prior to the release of the hostages.

Generally speaking the three political accords stipulated the measures to be taken by the United States and Iran as settlement of the crisis. These measures consisted of: (a) The restoration of the financial position of Iran, so far as possible, to that which existed prior to the blocking of the Iranian assets; (b) The settlement of the claims of the United States, its instrumentalities and nationals against Iran and its State enterprises and of the claims of Iran, its instrumentalities and nationals against the United States and its agencies through binding arbitration; (c) The pledge of the United States not to intervene directly or indirectly in Iran's internal affairs (→ Territorial Integrity and Political Independence); and (d) Steps to be taken by the United States to assist

Iran in the recovery in the United States courts of the assets of the family of the former Shah.

The release of the hostages, the transfer of the frozen assets and the claims settlement were carefully timed and structured. The release of the hostages was conditioned upon the transfer to the escrow account of the Central Bank of Algeria with the Bank of England of the Iranian assets in the Federal Reserve Bank of New York and in the foreign branches of United States banks. These transfers were made early on January 20, paving the way for the release of the hostages. Of the amounts so transferred the Bank of England was to retransfer an amount considered necessary to pay off the syndicated bank loans owed by Iran (→ Loans, International; → State Debts). The sum of $1418 thousand million was to be retained in a special interest-bearing account to secure the payment of any disputed amounts of the bank loans, and the balance was to be transferred to the Central Bank of Iran.

The remaining assets of Iran were to be transferred to Iran subsequent to the return of the hostages in accordance with terms set forth in the General Declaration. Assets in the American branches of United States banks were to be transferred to an escrow account in the name of the Central Bank of Algeria with a central bank to be selected by the two governments. Of the funds so transferred, one half was to be deposited in a special interest-bearing security account established for the sole purpose of paying claims against Iran in accordance with the claims settlement agreement. The other half and all amounts transferred after the special security amount reached the level of $1000 million were to be paid over to Iran. Iran undertook to replenish the security account when payments therefrom reduced it below $500 million. The central bank chosen for these operations was the N.V. Settlement Bank of the Netherlands, a subsidiary of the Dutch Central Bank specially organized for that purpose.

3. Settlement of Claims by the Tribunal

The Algerian Accords provided for an international arbitral tribunal, the Iran-United States Claims Tribunal, to settle the claims which had been caused by the disruption of the prior economic relations, except those waived by the agreement (→ Waiver) or excluded from the Tribunal's jurisdiction. The United States undertook to lift all attachments and nullify all judgments obtained in its domestic courts in litigations involving claims within the jurisdiction of the Tribunal and to bar all further prosecution of such claims. After a judgment of the United States Supreme Court upheld the validity of the measures taken in compliance with those undertakings, the Tribunal was constituted on June 9, 1981. It consists of nine judges, one third of whom were appointed by each government while the remaining three were selected by the six national judges. Supplementary rules for the appointment, replacement or challenges of members of the Tribunal are supplied, *mutatis mutandis*, by the arbitration rules of the United Nations Commission on International Trade Law relating to these matters. Resort to these provisions was had as a result of Iran's early attempt to disqualify one of the neutral arbitrators, culminating in the designation of an Appointing Authority and his rejection of the admissibility of Iran's action. These rules likewise govern the appointment of a new neutral arbitrator if a replacement is needed and the parties fail to agree on a successor.

The jurisdiction of the Tribunal is carefully circumscribed in both positive and negative terms. It is vested with jurisdiction over:

(a) claims of the nationals of each party against the other party or its governmental agencies and instrumentalities and counter-claims arising out of the same transaction or occurrence that constitutes the subject-matter of the same claim, such claims and counter-claims arising out of debts, contracts, expropriation or other measures affecting property rights outstanding on January 19, 1981 (→ Expropriation and Nationalization);

(b) official claims of the two governments against each other arising out of the purchase or sale of goods and services;

(c) any dispute between the two parties as to the interpretation or performance of any provision of the General Declaration or Claims Settlement Declaration, including the obligation of the United States relating to the recovery of the assets of the family of the late Shah (→ Interpretation in International Law).

Excluded from the Tribunal's jurisdiction are:

(a) claims of the United States or its nationals arising out of the seizure and detention of the 52 hostages or out of injury to property of the United States or its nationals caused within the United States Embassy compound in Tehran between the date of the seizure and the conclusion of the accords or as a result of popular movements of the Islamic Revolution in Iran;

(b) claims arising out of actions by the United States in response to the events listed under (a);

(c) claims arising under binding contracts specifically providing for the exclusive jurisdiction of Iranian courts over disputes thereunder.

The General Declaration provided in addition that the United States bar the prosecution in its courts of the claims arising out of the events specified under (a).

The Claims Settlement Declaration provides for the application of the arbitration rules of the → United Nations Commission on International Trade Law, except to the extent modified by the parties or the Tribunal to ensure the proper execution of the agreement. The Tribunal adopted a set of "provisional" Tribunal Rules at its 40th meeting on March 10, 1982. The applicable law is defined as "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of trade, contract provisions and changed circumstances".

Claims of nationals of the two parties were to be presented to the Tribunal either by the claimants themselves or, in the case of claims for less than $250 000, by the government of such nationals. Even in the cases where the governments are responsible for the filing of the claims of their nationals the latter are the "arbitrating parties". Claims had to be filed between October 20, 1981 and January 19, 1982. In addition to the more than 1000 large claims filed with the Tribunal, the United States filed 2795 small claims as representatives of its nationals (cf. → Diplomatic Protection).

The Tribunal has handed down a number of important orders and judgments dealing with its jurisdiction and other interpretations of the accords. For instance, in Case A/1 (1 Iran-U.S. Claims Trib. Rep. 144, 189) the Tribunal determined, *inter alia*, the standard to be applied by the Tribunal in approving a settlement as an Award on Agreed Terms, entitled to payment from the Security Account, and the disposition of the interest earned on the Security Account. In the absence of a common intention of the parties on the point at issue and "in order to avoid a denial of justice", the Tribunal held that the interest should be credited to a special interest-bearing account, subject to Iran's right to resort to it in the fulfilment of its replenishment obligation with respect to the principal Security Account (→ Denial of Justice).

In Case A/2 (1 Iran-U.S. Claims Trib. Rep. 101) the Tribunal held that nationals of either party could be subject only to counter-claims and not to independent claims.

On the basis of nine selected cases involving claims of United States nationals, the Tribunal determined what type of forum selection clause would deprive it of jurisdiction over the respective claim. The Tribunal concluded that it was not vested with jurisdiction to determine whether changes in Iran had any impact on the enforceability of forum selection clauses and thus decided the issue of jurisdiction on the basis of the wording of the respective clauses (1 Iran-U.S. Claims Trib. Rep. 236, 242, 248, 252, 261, 268, 271, 274, 280). Other cases of general interest relate both to jurisdictional and substantive issues. Thus in the Case A/16 the full Tribunal held that it did not have jurisdiction over direct claims by Iranian banks against the United States or United States financial institutions based on standby letters of credit issued by such institutions. The Tribunal reserved the issue, raised in the pending Case A/15, of the liability of the United States because of its alleged failure to bring about the transfer of the proceeds of certain stand by letters of credit and left it to each Chamber to decide whether an Iranian bank claim on a stand by letter of credit can be joined as a counter-claim against the relevant United States contractor. In the Case A/18 (ILM, Vol. 23 (1984) p. 489) the full Tribunal held that it has jurisdiction over claims by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date of the accrual of the claim to 19 January 1981 was that of the United States. In the Case No. 2, American International Group, Inc. v. Islamic Republic of Iran (ILM, Vol. 23

(1984) p. 1), Chamber No. 2 held that claimants who owned 35 per cent of the shares in a nationalized insurance company were entitled, under general principles of international law, to compensation for the full value of the property taken, such value to be determined on the basis of the going concern value of the enterprise. The Chamber outlined the factors to be considered in such valuation. This case as well as a number of other cases (e.g., Cases 36, 91 and 94, 1 Iran-U.S. Claims Trib. Rep. 455, 2 Id. 33, 294) dealt with the requisite proof of the nationality of corporations, a matter which is also the subject of an interpretative dispute filed by Iran (Case A/20). Additionally the Tribunal held that its "inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that its jurisdiction and authority are made fully effective" authorized it to request Iran to cause the stay of proceedings in its domestic courts on claims which are within its jurisdiction over counter-claims, although the Accords deprive Iranian courts of jurisdiction over claims only if they are actually filed as counter-claims with the Tribunal (Cases 388 and 430, 2 Iran-U.S. Claims Trib. Rep. 51, 310, 369).

4. Validity and Effect

Although it was argued that the accords were subject to → nullity in view of Art. 52 of the → Vienna Convention on the Law of Treaties, the parties decided to execute the agreements even after neither party was any longer subject to duress (→ Treaties, Validity). While the Accords have no binding effect on third States, it would seem to flow from the general principles of international cooperation that courts of third countries should not entertain proceedings which conflict with the settlement agreement (→ Comity; → Treaties, Effect on Third States).

G. BERLIOZ, The Iranian Crisis: The Implication for International Financial Law, International Contract Law and Finance Review, Vol. 1 (1980) 8–17.

G.F. McLAUGHLIN and L.A. TECLAFT, The Iranian Hostages Agreements, Fordham International Law Journal, Vol. 4 (1980–1981) 223–264.

B. AUDIT, Les "Accords d'Alger" du 19 janvier 1981 tendant au règlement des différends entre Etats-Unis et l'Iran, Clunet, Vol. 108 (1981) 713–785.

L. RADICATI DI BROZOLO, La prima fase del contenzioso relativo agli averi iraniani bloccati dagli Stati Uniti, RivDirInt, Vol. 64 (1981) 328–357.

J.M. REDUINE, The Effect of Duress on the Iranian Hostage Settlement Agreement, Vanderbilt Journal of Transnational Law, Vol. 14 (1981) 847–890.

E. SUY, Settling U.S. Claims Against Iran Through Arbitration, AJCL, Vol. 29 (1981) 523–529.

L. RADICATI DI BROZOLO, La soluzione delle controversie tra Stati e stranieri mediante accordo internazionale gli Accordi tra Stati Uniti ed Iran, RivDirInt, Vol. 65 (1982) 299–343.

S.A. RIESENFELD, Rechtsprobleme des Geiselbefreiungsabkommens zwischen Iran und den Vereinigten Staaten, Praxis des Internationalen Privat- und Verfahrensrechts, Vol. 2 (1982) 125–130.

D.P. STEWART and L.B. SHERMAN, Developments at the Iran-United States Claims Tribunal: 1981–1983, Virginia Journal of International Law, Vol. 24 (1983) 1–53.

J.M. SELBY and D.P. STEWART, Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal, The International Lawyer, Vol. 18 (1984) 211–244.

STEFAN A. RIESENFELD

UNIVERSAL DECLARATION ON HUMAN RIGHTS *see* Human Rights, Universal Declaration (1948)

VESTED RIGHTS *see* Aliens, Property; Expropriation and Nationalization

VISAS *see* Passports

WHITE SLAVE TRADE *see* Traffic in Persons

WOMEN, INTERNATIONAL PROTECTION *see* Sex Discrimination; Traffic in Persons

WORLD POPULATION

1. Factual Background

World population, which was approximately 978 million in 1800, grew to 1650 million in 1900, 2500 million in 1950, 3000 million in 1960, 4000 million in 1975, and 4450 million in 1981. According to the projections of the United Nations Population Division, using medium variant, the annual rate of growth will be reduced from the current rate of 1.7 per cent to 1.5 per cent by the year 2000 when the estimated global population will be 6100 million. By the year 2025 the annual rate of growth is estimated to fall to 1 per cent with world population increasing by then to 8200 million. Since population growth in the

→ developing States has declined from 2.4 per cent annually during 1965 to 1970 to an estimated 2 per cent during 1980 to 1985, it is possible that, if this downward trend sustained, the global population could be stabilized by the end of the 21st century.

2. *Historical Evolution of Legal Activities*

Since national → sovereignty is acknowledged as the basic tenet of the contemporary international system, legal activities concerning population have remained, until recently, primarily national in scope. Whereas the → United Nations was urged after its inception to "face and at least partly solve world population problems" and a United Nations Population Commission was established by the → United Nations Economic and Social Council (ECOSOC) in 1946, the first → United Nations General Assembly resolution on the subject was not adopted until its 12th session in December 1957.

In this resolution (1217(XII)) the General Assembly recognized the close relationship between "economic problems and population problems, especially with regard to countries which are in the process of economic development", and invited the member States "to follow as closely as possible the interrelationships existing between economic and population changes". However, another five years passed before the General Assembly, in December 1962, asked the United Nations to "encourage and assist Governments, especially those of the less developed countries, in obtaining basic data and in carrying out essential studies of the demographic aspects, as well as other aspects, of their economic and social development problems" (Res. 1838(XVII)).

The turning point in the General Assembly's attitude toward population questions can be traced to Resolution 2211(XXI), adopted unanimously in December 1966 and entitled "Population Growth and Economic Development". The Assembly requested the → United Nations Secretary-General to pursue the implementation of work programme "covering training, research, information and advisory services in the field of population". The Assembly also called upon ECOSOC, the Population Commission, the United Nations economic commissions (→ Regional Commissions of the United Nations), and the Specialized Agencies of the United Nations (→ United Nations, Specialized Agencies) "to assist, when requested, in further developing and strengthening national and regional facilities for training, research, information and advisory services in the field of population". In an introductory paragraph, the General Assembly recognized "the sovereignty of nations in formulating and promoting their own population policies, with due regard to the principle that the size of the family should be the free choice of each individual family".

A significant development occurred with the adoption of the World Population Plan of Action (WPPA) at the UN World Population Conference in August 1974. The WPPA acknowledged that national action or inaction in the field of population had international implications and emphasized that population issues be addressed within the overall framework of political, social and economic development.

3. *Actions by International, Intergovernmental and Non-governmental Organizations*

Since the General Assembly resolution of December 1966, the United Nations and several intergovernmental and → non-governmental organizations have been actively associated with issues related to global population.

(*a*) *United Nations*

In response to the 1966 resolution, the UN Secretary-General established in 1967 the United Nations Fund for Population Activities (the Fund) and invited voluntary contributions. The Fund was designed to assist countries desiring its aid in assessing and coping with their population problems, and to help coordinate population programmes among the various organizations of the United Nations system which are supported by the Fund. Henceforth, the United Nations and its agencies could assist the member States with population problems. It is encouraging to note that during 1982 the Fund received pledges and payments from 90 countries, which include a number of developing States in Asia, Africa and Latin America. The Fund approved 200 new country projects in 1982 and has given priority status to 53 countries for the Fund's assistance.

Earlier, in 1968, the UN Conference on Human Rights in Tehran provided a major breakthrough

in relating population issues to → human rights. The Conference observed that the present rapid rate of population growth in some countries "hampers the struggle against poverty and hunger", and recognized that couples have a basic human right to decide "freely and responsibly" as to the number and spacing of their children and a right to be adequately educated and informed in their decision. The Conference urged the United Nations and its member States to "give close attention to the implications for the exercise of human rights of the present rapid increase in world population" (Final Act, UN Doc. A/CONF.32/41).

At its 25th session, the UN General Assembly identified, as a minimum target for the second UN Development Decade, the availability of the necessary information and advice to all persons who so desire, to enable them to decide on the number and spacing of their children. Also, the Assembly designated 1974 as "World Population Year".

During 1974, a specially convened UN Conference adopted the WPPA. The single most noteworthy feature of the WPPA is its recognition that population is an integral part of social, economic and cultural development, and that the WPPA is to be "an instrument of the international community for the promotion of economic development, quality of life, human rights, and fundamental freedoms". Within this broader context of social and economic development, the WPPA identifies six major variables as constituting its population goals and policies: population growth; mortality; reproduction, family formation, and the status of women; population distribution and internal migration; international migration (→ Migration Movements; → Migrant Workers); and population structures. The WPPA envisages influencing and affecting these population variables indirectly by promoting socio-economic measures and programmes, and directly by family planning.

During the decade following the adoption of the WPPA, positive progress toward its implementation is evidenced by the formulation of policies and programmes concerned with population and development by a great many nations, which now consider population change as a proper subject of direct governmental intervention. Moreover, international cooperation on population issues is becoming a reality, for governments have become much more willing than ever before to seek and use international resources toward the implementation of WPPA.

In 1981, ECOSOC decided (pursuant to Resolution 1981/87) to convene in 1984 an International Conference on Population. Expert groups met during 1983 and submitted recommendations on each of the following four topics: (1) fertility and the family, (2) population distribution, migration and development, (3) mortality and health policy, and (4) population, resources, environment and development. In preparation for the conference in Mexico City from August 6 to 13, 1984, the United Nations Population Commission, a subsidiary body of ECOSOC and the primary body involved with the monitoring, review and appraisal of progress toward the implementation of the WPPA, acted as the preparatory committee.

In addition to the General Assembly, the Fund, and the Population Commission, several other United Nations bodies have been actively concerned with various population problems. They include the Population Division of the Department of International Economic and Social Affairs, the Department of Technical Co-operation for Development, the → United Nations Development Programme, the → United Nations Industrial Development Organization, and the United Nations regional commissions. These regional commissions have been primarily involved with population and development issues in their regions in an advisory capacity. Their functions include undertaking research projects, data collection and analysis, information dissemination programmes, and training programmes.

(*b*) *Specialized Agencies*

Agencies with major involvements include the → United Nations Children's Fund, the → International Labour Organisation, the → Food and Agriculture Organization of the United Nations, the → United Nations Educational, Scientific and Cultural Organization, the → World Health Organization, and the → International Bank for Reconstruction and Development. Each agency has activities directly and explicitly concerned with population and has

an organizational unit identified as specifically concerned with population programmes. The Fund works closely with these organizations.

(*c*) *Intergovernmental organizations*

Actions by the intergovernmental organizations include those by the → Council of Europe, the → Council for Mutual Economic Assistance, the → Organization of American States, the → Organisation for Economic Co-operation and Development, and the → Intergovernmental Committee for Migration.

(*d*) *Non-governmental organizations*

Over 50 educational, scientific, and religious non-governmental organizations, including the International Planned Parenthood Federation, the International Union for the Scientific Study of Population, and the Population Council, focus their activities both on demographic and non-demographic objectives of WPPA. These activities include demographic research and analysis, maternal and child help, family planning services, activities in the field of aging, and training services.

4. Special International Law Aspects

(*a*) *Sovereignty*

The various United Nations proposals, recommendations and actions on population, including the WPPA and its implementation measures, show a keen awareness of national sensitivity to the question of → sovereignty. A general principle, often reiterated, is to respect the sovereign right of each nation to formulate and implement its own population policies. Assistance is provided in the population field to States only "upon request". Thus, even the dissemination of information and education about family planning and the availability of the means to practice family planning effectively are provided to States consistent with their needs and in accordance with their national population policies.

However, the need for improved demographic statistics, technical cooperation and further research on issues related to population are acknowledged as necessary and valid subjects of concern for the United Nations system, without infringing on national sovereignty. Also, reference is being made in various UN resolutions to the close relationship between population growth and economic and social development, and the need is being increasingly acknowledged for formulating national population policies and programmes.

(*b*) *Human rights*

It is submitted that the respect for national sovereignty under international law and the ensuring of the basic → human right of each individual to have access to family planning information and services are complementary norms. Thus, regardless of a country's overall demographic goals, persons have the right to determine, in a free, informed and responsible manner, the number and spacing of their children. Consequently, it would be considered proper and essential that governments provide appropriate education on responsible parenthood and make available to persons who so desire advice and the means of achieving it. Family planning is not to be viewed as a goal in itself, but as a means to achieve a set of basic human rights which include adequate food, health, clothing, shelter, education, work, recreation, and old-age security.

(*c*) *National and international laws affecting population factors*

In order to more effectively implement human rights, it is essential to undertake reform of the laws which directly or indirectly affect population factors. Thus, legal reform in such fields as the status of women, family relations, contraception, voluntary sterilization and abortion are desirable. States and international organizations interested in the formulation and implementation of population policies are increasingly aware that, from earliest times, population laws have been pronatal, and that these laws are not only often inconsistent with human rights but also with the governments' own population policies. Thus, it is essential that efforts be undertaken to enhance the growing awareness of these inconsistencies with a view to their rectification.

5. Evaluation

There is growing world-wide attention and concern regarding social and economic conditions in relation to population. Many factors are responsi-

ble for this, such as the highest rates of population growth in human history during the last three decades, and a growing imbalance between birth and death rates, which has increasingly affected living conditions, movement and distribution of population, natural resources and the environment.

A large number of governments consider the following as necessary objectives: lower fertility, lower mortality, relieving the pressure on the largest cities, conserving resources, developing alternative sources of energy and, at the same time, preserving the quality of environment. The WPPA suggested targets for population growth, mortality and life expectancy, and measures to conserve resources, regulate migration and improve education, nutrition, health and the status of women. However, the WPPA's key provision, the right of persons to freely and responsibly decide the number and spacing of their children and the right to information and the means to do so, is the right which at the same time acknowledges governmental responsibility for providing people with the means to make effective decisions on family size. Governmental actions to improve health standards, education, employment opportunities, and the status of women have considerable effects on decisions about family size and migration. Reform of inconsistent laws on these subjects is highly desirable.

Ideally, the entire global system should be managed as a unit. The implementation of the WPPA is a necessary first step to reach that ideal and indeed appears essential to our quest for survival.

Report of the United Nations World Population Conference, 1974, UN Doc. E/CONF.60/19 (1975).

Review and Appraisal of the World Population Plan of Action, UN Doc. ST/ESA/SER.A/71 (1979).

Concise Report on the World Population Situation in 1979, UN Doc. ST/ESA/SER.A/72 (1980).

World Population Prospects as Assessed in 1980, UN Doc. ST/ESA/SER.A/78 (1981).

Review and Appraisal of the World Population Plan of Action, UN Doc. E/CONF.76/PC/10 (1983).

Population Bulletin[s] of the United Nations, No. 1 (1951)–No. 14 (1982), UN Docs. ST/ESA/SER.N/1–14.

V.P. NANDA, The Role of International Law and Institutions Toward Developing Global Plan of Action on Population, Denver Journal of International Law, Vol. 3 (1973) 1–44.

L. LEE, Legal Implications of the World Population Plan of Action, Journal of International Law and Economics, Vol. 9 (1974) 375–417.

E. KELLOGG, Reform of Laws Affecting Population Growth: Recent Developments, Journal of International Law and Economics, Vol. 10 (1975) 1–36.

V.P. NANDA, Selected Legal Issues in the World Population/Food Equation, Denver Journal of International Law, Vol. 7 (1977) 77–102.

The Global 2000 Report to the President, Vols. 1–3 (1980).

C. MIRO and J. POTTER, Population Policy: Research Priorities in the Developing World (1980).

L. BROWN, Population Policies for the New Economic Era (1983).

VED P. NANDA

WORLD TRADE, PRINCIPLES

The international trade in goods and services and its legal regulation by private traders, governments and international organizations are influenced by 1. economic principles, 2. political principles, 3. principles of private transnational commercial law, 4. principles of national foreign trade legislation, and 5. principles of public international trade law. As international trade and economic integration presuppose a social and legal integration (*ubi commercium, ibi jus*), the history of the principles and law of international trade is as old as the history of international trade itself. Principles of international trade evolved spontaneously or were created deliberately by agreements so as to maximize the gains from trade and render private trade transactions and governmental trade interventions more predictable. The application of general principles to practical cases led to the evolution of specific rules and trading régimes, the law of which has tended to develop into complex and mutually interdependent legal systems.

1. Economic Principles of World Trade

International trade is largely influenced by economic principles of comparative advantage, competition and optimal trade intervention. Economic principles also affect the interpretation, application and economic effects of the rules of trade law.

(a) *Principles of trade liberalization*

The history of international trade dates back to the interregional commerce of ancient and medieval times (→ History of the Law of Nations) and is much older than the theoretical explanation of the mutual benefits of trade as supplied by the economic theories of absolute advantage (Adam Smith, 1723–1790) and comparative advantage (David Ricardo, 1772–1823). Smith's "Inquiry into the Nature and Causes of the Wealth of Nations" (1776) recommended that the productivity of trading countries be increased by specialization in the production and export of those commodities which could be produced at absolutely lower real cost at home, and by the importation of those commodities which could be produced at absolutely lower real cost in another country. Ricardo showed that, even if a country was able to produce every commodity at an absolutely lower real cost than another country, it could still increase its real national income by specializing in the production and export of those commodities for which its production costs were comparatively the lowest, and by importing commodities it could produce only at comparatively high costs. The utility of international trade thus depends neither on "stages of economic development" nor on "counter-concessions" from trading partners (since trade liberalization benefits primarily the liberalizing country) but rather on differences in the relative costs of production of countries in the absence of trade.

Trade liberalization, by promoting a more efficient division of labour exploiting absolute and comparative cost advantages resulting from national differences in production factor endowments, does therefore operate as a "positive-sum game", beneficial for each trading nation, and has become a universally accepted policy objective recognized in numerous international treaties. It yields economic gains in five important areas: consumption gains, such as increased choice and lower prices for consumers; production gains, deriving from the replacement of less efficient domestic production by imports permitting a reallocation of domestic land, labour and capital into more productive industries; economies of scale gains, such as cost reductions resulting from increased scales of markets, production and specialization; gains from a more competitive domestic economy (e.g. import competition as an antitrust device and as a stimulus for technological progress); as well as a contribution to domestic price stability, since import competition tends to reduce price and wage pressures.

(b) *Principles of fair trade*

Economic theory has long since recognized that market prices are able to harmonize private and social interests only under conditions of competition; "market imperfections" (monopolies, external effects, public goods) may thus require governmental intervention in the economy. Modern trade agreements such as the → General Agreement on Tariffs and Trade, which regulates over 80 per cent of world trade among 122 States (1984), duly reflect the world-wide recognition that market economies and free trade have to be created and secured by coherent sets of legal principles, rules and procedures. The basic GATT objective of liberal and non-discriminatory trade "under fully competitive conditions" (Art. VII(2)(b)) is complemented by various principles aimed at ensuring "fair trade".

Thus, while liberal trade induces and necessitates continuous adjustment of domestic production structures to import competition, the free-market approach to adjustment is mitigated by the admission of temporary protective measures to prevent or remedy "serious injury to domestic producers" (Art. XIX(1)). The notion of "fair competition" is also implied in the prohibition of export subsidies (Art. XVI) and in the admissibility of offsetting market distortions resulting from dumping, subsidies or exemption of exported products from domestic taxes by anti-dumping duties, countervailing duties and non-discriminatory "border tax adjustments" in the importing country (Art. VI). Also State-trading enterprises are to "make . . . purchases or sales solely in accordance with commercial considerations" and "act in a manner consistent with the general principles of non-discriminatory treatment" (Art. XVII(1)). Rules of international → antitrust law and → codes of conduct for → transnational enterprises and restrictive business practices are also necessary supplements to the intergovernmental GATT regulations so as "to ensure that restrictive business practices do not impede or negate the

realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting the trade and development of developing countries" (see UN GA Res. 35/63 of December 5, 1980 on "Restrictive Business Practices"). The legal recognition of the demands of less-developed countries (LDCs) for non-reciprocal treatment (GATT, Art. XXXVI(8)), for "stable, equitable and remunerative prices for exports" of primary products of particular interest to LDCs (Art. XXXVIII(2)(a)), and for preferential treatment of LDCs (GATT Decision of November 28, 1979) imply limitations of efficiency-oriented market economy principles by considerations of "fair competition" and redistributive equity (→ International Economic Order).

(*c*) *Principles of optimal trade intervention*

Since the mercantilist trade policy of maximizing exports and minimizing imports was proved to be unworkable, views on free trade have passed through three phases: The first was the recognition of the gains to be made from free trade; the second was the acceptance of limits on free trade similar to those accepted for national market economies; the third was the return to support for free trade on the ground that government intervention to correct domestic distortions can most efficiently be carried out by aiming directly at the source of market failure rather than by introducing costly further distortions through foreign trade restrictions. This economic theory of optimal intervention has demonstrated that trade restrictions almost never constitute "first best policies" for promoting full employment, monetary stability or industrialization, and that government intervention in the economy should be carried out using internal measures without foregoing the gains from trade. GATT admits non-discriminatory internal regulations (Art. III) and production subsidies (Art. XVI) but proscribes non-tariff barriers to trade (Art. XI) and market-distorting export subsidies (Art. XVI), which are only in very exceptional cases a means of maximizing a country's economic welfare. The function of international rules on non-discriminatory trade liberalization such as those of GATT is therefore not to reconcile conflicting national economic interests but to enable and induce the contracting parties to pursue economically efficient trade policies in their own economic national interest.

2. Political Principles of World Trade

(*a*) *Principles of foreign policy*

Foreign policy has always influenced international trade. The treaties of commerce of 508 and 348 B.C. between Rome and Carthage prohibited the merchants of the contracting parties from trading in specified parts of the Mediterranean. The declared objectives of mercantilist trade policy during much of the period from the 15th to the 18th century included political power, economic self-sufficiency and the acquisition of colonies (→ Colonies and Colonial Régime). The "Statement of Purposes" in the United States Trade Expansion Act of 1962 mentions, *inter alia*, the prevention of "Communist economic penetration". Modern trade agreements also refer to trade liberalization as a means for "an ever closer union among the peoples" and a means "to preserve and strengthen peace and liberty" (Preamble to the Treaty establishing the → European Economic Community). "Foreign policy exceptions" to treaty obligations to liberalize trade continue to be recognized particularly in three areas: (a) the sovereign freedom of States to conclude or not to conclude trade agreements, which is sometimes protected by provisions such as Art. XXXV GATT that permit the non-application of the agreement between particular parties when States are admitted to multilateral agreements by majority decisions; (b) various kinds of preferential trade agreements such as the Ottawa agreements of 1932 on → British Commonwealth preferences (see GATT, Art. I(2)), → free trade areas and → customs unions (Art. XXIV), or preferential treatment of LDCs, which all depart from the liberal idea of non-discriminatory market competition by introducing discriminatory distortions; (c) the legal admissibility of trade → embargoes for political ends and controls on trade in strategic goods (see → United Nations Charter, Art. 41 and GATT, Art. XXI).

(*b*) *Principles of domestic policy*

Although States conclude trade agreements because they are perceived to be in the interest of the national economy as a whole, they may inter-

fere with other governmental policies or be inimical to the interests of particular groups. Trade agreements therefore usually permit macro-economic safeguard measures to alleviate balance of payments difficulties (e.g. GATT, Arts. XII and XVIII) and micro-economic safeguards allowing for emergency protection of domestic producers (Art. XIX) or for protection of "infant industries" in LDCs (Art. XVIII). "Domestic policy exceptions" are usually also provided for domestic agricultural policy (see Art. XI(2)) and for various reasons of public policy (Art. XX). Since the traditional employment and balance of payments arguments for insisting on counter-concessions from trading partners as a means for alleviating temporary adverse impacts of import liberalization on employment and on the balance of payments have largely lost their economic validity under flexible exchange rates, the main rationale of the principle of → reciprocity in trade → negotiations under floating exchange rates also consists in a "domestic policy argument" that holding out the promise of export gains to certain sectors of the economy may generate domestic political support for trade liberalization.

Safeguard provisions and the principle of reciprocity promote the political acceptability of trade agreements by protecting certain domestic interests in importing States. International trade rules also serve as a counterweight to domestic sectional pressures for protection against import competition and enable governments to invoke their international obligations, as well as the national interest in adhering to them, as grounds for resisting demands by protectionist pressure groups for the granting of "protection rents". Liberal trade rules thus influence national decision-making and also regulate the political market for protection by promoting rule-oriented trade policies in the national economic self-interest, providing agreed normative standards for the appraisal of the benefits and costs of trade policy decisions, and discouraging restraints of competition and interferences in economic freedoms.

3. *Principles of Private Transnational Commercial Law*

From time immemorial, international trade has mainly been carried out by private merchants and has given rise to uniform commercial usages, principles and rules serving the common commercial needs of participants in international trade transactions. The performance of foreign trade transactions usually requires the allocation of a large number of commercial risks which are typically regulated in contracts of sale and arrangements for the carriage, insurance, delivery and payment of goods. As sellers and buyers reside in different countries, they often prefer to avail themselves of generally recognized legal principles – such as the freedom of contract, → good faith, → *pacta sunt servanda*, the applicability of commercial customs, the use of commercial corporations with separate legal personality, the resort to → commercial arbitration and the recognition of commercial arbitral awards – so as to apply customary commercial and contract practices to their contractual relations rather than submitting the contract exclusively to the municipal law and domestic courts of one party to the possible disadvantage of the other foreign party. Despite wide differences among national legal systems, contract practices for the export and import of goods exhibit a high degree of uniformity and, with the legal recognition of them as optional rules in both national domestic laws and in → international legislation, give rise to uniform principles of private transnational commercial law (→ Unification and Harmonization of Laws). However, the widespread cartelization of world trade between the two world wars by means of private market-regulating agreements, as well as the risks of abuses inherent in privately agreed applicable law clauses and in forum or arbitration clauses as a means for escaping domestic contract, corporation, tax or industrial property laws, also illustrate the need to limit private party autonomy by mandatory rules of national → *ordre public* (public order) and → international public order.

Particular rules for the interregional commerce of ancient times were already present in the Babylonian Code of Hammurabi, in the laws of the Greek cities and in Roman law. In medieval Europe, the commercial customs (*coutumes*) evolved into international uniform principles of equity and mercantile law often administered by merchants themselves in speedy and informal procedures and derived from various elements: usages and customs of the large international fairs

which were regularly held throughout Europe; the rise of banking, foreign exchange and commercial arbitration; the institution of the "staple" which channelled commerce through governmentally-controlled staple places; the commercial leagues of cities such as the Hanseatic League which included over 70 cities; the general codes regulating maritime law, e.g. the laws of Oleron (*circa* 1150), Wisby (*circa* 1350) and the Consolato del Mare of Barcelona (14th century); and, from the 16th century onwards, the dominance of around a hundred joint-stock and chartered companies carrying out international trade (such as the English, Dutch and French East India Companies), often vested with sovereign powers (→ Sovereignty), trade monopolies or privileges and functionally operating as a substitute for a governmental trade policy.

From about the 17th century, the medieval *lex mercatoria*, which had not only been a *jus mercatorum* but also a customary law approved by governmental authorities, became increasingly "nationalized" and incorporated into the national codifications of commercial laws in several European countries such as Colbert's Ordonnance sur le commerce (1673) and the Ordonnance de la marine (1681) in France. In England, the law merchant continued to be recognized as a universal body of law separate from common law and equity until 1756 when, under Lord Mansfield C.J. of the King's Bench and specially created juries of merchants, the customary merchant and maritime law was recognized as an integral part of English common law. Various kinds of systematic codifications emerged from the 18th century onwards: partial codifications such as the English Bills of Exchange Act (1882) and the Sale of Goods Act (1893); comprehensive codifications of commercial law such as the French Code de commerce (1807) and the German Allgemeines Deutsches Handelsgesetzbuch (1861); or systematic civil law codifications such as the Swiss Obligationenrecht (1910) which regulate commercial transactions as part of civil law. The national commercial laws often elaborated on the contents of the old law merchant and on established international commercial customs.

Modern private transnational commercial law is characterized by new types of commercial custom and standard contracts, by an increasing number of national foreign trade legislation and government procurement practices prescribing the terms of the contracts, and the influence of intergovernmental and private "formulating agencies" of international trade law, such as the → United Nations Commission on International Trade Law or the → International Chamber of Commerce, which elaborate international conventions, standard contracts, model laws and commercial usages relating to the international sale of goods (→ Sale of Goods, Uniform Laws), international payments and credits, → arbitration and shipping regulations. The largely depoliticized principles of transnational law, founded on the principle of the autonomy of the parties' will and its recognition as optional law in the various national legal systems, substitute the traditional national rules of → private international law in the conflict of laws sense (which aim at "nationalizing" the dispute by localizing the "seat of the obligation" and consigning the case to one single municipal law system) by uniform substantive principles of commercial law and arbitration.

4. *Principles of National Foreign Trade Legislation*

Since the consolidation of nation-States, the power of trade regulation has passed from the towns to the States. Governmental trade policies operate through statutes and other legal regulations and interferences in economic freedoms and property rights. In most States, systematic foreign trade legislation was developed only during the 20th century. The sovereign right of States to regulate their foreign trade is legally limited not only by international law (see section 5 *infra*) but also by domestic law guarantees, e.g. for economic freedoms and property rights, the rule of law, the separation and only limited delegation of trade policy powers, and formal judicial review.

The main legal instruments of national foreign trade policy continue to be customs tariffs, quantitative restrictions, subsidies, State trading and government procurement. The legal regulation of these instruments is complicated by the fact that they may assume many forms; moreover, they are replaceable by a multitude of non-tariff barriers to trade. Taxes on imports may be levied as revenue tariffs, protective tariffs, surcharges to improve the balance of payments, "border tax

adjustments" or as indirect domestic taxes, and may be *ad valorem* (a percentage of the unit value), specific (a fixed sum for each unit), a combination of the two, or variable levies dependent on market prices. Economists prefer subsidies to tariffs (because they distort only the production pattern and not the consumption pattern and make their costs apparent), and subsidies and tariffs to quantitative import restrictions (so as to protect the price mechanism and to avoid "monopoly rents" being enjoyed by the holders of import licenses). Governments, however, often prefer "second-best policies" for reasons of political and administrative convenience since, for example, tax increases have to be enacted by the legislature whereas quantitative import restrictions may be instituted more expeditiously by executive action without parliamentary control.

Apart from a few generalizations – such as that depressions and wars often lead to increases in protection, and prosperity and peace are conducive to trade liberalization – no consistent causal relationship emerges to explain why governments resort to highly protective tariff legislation at certain times (e.g. the United States Hawley–Smoot Tariff Act of 1930) or make different use of trade policy instruments. The trade policy powers of governments are limited by constitutional law and national foreign trade legislation which differ from State to State. The policy choices between "government by rules" (*Ordnungspolitik*) and "government by discretion" (*Lenkungspolitik*) also depend on the respective national social and economic policies of governments.

In the United States, Congress has used its constitutional powers "to lay and collect taxes, duties, imposts and excises" (Constitution, Art. I, Section 8, clause 1) and "to regulate commerce with foreign nations, and among the several States" (clause 3) by enacting numerous and often temporary tariff acts, trade acts and trade agreement acts which delegate only limited trade policy powers to the executive and authorize conclusion and implementation of international trade agreements only under specified conditions. Executive agreements based on congressional legislation, such as some 30 trade agreements (including GATT) concluded on the basis of the Reciprocal Trade Agreements Act of 1934, have become the principal means by which the United States enters into international trade commitments. The constitutional structure of the United States, in particular the power struggle between Congress and the executive over trade policy, has also influenced the rules and practice of international trade institutions such as GATT which itself, after having been accepted by the United States as an → executive agreement, contributed to a *de facto* shift of power over foreign commerce from the Congress to the executive. Lack of statutory authority and effective judicial control may hinder the executive from using certain trade policy instruments such as voluntary export restraint arrangements (see Consumers Union of the United States, Inc. vs. Kissinger, 506 F.2d 136) or induce governments to have recourse to trade regulations which do not require parliamentary approval.

The German Foreign Trade Law of 1961 (Bundesgesetzblatt (1961 I) p. 481, as amended), in contrast to the trade legislation of many States, is based on a few liberal framework rules of unlimited duration and on constitutionally guaranteed individual freedoms to engage in foreign trade. It provides that "in principle trade and commerce with foreign economic areas is free as to goods, services, capital, payments or other economic transactions" (§1) and "restrictions are to be limited as to character and extent to the minimum necessary to achieve the purpose stipulated in the empowering legislation" (§2). The constitutional guarantees of economic liberties and the rule of law entail that, due to its lack of statutory authority, the executive is legally barred from applying various kinds of trade restrictions such as expropriating interferences in transnational commercial contracts or certain foreign exchange restrictions.

5. Principles of Public International Trade Law

The private law merchant is much older than public international trade law which only developed into a legal system from about the 16th century due to the → coexistence of economically sovereign States in Europe, the actual extraterritorial effects of their government interventions in foreign trade, and their economic intercourse based on actual freedoms of commerce (*liberum commercium*), of communications and of the → high seas (*mare liberum*). The general

principles of classical international law continue to govern world trade and are duly reflected in the law of international → economic organizations and groups: economic sovereignty, law-creation by → consensus, the principles of *pacta sunt servanda* and good faith, the → responsibility of States, the → minimum standard for the treatment of → aliens, freedom of the high seas, the outlawry of → piracy, and the → customary international law governing → economic warfare. General international law does not stipulate rights and duties of States to have communications with one another (*jus communicationis*) or to grant freedom of commerce or navigation (see the → Permanent Court of International Justice, Advisory Opinion of October 15, 1931 in the → Railway Traffic between Lithuania and Poland Advisory Opinion, PCIJ Series A/B, No. 42, pp. 118–119). State sovereignty thus comprises the right to freely regulate foreign trade by means of national law and international agreements.

The centuries-old treaty practice among States has led to typical treaty clauses and "standards" which can be embodied into treaties without further elaboration, such as → most-favoured-nation treatment, preferential treatment, "open door" treatment, fair treatment, equal (or "national") treatment of foreigners and nationals, or a minimum standard for cases where the other standards do not apply. All these standards aim at equality in some form and, except for the minimum standard which has grown into a compulsory rule of international customary law, are purely optional patterns which contracting parties may adopt subject to any modifications they may wish to make. These principles and standards are applicable independent of particular economic systems and aim at reconciling the need for international economic cooperation with the coexistence at present of more than 170 sovereign States with divergent national economic and legal systems.

The classical principles and standards of international economic law continue to be recognized in modern intergovernmental trade agreements and in their respective national implementing legislation (→ Economic Law, International). The agreed principles promote the consistency of national and international trade laws and hence of the international trading system which depends for its own effectiveness on complementary national and international principles and rules on trade and payments. The principles of public international trade law are often influenced by domestic legislation, as is illustrated by the impact of the repeal of the Corn Laws in England (1846) on the liberal Cobden-Chevalier Trade Treaty of 1860, by the influence of the United States Reciprocal Trade Agreements Act of 1934 on the General Agreement on Tariffs and Trade of 1947, or of the United States Trade Act of 1974 on the Tokyo Round Agreements of 1979. But vice versa also, national trade laws often depend on international trade agreements, as is illustrated by the functional dependence of the United States Trade Act of 1974 and the Trade Agreements Act of 1979 on the continued existence of the GATT trading system or by the *de facto* development of GATT to the central international trade organization which, for example in the United States, has tended to increase the trade policy powers of the executive and contributed to the refusal of Congress to authorize acceptance of those agreements concluded in the Kennedy Round that required its consent. In the present interdependent world economy, the recognition of general principles and rules of public international trade law has become an indispensable legal prerequisite for liberal and non-discriminatory market competition, for the protection of relative freedoms of private traders and governments, for the coordination of domestic economic policies and national trade laws, as well as for the promotion of relative legal security and predictability in an interdependent trading system faced with continuous social change (→ Interdependence).

Whereas → treaties of friendship, commerce and navigation deal more generally with economic relations among nations (such as the treatment of foreign investment, foreign shipping, and the rights of foreigners), → commercial treaties mainly deal with customs duties and other treatment accorded to goods originating in the countries of the contracting parties (→ Customs Law, International). The GATT is the only multilateral trade agreement that lays down a legal framework for a worldwide liberalization of trade among 122 States (1984), for the legal coordination of trade policies and for a forum for continuous discussions on trade policy matters, negotiations on the reduction of trade barriers and the settlement of

international trade disputes. Many GATT provisions were modelled on standard clauses contained in the bilateral commercial treaty systems drawn up while the Cobden Treaty between Britain and France (1860–1882) and the United States Reciprocal Trade Agreements Act (1934–1962) were in force. With the conclusion of GATT, these principles of world trade were put on a multilateral and institutionalized legal basis for the first time in history, gradually assuming "constitutional functions" for the international trading system: Most of the traditional bilateral trade agreements existing before 1947 have been replaced by multilateral GATT rules, and most international trade agreements concluded since 1947 either implement GATT provisions (for example, the Tokyo Round Agreements on Arts. VI, VII, XVI, and XXIII of GATT) or make use of exceptions provided for in GATT (for example, agreements of free-trade areas, customs unions, commodity arrangements (→ Commodities, International Regulation of Production and Trade)).

Although GATT is among the most complex international treaties, it is based on comparatively few principles of world trade: non-discrimination in international trade so as to avoid the economic and political costs of trade discrimination by granting most-favoured-nation treatment in the application of trade policy border measures (Art. I), non-discriminatory administration of quantitative restrictions (Art. XIII) and of State trading (Art. XVII), and national treatment of imported and domestic products as regards internal taxation and regulation (Art. III); elimination of quantitative restrictions and other non-tariff barriers to trade (Art. XI) which, according to economic theory, are hardly ever an efficient means for maximizing national welfare; protection, where it is given, to be through customs tariffs which make the extent of protection transparent, which are comparatively easy to negotiate and to "bind" legally in tariff schedules (Art. II), and which least interfere with market competition; "mutually advantageous arrangements" (GATT preamble) based on overall reciprocity among contracting parties and on non-reciprocal preferential treatment of LDCs (Art. XXXVI(8)); and the admissibility of free-trade areas, customs unions and trade preferences among LDCs (cf. Art. XXIV). GATT also recognizes the need for "measures designed to attain stable, equitable and remunerative prices for exports" of primary products (Art. XXXVIII(2)(a)) which have been agreed upon, *inter alia*, in the context of international commodity agreements.

The legal principles of world trade, as set out in GATT, reflect the trend from bilateralism to multilateralism and to institutionalization in the evolution of public international trade law. During the 19th century the increasing use of unconditional most-favoured-nation clauses in bilateral trade agreements and the monetary gold standard had already led to a multilateralization of trade liberalization. Hence, it became more rational to hold multilteral trade negotiations and to create an institutional framework for consultations on trade policy issues and for the settlement of trade disputes. Institutionalized multilateral cooperation created a framework conducive to dealing with a number of specific trade policy instruments such as export subsidies or customs unions which could not be adequately dealt with on a bilateral basis. The proliferation, in particular since about 1974, of sectoral trade restrictions outside the GATT rules (e.g. for agricultural products, textiles and steel), the increasing departure from the unconditional most-favoured-nation principle, and the lack of adequate international rules for restrictive business practices, for trade in services and for transactions of transnational corporations do, however, indicate a need for legal reforms and for agreement on additional principles of world trade.

6. *Principles, Rules and Order*

The practice of international trade has invariably induced traders and States to reduce the economic costs of uncertainty by agreeing on legal principles and rules of world trade which have tended to develop into complex legal systems. The private law merchant, municipal trade legislation, public international trade law and codes of conduct have historically evolved into a "layered" and mutually interdependent legal order, the consistency of which depends largely on the recognition of agreed general principles of world trade.

The legal sovereignty of the more than 170 States, the legal autonomy of intergovernmental economic organizations, and the legal guarantees

for individual economic freedoms and property rights, at least in the 24 States of the → Organisation for Economic Co-operation and Development which account for more than 60 per cent of the world trade, entail a legally decentralized and predominantly market-oriented structure of world trade. The production, consumption and trading decisions of the millions of participants in international trade are mainly coordinated by market mechanisms and private commercial contracts. The principle of "spontaneous market coordination" allows more efficient information processing than political guidance and intergovernmental → diplomacy could ever provide and, through market prices, signals potential scarcities or surpluses anywhere in the world economy without delay. The need of supplementing the "invisible hand" of market competition by the "visible hand" of the law so as to protect the economic freedoms (of both individuals and States) and market competition against the abuses of economic or political power is, however, largely recognized. In order to function in an "orderly" manner, market competition must be secured by permanent legal principles, rules and procedures. National and international public trade law aim to prevent and correct "market failures" as well as "government failures" by providing for constitutive principles for the proper functioning of market competition (such as economic freedoms, property rights and non-discriminatory liberal trade) and regulative principles for the coordination of national trade policies (such as principles of market conformity, fair trade and optimal trade intervention).

The GATT objectives of liberal market competition and of reducing the economic costs of legal uncertainty can be achieved only to the extent that traders, producers and consumers disposing of individual freedoms and property rights can rely on the observance of GATT rules in their micro-economic trade and investment decisions. Intergovernmental trade agreements therefore depend for their own effectiveness on complementary private and public national trade laws. Since freedom of trade in goods can also be cancelled by monetary exchange and payments restrictions, and since production costs of commodities in different countries could not be compared without the convertibility of currencies and predictable exchange rates, rules on liberal trade in goods and services further require complementary rules for the free flow of payments for these very same current transactions (see GATT, Art. XV) and only together make possible an international price system and market competition (→ Monetary Law, International; → Capital Movements, International Regulation). International trade therefore necessitates an international economic order based on dovetailed arrangements for trade, money and finance.

Just as international trade largely operates as a spontaneous order based on self-generating market mechanisms and freely negotiated contracts, the international payments and monetary system (such as the gold standard during the 19th century, the system of floating exchange rates since 1973, or the modern standard loan agreements of Eurodollar banks) also largely evolved as a decentralized order grown out of practices of traders, banks and governments. The main advantages of the decentralized legal structure of world trade lie in the protection of the economic freedoms of both individuals and States, the spontaneous coordination of decentralized economic activities, efficient information processing and the promotion of economic efficiency and of continuous adjustment to a constantly changing world economy. The constitutional task of public trade law consists in devising and safeguarding a legal framework under which liberal trade can operate in a way beneficial to all participants and abuses of economic and political power can be prevented. The initiatives for a "new international economic order" demonstrate that the policy choices between spontaneous growth and the deliberate creation of general principles, specific rules and institutions of international trade remain a perennial issue; a better integration of the various historically-evolved "layers" of international trade law into a mutually consistent legal framework of world trade remains a major policy task.

A. ISAACS, International Trade, Tariff and Commercial Policies (1948).

J.B. CONDLIFFE, The Commerce of Nations (1951).

W. RÖPKE, Economic Order and International Law, RdC, Vol. 86 (1954 II) 206–270.

G. ERLER, Grundprobleme des Internationalen Wirtschaftsrechts (1956).

C.M. SCHMITTHOFF (ed.), The Sources of the Law of International Trade (1964).

G. CURZON, Multilateral Commercial Diplomacy (1965).

G. SCHWARZENBERGER, The Principles and Standards of International Economic Law, RdC, Vol. 117 (1966 I) 1–98.

J. FAWCETT, Trade and Finance in International Law, RdC, Vol. 123 (1968 I) 219–308.

R.N. GARDNER, Sterling-Dollar Diplomacy (1969).

J.H. JACKSON, World Trade and the Law of GATT (1969).

W.M. CORDEN, Trade Policy and Economic Welfare (1974).

K.W. RYAN, International Trade Law (1975).

C.M. SCHMITTHOFF and K. SIMMONDS (eds.), International Economic and Trade Law (1976).

R. BLACKHURST, N. MARIAN and J. TUMLER, Trade Liberalization, Protectionism and Interdependence (1977).

H.J. BERMAN and C. KAUFMAN, The Law of International Commercial Transactions, Harvard ILJ, Vol. 19 (1978) 221–277.

F. ROESSLER, Law, De Facto Agreements and Declarations of Principle in International Economic Relations, German YIL, Vol. 21 (1978) 27–59.

J.H. JACKSON, United States–EEC Trade Relations: Constitutional Problems of Interdependence, CMLRev, Vol. 16 (1979) 453–478.

C.M. SCHMITTHOFF, Export Trade, The Law and Practice of International Trade (7th ed. 1980).

C.M. SCHMITTHOFF, Commercial Law in a Changing Economic Climate (2nd ed. 1981).

P. VERLOREN VAN THEMAAT, The Changing Structure of International Economic Law (1981).

N. HORN and C.M. SCHMITTHOFF (eds.), The Transnational Law of International Commercial Transactions (1982).

E. McGOVERN, International Trade Regulation (1982).

E.-U. PETERSMANN, International Economic Theory and International Economic Law, in: R.St.J. McDonald and D.M. Johnston (eds.), The Structure and Process of International Law (1983) 227–261.

E.-U. PETERSMANN, Participation of the European Communities in the GATT: International Law and Community Law Aspects, in: H.G. Schermers and D. O'Keefe (eds.), Mixed Agreements (1983) 167–198.

E.-U. PETERSMANN, Protektionismus als Ordnungsproblem und Rechtsproblem, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 47 (1983) 478–501.

J.H. JACKSON, J.V. LOUIS and M. MATSUSHITA, Implementing the Tokyo Round. National Constitutions and International Economic Rules (1984).

E.-U. PETERSMANN, Allgemeines Zoll- und Handelsabkommen (GATT), in: von der Groeben, Thiesing, Ehlermann (eds.), Handbuch des Europäischen Rechts, Vol. 21 (1984) V A 10, 1–26.

ERNST-U. PETERSMANN

LIST OF ARTICLES*
FOR THE ENTIRE ENCYCLOPEDIA

Aaland Islands
Abu Dhabi Oil Arbitration (2)
Abuse of Rights (7)
Académie de Droit International
Acquiescence (7)
Acquisition of Polish Nationality (Advisory Opinion) (2)
Acts of State
Administrative, Judicial and Legislative Activities on Foreign Territory
Administrative Law, International Aspects
Administrative Tribunals, Boards and Commissions in International Organizations (1)
Admiralty Law
Admission of a State to Membership in United Nations (Advisory Opinions) (2)
Advisory Opinions of International Courts (1)
Aegean Sea
Aegean Sea Continental Shelf Case (2)
Aerial Incident Cases (U.S. v. Hungary; U.S. v. U.S.S.R.; U.S. v. Czechoslovakia) (2)
Aerial Incident of 27 July 1955 Cases (Israel v. Bulgaria; U.S. v. Bulgaria; U.K. v. Bulgaria) (2)
African Charter on Human and Peoples' Rights (8)
Aggression (3)
Aide-mémoire
Air, Sovereignty over the
Air Law
Air Pollution
Air Transport Agreements
Air Transport, Regulations on Liability and Related Questions
Air Warfare (3)
Aircraft
Aircraft Operations
Airports
Airspace over Maritime Areas
Aix-la-Chapelle, Congress of (1818) (7)
AKU Cases (8)
Alabama, The (2)
Algeciras Conference (1906) (7)
Aliens (8)
Aliens, Admission (8)
Aliens, Expulsion and Deportation (8)
Aliens, Military Service (8)
Aliens, Property (8)
Alliance (3)
Altmark,The (3)
Ambatielos Case (2)
American-Canadian Boundary Disputes and Cooperation (6)
American Civil War (7)
American Convention on Human Rights (8)
American-Mexican Boundary Disputes and Cooperation (6)
Amnesty Clause (3)
Amnesty International (8)
Amoco Cadiz Incident
Andean Common Market (6)
Andean Common Market, Court of Justice (6)
Andorra
Angary, Right of (3)
Anglo-Iranian Oil Company Case (2)
Annexation (3)
Antarctica
Antarctica Cases (U.K. v. Argentina; U.K. v. Chile) (2)
Antitrust Law, International (8)
ANZUS Pact (1951) (3)
Apartheid (8)
Appeals from Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Cases) (2)
Aqaba, Gulf of
Arab States, League of (6)
Aramco Arbitration (2)
Arbitral Award of 1906 Case (Honduras v. Nicaragua) (2)
Arbitral Commission on Property, Rights and Interests in Germany (1)
Arbitration (1)
Arbitration and Conciliation Treaties (1)
Arbitration Clause in Treaties (1)
Archipelagos
Arctic
Argentina-Chile Frontier Case (2)
Armed Conflict (3)
Armed Conflict, Fundamental Rules (3)
Armistice (3)
Arms Control (3)
Arms, Traffic in (3)
Artificial Islands and Installations
Asama Maru Incident (3)
Asian-African Legal Consultative Committee
Association of South-East Asian Nations (6)
Astronauts
Asylum, Diplomatic (8)
Asylum, Territorial (8)
Athenia, The (3)
Atlantic Charter (1941)
Attilio Regolo, The (2)
Austria
Austrian State Treaty (1955) (3)
Austro-German Arbitration Award under the Treaty of Finance and Compensation of 1961 (2)
Austro-German Property Treaty (1957), Arbitral Tribunal (1)
Autonomous Territories
Awards of Compensation Made by UN Administrative Tribunal (Advisory Opinion) (2)
Balance of Power (7)
Balkan Pact (1953/1954) (6)
Balkan Wars (1912/1913) (7)
Baltic Sea
Baltic States
Banco de Bilbao v. Sancha and Rey
Bancroft Conventions (8)
Bandung Conference (1955)
Bank for International Settlements (5)
Barcelona Conference (1921)
Barcelona Traction Case (2)
Barents Sea
Baselines
Bays and Gulfs
Beagle Channel Arbitration (2)
Behring Sea Arbitration (2)

*This list is subject to minor changes. A number in brackets following an article shows the instalment in which it has appeared.

Belgium-Luxembourg Economic Union (6)
Belize Dispute (6)
Benelux Economic Union (6)
Benelux Economic Union, College of Arbitrators and Court of Justice (6)
Berlin
Berlin Clause
Berlin Congress (1878) (7)
Berlin West Africa Conference (1884/1885) (7)
Bernstein v. Van Heyghen Frères
Bhutan
Bills of Exchange and Cheques, Uniform Laws (8)
Biological Warfare (3)
Black Sea
Blockade (3)
Blockade, Pacific (3)
Bogotá Pact (1948) (6)
Bombardment (3)
Bonn and Paris Agreements on Germany (1952 and 1954) (3)
Booty in Land Warfare (3)
Booty in Sea Warfare (3)
Borchgrave Case (2)
Border Controls
Boundaries
Boundaries in Latin America: uti possidetis Doctrine (6)
Boundary Disputes between China and USSR (6)
Boundary Disputes in Africa (6)
Boundary Disputes in Latin America (6)
Boundary Disputes in the Indian Subcontinent (6)
Boundary Régimes
Boundary Settlements between Germany and Her Western Neighbour States after World War II (3)
Boundary Traffic
Boundary Waters
Boycott (3)
Brazilian Loans Case (2)
Breda Fugitives Case
Brest-Litovsk, Peace of (1918) (3)
Bretton Woods Conference (1944) (5)
British Commonwealth
British Commonwealth, Subjects and Nationality Rules (8)
British Petroleum v. Libya Arbitration (2)
Broadcasting, International Regulation
Bryan Treaties (1913/1914) (1)
Buraimi Oasis Dispute (2)
Burmah Oil Co. v. Lord Advocate (8)
Cables, Submarine
Cabotage (8)
Calvo Doctrine, Calvo Clause (8)
Canals
Canevaro Claim Arbitration (2)
Capital Movements, International Regulation (8)
Caribbean Cooperation (6)
Carnegie Endowment for International Peace
Caroline, The (3)
Carthage, The, and The Manouba (2)
Casablanca Arbitration (2)
Cash and Carry Clause (8)
Casus foederis (3)
Celestial Bodies
Central American Common Market (6)
Central American Common Market, Arbitration Tribunal (6)
Central American Court of Justice (1)
Central Treaty Organization (6)
Cerruti Arbitrations (2)
Certain Expenses of the United Nations (Advisory Opinion) (2)
Channel Islands and the Isle of Man
Charter of Economic Rights and Duties of States (8)
Chemical Warfare (3)
Chevreau Claim Arbitration (2)
Chicago Convention
Children, International Protection
Chilean Copper Nationalization, Review by Courts of Third States (8)
China
Chinn Case (2)
City of Flint, The (3)
Civil Air Transport Inc. v. Central Air Transport Corp.
Civil Aviation, Unlawful Interference with
Civil Defence (3)
Civil Service, European (6)
Civil Service, International (5)
Civil War (3)
Civilian Objects (3)
Civilian Population, Protection (3)
Clausula rebus sic stantibus (7)
Clearing Agreements (8)
Clipperton Island Arbitration (2)
Coastal Fisheries
Coastal Trade
Coded Communications
Codes of Conduct (7)
Codification of International Law (7)
Coexistence
Collective Measures (3)
Collective Punishment (3)
Collective Security (3)
Collective Self-Defence (3)
Collisions at Sea
Colombo Plan (6)
Colonies and Colonial Régime
Colour Books
Columbia River
Combatants (3)
Comity (7)
Commercial Arbitration (8)
Commercial Treaties (8)
Commodities, Common Fund (8)
Commodities, International Regulation of Production and Trade (8)
Communication and Information, Freedom of
Comparative Law, Function and Methods
Comparative Law and European Law
Comparative Law and International Law
Competence of ILO concerning Methods of Agricultural Production (Advisory Opinion) (2)
Competence of ILO concerning Personal Work of the Employer (Advisory Opinion) (2)
Competence of ILO concerning Persons Employed in Agriculture (Advisory Opinion) (2)
Compromis (1)
Concessions (8)
Conciliation and Mediation (1)
Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947 (1)
Concordats (7)
Condominium
Confederations and Other Unions of States
Conferences and Congresses, International
Conferences of Ambassadors (7)
Conferences on the Law of the Sea
Connally Reservation (1)

Conquest (3)
Consensus (7)
Conservation of Living Resources of the High Seas
Consular Jurisdiction
Consular Relations
Consular Treaties
Consuls
Consultation
Contiguous Zone
Continental Shelf
Continental Shelf Arbitration (France/United Kingdom) (2)
Continental Shelf, Outer Limits
Continuity
Contraband (3)
Contracts between International Organizations and Private Law Persons (7)
Contracts between States and Foreign Private Law Persons (7)
Contributions (3)
Convoy (3)
Co-operation Council of the Arab Gulf States (6)
Corfu Affair (1923) (3)
Corfu Channel Case (2)
Costa Rica Packet Arbitration (2)
Costa Rica v. Nicaragua (2)
Costa v. ENEL (2)
Council for Mutual Economic Assistance (6)
Council of Europe (6)
Couriers
Court of Justice of the European Communities (6)
Crimean War (7)
Crimes against Humanity (8)
Crimes against Peace (3)
Crimes against the Law of Nations (8)
Criminal Law, International
Cuban Quarantine (3)
Cultural Agreements
Cultural and Intellectual Cooperation
Cultural Property
Cultural Property, Protection in Armed Conflict
Curzon Line
Customary International Law (7)
Customs Cooperation Council (5)
Customs Frontier (8)
Customs Law, International (8)
Customs Régime between Germany and Austria (Advisory Opinion) (2)
Customs Union (8)
Cyprus
Czarnikow v. Rolimpex (8)
Daimler Co. v. Continental Tyre and Rubber Co. (3)
Damages
Danube
Danzig
Danzig and ILO (Advisory Opinion) (2)
Danzig Legislative Decrees (Advisory Opinion) (2)
Dardanelles, Sea of Marmara, Bosphorus
Dawes Plan (3)
Days of Grace (3)
De facto Government
De facto Subjects
Debellatio (3)
Declaration (7)
Decolonization
Decolonization: British Territories
Decolonization: Dutch Territories
Decolonization: French Territories
Decolonization: Portuguese Territories
Delagoa Bay Arbitration (2)
Delagoa Bay Railway Arbitration (2)
Demarcation Line (3)
Démarche
Demilitarization (3)
Denationalization and Forced Exile (8)
Denial of Justice
Denunciation of Treaty of 1865 between China and Belgium (Orders) (2)
Depositary (7)
Deserters (3)
Designation of Workers' Delegate at ILO Conference (Advisory Opinion) (2)
Developing States
Diplomacy
Diplomacy, Secret
Diplomatic Agents and Missions
Diplomatic Agents and Missions, Privileges and Immunities
Diplomatic Protection
Diplomatic Protection of Foreign Nationals
Diplomatic Relations, Establishment and Severance
Disarmament
Disarming of Belligerents by Neutrals (3)
Discrimination against Individuals and Groups (8)
Dismemberment
Divided States
Dogger Bank Incident
Domestic Jurisdiction
Donauversinkung Case
Donckerwolcke Case (2)
Double Taxation (8)
Drago-Porter Convention (1907) (8)
Drug Control, International
Due Diligence
Dumbarton Oaks Conference (1944) (5)
East African Community (6)
Eastern Carelia (Request for Advisory Opinion) (2)
Eastern Greenland Case (2)
Economic and Technical Aid (8)
Economic Coercion (8)
Economic Community of West African States (6)
Economic Law, International (8)
Economic Organizations and Groups, International (8)
Economic Warfare (3)
Effectiveness (7)
Eisler Case (8)
El Triunfo Case (2)
Elbe
Electricité de Beyrouth Company Case (2)
Electricity Company of Sofia Case (2)
Embargo (8)
Emblems, Internationally Protected
Emigration (8)
Ems-Dollart
Enclaves
Enemies and Enemy Subjects (3)
Enemy Property (3)
Enemy States Clause in the United Nations Charter
Environment, International Protection
Equity in International Law (7)
Eritrea
Espionage (3)
Estoppel (7)
Etat russe v. La Ropit (8)
Ethos, Ethics and Morality in International Relations
European Atomic Energy Community (6)
European Atomic Energy Society (6)

European Civil Aviation Conference (6)
European Coal and Steel Community (6)
European Commission of Human Rights (8)
European Communities (6)
European Communities: Community Law and Municipal Law (6)
European Communities: External Relations (6)
European Company for the Chemical Processing of Irradiated Fuels (Eurochemic) (6)
European Company for the Financing of Railway Rolling Stock (Eurofima) (6)
European Conference of Ministers of Transport (6)
European Conference of Postal and Telecommunications Administrations (6)
European Convention for the Peaceful Settlement of Disputes (1)
European Convention on Human Rights (1950) (8)
European Convention on State Immunity
European Court of Human Rights (8)
European Defence Community (6)
European Economic Community (6)
European Economic Community, Association Agreements (6)
European Free Trade Association (6)
European Integration (6)
European Investment Bank (6)
European Law (6)
European Molecular Biology Cooperation (6)
European Monetary Cooperation (6)
European Organization for Astronomical Research in the Southern Hemisphere (European Southern Observatory) (6)
European Organization for Nuclear Research (6)
European Organization for the Safety of Air Navigation (Eurocontrol) (6)
European Patent Organisation (6)
European Political Community (6)
European Political Cooperation (6)
European Recovery Program (8)
European Road Transport Agreement Case (2)
European Schools (6)
European Social Charter (8)
European Space Agency (6)
Evidence before International Courts and Tribunals (1)
Exchange of Greek and Turkish Populations (Advisory Opinion) (2)
Exclusive Economic Zone
Executive Agreements (7)
Expropriated Religious Properties Arbitration (France, U.K., Spain v. Portugal) (2)
Expropriation and Nationalization (8)
Extradition (8)
Extradition Treaties (8)
Extraterritorial Effects of Administrative, Judicial and Legislative Acts
Fact-Finding and Inquiry (1)
Faeroe Islands
Falkland Islands
Fashoda Incident (7)
Federal Clause
Federal States
Federalism in the International Community
Financial Institutions, Inter-Governmental (5)
Fisheries Case (U.K. v. Norway) (2)
Fisheries, International Regulation
Fisheries Jurisdiction Cases (U.K. v. Iceland; Federal Republic of Germany v. Iceland) (2)
Fisheries, Sedentary
Fishery Commissions
Fishery Zones and Limits
Fishing Boats
Flag, Abuse of
Flag, Change of
Flag of Truce (3)
Flag, Right to Fly
Flags and Uniforms in War (3)
Flags of Convenience
Flegenheimer Claim (2)
Florida, The (2)
Flying Trader, The (3)
Fonseca, Gulf of
Food and Agriculture Organization of the United Nations (5)
Forced Labour (8)
Forced Resettlement (8)
Foreign Aid Agreements (8)
Foreign Debts (8)
Foreign Investments (8)
Foreign Legion (3)
Foreign Policy, Influence of Legal Considerations upon
Foreign Relations Power
France: Overseas and Dependent Territories
France-United States Air Transport Arbitration (1963) (2)
France-United States Air Transport Arbitration (1978) (2)
Frankfurt Peace Treaty (1871) (7)
Free Cities
Free Ports
Free Trade Areas (8)
Free Zones of Upper Savoy and Gex Case (2)
French-Peruvian Claims Arbitration (2)
Friendly Relations Resolution
Full Powers
Ganges
General Act for the Pacific Settlement of International Disputes (1928 and 1949) (1)
General Agreement on Tariffs and Trade (1947) (5)
General Participation Clause (3)
General Principles of Law (7)
Geneva Convention and Statute on the International Régime of Maritime Ports
Geneva Protocol for the Pacific Settlement of International Disputes (1924) (1)
Geneva Red Cross Conventions and Protocols (3)
Genocide (8)
Genocide Convention (Advisory Opinion) (2)
Gentlemen's Agreement (7)
German External Debts Arbitration (Greece v. Federal Republic of Germany) (2)
German Interests in Polish Upper Silesia Cases (2)
German Minorities in Poland, Cases concerning the (2)
German Minority Schools in Upper Silesia (Advisory Opinion) (2)
German Nationality (8)
German Secular Property in Israel Case (2)
German Settlers in Poland (Advisory Opinion) (2)
Germany, Federal Republic of, Treaties with Socialist States (1970–1974) (6)
Germany, Legal Status after World War II
Germany-Lithuania Nationality Arbitration (2)

Germany, Occupation after World War II (3)
Germany-United States Peace Treaty (1921) (3)
Gibraltar
Good Faith (7)
Good Offices (1)
Government
Government-in-Exile
Graf Spee, The (3)
Gran Chaco Conflict (2)
Great Lakes
Great Powers
Greco-Bulgarian "Communities" (Advisory Opinion) (2)
Greenland
Grisbadarna Case (2)
Guarantee (7)
Guarantee Treaties (7)
Guardianship of Infants Convention Case (2)
Guerrilla Forces (3)
Gugenheim v. Etat du Vietnam
Gut Dam Claims (2)
Guyana-Venezuela Boundary Dispute (6)
Hague Conventions on Civil Procedure
Hague Conventions on Private International Law
Hague Peace Conferences of 1899 and 1907 (3)
Haile Selassie v. Cable & Wireless Ltd.
Havana Charter (8)
Haya de la Torre Cases (2)
Hegemony
Heleanna Incident
Heligoland
Helsinki Conference and Final Act on Security and Cooperation in Europe
High Seas
Historic Rights (7)
History of the Law of Nations
A. Basic Questions and Principles (7)
B. Ancient Times to World War I
I. In General
1. Ancient Times to 1648 (7)
2. 1648 to 1815 (7)
3. 1815 to World War I (7)
II. Regional Developments
1. Africa (7)
2. Far East (7)
3. Islam (7)
4. Latin America (7)
5. South and South-East Asia (7)
C. World War I to World War II (7)
D. Since World War II (7)
Holy Alliance (7)
Holy Places
Holy See
Honduras-Nicaragua Boundary Dispute (2)
Hong Kong
Hospital Ships
Hostages (8)
Hot Pursuit
Hovering Acts
Human Rights (8)
Human Rights, Activities of Universal Organizations (8)
Human Rights, African Developments (8)
Human Rights and Humanitarian Law (8)
Human Rights Commission of the Arab States (8)
Human Rights Covenants (8)
Human Rights, Universal Declaration (1948) (8)
Humanitarian Intervention (3)
Humanitarian Law and Armed Conflict (3)
Hungarian-Romanian Land Reform Dispute (2)
I'm Alone, The (2)
IMCO Maritime Safety Committee, Constitution of (Advisory Opinion) (2)
Immigration (8)
Immunity Case (German Federal Constitutional Court, 1977)
Incognito
Indigenous Populations, Protection (8)
Indigenous Populations, Treaties with (8)
Indiscriminate Attack (3)
Individuals in International Law (8)
Indus Water Dispute (6)
Industrial Property, International Protection (5)
Inmarsat (5)
Innocent Passage, Transit Passage
Institut de Droit International
Intelsat (5)
Inter se Doctrine
Inter-American Commission on Human Rights (8)
Inter-American Court of Human Rights (8)
Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro (1947) (6)
Interdependence (7)
Intergovernmental Committee for Migration (5)
Interhandel Case (2)
Interim Measures of Protection (1)
Internal Waters
Internal Waters, Seagoing Vessels in
International Administrative Unions (5)
International Air Transport Association (5)
International Association of Lighthouse Authorities (5)
International Atomic Energy Agency (5)
International Bank for Reconstruction and Development (5)
International Bar Association
International Bureau of Education (5)
International Bureau of Weights and Measures (5)
International Chamber of Commerce
International Children's Centre (5)
International Civil Aviation Organization (5)
International Civil Defence Organization (5)
International Commission for Food Industries (5)
International Commission of Jurists (8)
International Commission on Civil Status (5)
International Committee of Military Medicine and Pharmacy (5)
International Controls
International Court of Justice (1)
International Courts and Tribunals (1)
International Covenant on Civil and Political Rights, Human Rights Committee (8)
International Crimes (8)
International Criminal Court (1)
International Development Association (5)
International Economic Order (8)
International Energy Agency (5)
International Finance Corporation (5)
International Fruit Co. Case (2)
International Fund for Agricultural Development (5)

International Hydrographic Organisation (5)
International Labour Organisation (5)
International Labour Organisation Administrative Tribunal (5)
International Law (7)
International Law, American (6)
International Law and Municipal Law
International Law and Municipal Law: Conflicts and Their Review by Third States
International Law Association
International Law Commission
International Law, Doctrine and Schools of Thought in the Twentieth Century (7)
International Law in Municipal Law: Law and Decisions of International Organizations and Courts
International Law, Intertemporal Problems
International Law, Islamic (6)
International Law of Cooperation
International Law of Development
International Legal Community (7)
International Legislation (5)
International Maritime Organization (5)
International Military Force (3)
International Monetary Fund (5)
International Obligations, Means to Secure Performance (1)
International Organizations, Financing and Budgeting (5)
International Organizations, General Aspects (5)
International Organizations, Headquarters (5)
International Organizations, Implied Powers (7)
International Organizations, Internal Law and Rules (5)
International Organizations, Legal Remedies against Acts of Organs (5)
International Organizations, Membership (5)
International Organizations, Observer Status (5)
International Organizations, Privileges and Immunities (5)
International Organizations, Resolutions (5)
International Organizations, Responsibility (5)
International Organizations, Succession (5)
International Organizations, Treaty-Making Power (5)
International Prize Court (1)
International Public Order (7)
International Refugee Organisation (5)
International Régimes
International Relations
International Rivers
International Schools and Universities
International Sea-Bed Area
International Secretariat (5)
International Telecommunication Union (5)
International Trade Centre UNCTAD/GATT (5)
International Union of Lawyers
International Watercourses Pollution
Internationale Handelsgesellschaft Case (2)
Internationalization
Internationally Wrongful Acts
Internment (3)
Inter-Parliamentary Union (5)
Interpol (5)
Interpretation in International Law (7)
Interpretation of Agreement of 25 March 1951 between WHO and Egypt (Advisory Opinion) (2)
Interpretation of Convention Concerning Employment of Women during the Night (Advisory Opinion) (2)
Interpretation of Greco-Bulgarian Agreement of 1927 (Advisory Opinion) (2)
Interpretation of Greco-Turkish Agreement of 1926 (Advisory Opinion) (2)
Interpretation of Memel Territory Statute Case (2)
Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinions) (2)
Interpretation of Treaty of Lausanne (Advisory Opinion) (2)
Intervention (3)
Investment Codes (8)
Investment Disputes, Convention and International Centre for the Settlement of (5)
Irredentism (8)
Island Disputes in the Far East (6)
Islands
Islands in the Caribbean: Statehood in Association (6)
Isolationism
Israel and the Arab States
Israel: Status, Territory and Occupied Territories
Italy-United States Air Transport Arbitration (1965) (2)
Jan Mayen
Japanese House Tax Arbitration (2)
Jaworzina (Advisory Opinion) (2)
Jay Treaty (1794) (1)
Jerusalem
Joint Undertakings
Joyce v. Director of Public Prosecutions (8)
Judgment No. 158 of UN Administrative Tribunal, Application for Review of (Advisory Opinion) (2)
Judgments of ILO Administrative Tribunal (Advisory Opinion) (2)
Judgments of International Courts and Tribunals (1)
Judicial and Arbitral Decisions: Validity and Nullity (1)
Judicial Settlement of International Disputes (1)
Jurisdiction of States
Jurisdiction of the Courts of Danzig (Advisory Opinion) (2)
Jurisdiction of the European Commission of the Danube (Advisory Opinion) (2)
Jurisdiction of the ICAO Council Case (2)
Jurisdiction of the International Commission of the Oder Case (2)
Jus cogens (7)
Kashmir
Kehler Hafen Case
Kellogg-Briand Pact (1928) (3)
Kidnapping (8)
Kiel Canal
Korea
Kronprins Gustaf Adolf and Pacific Arbitration (2)
Kurile Islands
La Plata Basin (6)
Labour Law, International Aspects
Lac Lanoux Arbitration (2)
Lake Chad
Lake Constance
Lake Geneva
Land Warfare (3)

Land-Locked and Geographically Disadvantaged States
Lateran Treaty (1929)
Latin American Economic Cooperation (6)
Latin American Integration Association (6)
Lausanne Peace Treaty (1923) (3)
Law of the Sea
Law of the Sea, History
Law of the Sea, Settlement of Disputes (1)
League of Nations (5)
Legal Assistance between States in Administrative Matters
Legal Assistance between States in Civil Matters
Legal Assistance between States in Criminal Matters
LIAMCO-Libya, Petroleum Concessions Arbitration (1977) (8)
Liberation Movements (3)
Libya-Oil Companies Arbitration (2)
Liechtenstein
Lighthouses and Lightships
Lighthouses Cases (2)
Literary and Artistic Works, International Protection (5)
Loans, International (8)
Local Remedies, Exhaustion of (1)
Locarno Treaties (1925) (7)
Lomé Conventions (6)
London Agreement on German External Debts (1953) (8)
London Agreement on German External Debts (1953), Arbitral Tribunal and Mixed Commission (1)
London Naval Conference of 1908/1909 (3)
Losinger Dispute (Orders) (2)
Lotus, The (2)
Lübeck, Bay of
Lump Sum Agreements (8)
Lusitania, The (2)
Macao
Malta, Order of
Mandates
Maps
Marine Environment, Protection and Preservation
Marine Research
Marine Resources
Maritime Archaeology
Maritime Boundaries, Delimitation
Maritime Jurisdiction
Marriages Performed by Diplomatic and Consular Agents
Martens' Clause (3)
Martini Case (2)
Mavrommatis Concessions Cases (2)
Mayaguez Incident (3)
Medical Transportation
Mediterranean Pollution Conventions
Mekong
Mercenaries (3)
Merchant Ships
Merchant Ships, Armed (3)
Mergé Claim (2)
Methodology of International Law (7)
Meuse, Diversion of Water Case (Belgium v. Netherlands) (2)
Micro-States
Migrant Workers (8)
Migration Movements (8)
Military Aid (8)
Military Bases on Foreign Territory (3)
Military Forces Abroad (3)
Military Government (3)
Military Necessity (3)
Military Objectives (3)
Military Reconnaissance (3)
Militias (3)
Mines (3)
Minimum Standard (8)
Minorities (8)
Minorities in Upper Silesia Case (Minority Schools) (2)
Minority Schools in Albania (Advisory Opinion) (2)
Minquiers and Ecrehos Case (2)
Missing and Dead Persons
Missionaries (8)
Mixed Arbitral Tribunals (1)
Mixed Claims Commissions (1)
Mixed Commissions (1)
Modus vivendi
Monaco
Monastery of Saint-Naoum (Advisory Opinion) (2)
Monetary Gold Case (2)
Monetary Law, International (8)
Monetary Unions and Monetary Zones (8)
Monroe Doctrine (7)
Moratorium (8)
Moselle
Most-Favoured-Nation Clause (8)
Mundat Forest
Munich Agreement (1938) (3)
Muscat Dhows, The (2)
Namibia
National Legal Persons in International Law
Nationality (8)
Nationality Decrees in Tunis and Morocco (Advisory Opinion) (2)
Natural Law (7)
Natural Resources, Sovereignty over
Naulilaa Arbitration (Portugal v. Germany) (2)
Naval Demonstration (4)
Naval Manoeuvres (4)
Navigation, Freedom of
Navigation on Rivers and Canals
Negotiation (1)
Neighbour States
Neuilly Peace Treaty (1919) (4)
Neuilly Peace Treaty Cases (2)
Neutral Nationals (4)
Neutral Trading (4)
Neutrality, Concept and General Rules (4)
Neutrality in Air Warfare (4)
Neutrality in Land Warfare (4)
Neutrality in Sea Warfare (4)
Neutrality Laws (4)
Neutralization (4)
New Hebrides
New States and International Law (7)
Niger River Régime
Nile River
Non-Aggression Pacts (4)
Non-Aligned States
Non-Binding Agreements (7)
Non-Governmental Organizations
Non-Intervention, Principle of (7)
Non-Proliferation Treaty
Non-Recognition
Non-Self-Governing Territories
Nordic Cooperation (6)
Nordic Council and Nordic Council of Ministers (6)
North American Dredging Co. of Texas Arbitration (2)
North Atlantic Coast Fisheries Arbitration (2)
North Atlantic Treaty Organization (6)
North Sea Continental Shelf Case (2)
Northern Cameroons Case (2)
Norwegian Loans Case (2)
Norwegian Shipowners' Claims Arbitration (2)
Note
Note verbale
Notification

Nottebohm Case (2)
Nuclear Energy, Peaceful Use
Nuclear-Free Zones (4)
Nuclear Research
Nuclear Ships
Nuclear Tests (4)
Nuclear Tests Cases (Australia v. France; New Zealand v. France) (2)
Nuclear Warfare and Weapons (4)
Nullity in International Law (7)
Nuremberg Trials (4)
Nyon Agreement (1937) (4)
Observers (4)
Occupation after Armistice (4)
Occupation, Belligerent (4)
Occupation, Pacific (4)
Oder-Neisse Line
Oil Pollution Conventions
Onassis Incident
OPEC Fund for International Development (5)
Open Towns (4)
Option of Nationality (8)
Ordre public (Public Order)
Organisation for Economic Co-operation and Development (5)
Organisation for Economic Co-operation and Development, Nuclear Energy Agency (5)
Organization of African Unity (6)
Organization of American States (6)
Organization of Arab Petroleum Exporting Countries (6)
Organization of Central American States (6)
Organization of Petroleum Exporting Countries (5)
Orinoco River
Orinoco Steamship Co. Arbitration (2)
Ottoman Debt Arbitration (2)
Outer Space Treaty
Overflight
Pacific Islands
Pacifism (4)
Pacta sunt servanda (7)
Pactum de contrahendo, pactum de negotiando (7)
Pagani Case
Pajzs, Csáky, Esterházy Case (2)
Palestine
Palestine Liberation Organization
Palmas Island Arbitration (2)
Panama Canal
Panevezys-Saldutiskis Railway Case (2)
Paracel Archipelago
Paria, Gulf of
Paris Peace Treaty (1856) (7)
Parliamentary Assemblies, International (5)
Passports (8)
Paul Clerget v. Banque commerciale pour l'Europe du nord et Banque du commerce extérieur du Vietnam
Peace and War (4)
Peace, Historical Movements towards (4)
Peace, Means to Safeguard (4)
Peace, Proposals for the Preservation of (4)
Peace Settlements after World War II (4)
Peace, Threat to (4)
Peace Treaties (4)
Peace Treaties after World War I (4)
Peace Treaties of 1947 (4)
Peace Treaty with Japan (1951) (4)
Peaceful Change (7)
Peaceful Settlement of Disputes (1)
Pearl Fisheries
Peleus, The (4)
Perfidy (4)
Permanent Court of Arbitration (1)
Permanent Court of International Justice (1)
Permanent Neutrality and Economic Integration (8)
Permanent Neutrality of States (4)
Persian Gulf
Phosphates in Morocco Case (2)
Pillage (4)
Pinson Claim Arbitration (France v. Mexico) (2)
Pious Fund Arbitration (2)
Pipelines
Piracy
Pirate Broadcasting
Plant Protection, International
Plebiscite (8)
Pledge of State Territory and Property
Plurinational Administrative Insitutions (5)
Polish Agrarian Reform (Orders) (2)
Polish Nationals in Danzig (Advisory Opinion) (2)
Polish Postal Service in Danzig (Advisory Opinion) (2)
Polish War Vessels in the Port of Danzig (Advisory Opinion) (2)
Population, Expulsion and Transfer (8)
Ports
Positivism (7)
Postal Communications, International Regulation (5)
Postal Ships
Postliminium (4)
Potsdam Agreements on Germany (1945) (4)
Power Politics
Preamble (7)
Preferential Claims against Venezuela Arbitration (2)
Preliminary Objections (1)
Premiums for Reducing Dairy Production Case (E.C. Commission v. Italy) (2)
Prescription
Prince von Pless Administration (Orders) (2)
Prisoners of War (4)
Private International Law
Privateering (4)
Prize Law (4)
Procedure of International Courts and Tribunals (1)
Procès-verbal (7)
Propaganda
Property Commissions Established pursuant to Art. 15 (a) of Peace Treaty with Japan of 1951 (1)
Proportionality (7)
Protected Persons (8)
Protecting Power
Protectorates
Protest
Public Health, International Cooperation (5)
Pueblo Incident
Quirin, ex parte (4)
R. v. Bottrill, ex parte Küchenmeister (4)
Racial and Religious Discrimination (8)
Radio Corporation of America v. China Arbitration (2)
Radio Orient Arbitration (2)

Railway Stations on Foreign Territory
Railway Traffic between Lithuania and Poland (Advisory Opinion) (2)
Railway Transport, International Regulation (5)
Rann of Kutch Arbitration (Indo-Pakistan Western Boundary) (2)
Rapallo Treaty (1922) (4)
Rauter Case (4)
Reciprocity (7)
Recognition
Recognition and Execution of Foreign Judgments and Arbitral Awards
Recognition of Belligerency (4)
Recognition of Foreign Legislative and Administrative Acts
Recognition of Insurgency (4)
Red Cross (5)
Red Crusader Incident
Refugees (8)
Refugees, League of Nations Offices (5)
Refugees, United Nations High Commissioner (5)
Regional Arrangements and the UN Charter (6)
Regional Commissions of the United Nations (6)
Regional Cooperation and Organization: African States (6)
Regional Cooperation and Organization: American States (6)
Regional Cooperation and Organization: Asian States (6)
Regional Cooperation and Organization: Pacific Region (6)
Regional Cooperation and Organization: Socialist States (6)
Regional Cooperation and Organization: Western Europe (6)
Regional Development Banks (6)
Regional International Law (7)
Reinsurance Treaty between Germany and Russia (1887) (7)
Relief Actions (4)
Reparation for Injuries Suffered in Service of UN (Advisory Opinion) (2)
Reparation for Internationally Wrongful Acts
Reparations (4)
Reparations after World War II (4)
Repatriation (8)
Reporting Systems in International Relations
Representatives of States in International Relations
Reprisals
Requisitions (4)
Resistance Movements (4)
Responsibility of States: Fault and Strict Liability
Responsibility of States for Activities of Private Law Persons
Responsibility of States: General Principles
Restitution
Retorsion
Revere Copper Arbitral Award (8)
Rhine
Rhine-Main-Danube Waterway
Rhineland Occupation after World War I (4)
Rhodesia/Zimbabwe
Right of Passage over Indian Territory Case (2)
River and Lake Pollution
River Bridges
River Deltas
Rockall
Rose Mary, The (8)
Russian Indemnity Arbitration (1912) (2)
Rutili Case (2)
Saar Territory
Saavedra Lamas Treaty (1933) (1)
Sabbatino Case
Safe-Conduct and Safe Passage (4)
Safety Rules at Sea
Safety Zones (4)
Sahara
Saint-Germain Peace Treaty (1919) (4)
St. Lawrence Seaway
Sale of Goods, Uniform Laws (8)
Salem Case (2)
Salvage of Ships
San Marino
Sanctions
Sapphire Arbitration (2)
Satellite Broadcasting
Satisfaction
Savarkar Case (2)
Scheldt River
Schiffahrt-Treuhand v. Procurator General (4)
Schtraks v. Government of Israel (8)
Sea-Bed and Subsoil
Sea Fisheries Restrictions Case (E.C. Commission v. Ireland) (2)
Sea Lanes
Sea Warfare (4)
Seal Fisheries
Secession
Sei Fujii v. California (7)
Self-Defence (4)
Self-Determination (8)
Self-Executing Treaty Provisions (7)
Self-Help (4)
Self-Preservation (4)
Sequestration (4)
Serbian Loans Case (2)
Servitudes
Sex Discrimination (8)
Ships, Diverting and Ordering into Port (4)
Ships in Distress
Ships, Nationality and Status
Ships, Visit and Search (4)
Shufeldt Claim (2)
Siege (4)
Sikkim
Singapore Oil Stocks Case (4)
Slavery (8)
Social Security, International Aspects
Socialist Conceptions of International Law (7)
Socialist Internationalism
Société Commerciale de Belgique Case (2)
Société Levant Express Transport v. Chemins de fer du gouvernement iranien
Sociology of International Law
Sources of International Law (7)
South African Bantustan Policy
South-East Asia Treaty Organization (6)
South Pacific Commission (6)
South Tyrol
South West Africa/Namibia (Advisory Opinions and Judgments) (2)
Sovereignty
Sovereignty over Certain Frontier Land Case (Belgium/Netherlands) (2)
Soviet Republics in International Law
Space Activities, Liability for
Space Law
Spacecraft and Satellites
Spain: Dependent Territories
Spanish Civil War (7)
Spanish Zone of Morocco Claims (2)

Special Missions
Spheres of Influence
Spitzbergen/Svalbard
Sport, International Legal Aspects
Spratly Archipelago
Standing before International Courts and Tribunals (1)
State
State Aircraft
State Debts (8)
State Debts, International Administration and Conrol (8)
State Immunity
State Ships
State Succession
Stateless Persons (8)
States, Equal Treatment
States, Extinction
States, Fundamental Rights and Duties
States, Sovereign Equality
Status quo (7)
Stimson Doctrine (4)
Straits
Strategic Areas (5)
Strategic Arms Limitation Talks (SALT)
Subjects of International Law (7)
Submarine Warfare (4)
Submarines
Suez Canal
Supranational Organizations (5)
Surrender (4)
Suspension of Hostilities (4)
Taft Arbitration Treaties (1911) (1)
Taiwan
Taxation, International (8)
Technology Transfer (8)
Tehran Conference (1943) (4)
Telecommunications, International Regulation
Temple of Preah Vihear Case (2)
Territorial Integrity and Political Independence
Territorial Sea
Territorial Sovereignty
Territory, Abandonment
Territory, Acquisition
Territory, Discovery
Territory, Lease
Terrorism
Tibet
Timor Island Arbitration (2)
Tinoco Concessions Arbitration (2)
Tokyo Trial (4)
Torture (8)
Tourism
Trading with the Enemy (4)
Traffic and Transport, International Regulation (5)
Traffic in Persons (8)
Trail Smelter Arbitration (2)
Transfrontier Cooperation between Local or Regional Authorities (6)
Transfrontier Pollution
Transit over Foreign Territory
Transnational Enterprises (8)
Treaties (7)
Treaties, Conclusion and Entry into Force (7)
Treaties, Conflicts between (7)
Treaties, Effect of Territorial Changes (7)
Treaties, Effect on Third States (7)
Treaties, Multilateral (7)
Treaties of Friendship, Commerce and Navigation (7)
Treaties, Registration and Publication (7)
Treaties, Reservations (7)
Treaties, Revision (7)
Treaties, Secret (7)
Treaties, Termination (7)
Treaties, Territorial Application (7)
Treaties, Validity (7)
Treaty for Amazonian Cooperation (6)
Trendtex Trading Corp. v. Central Bank of Nigeria
Trial of Pakistani Prisoners of War Case (2)
Trianon Peace Treaty (1920) (4)
Trieste
Tunisia-Libya Continental Shelf Case
Ultimatum (4)
Unequal Treaties (7)
Unfriendly Act (4)
Unification and Harmonization of Law
Unilateral Acts in International Law (7)
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland: Dependent Territories
United Nations (5)
United Nations Administrative Tribunal (5)
United Nations Charter (5)
United Nations Children's Fund (5)
United Nations Commission on Human Settlements (5)
United Nations Commission on International Trade Law (5)
United Nations Conference on Trade and Development (5)
United Nations Development Programme (5)
United Nations Economic and Social Council (5)
United Nations Educational, Scientific and Cultural Organization (5)
United Nations Educational, Scientific and Cultural Organization, Arbitral Award on the Interpretation of the Constitution of (2)
United Nations Environment Programme (5)
United Nations Forces (4)
United Nations General Assembly (5)
United Nations Industrial Development Organization (5)
United Nations Institute for Training and Research (5)
United Nations Peacekeeping System (4)
United Nations Relief and Rehabilitation Activities (5)
United Nations Relief and Works Agency for Palestine Refugees (8)
United Nations Secretary-General (5)
United Nations Security Council (5)
United Nations, Specialized Agencies (5)
United Nations Trusteeship System (5)
United Nations University (5)
United States: Dependent Territories
United States Diplomatic and Consular Staff in Tehran Case (2)
United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements) (8)
United States Nationals in Morocco Case (2)
United States v. California (Monterey Bay Case)
Uniting for Peace Resolution (5)
Universal Postal Union (5)
University for Peace (5)
Unjust Enrichment
Use of Force (4)
Uti possidetis Doctrine
Van Gend en Loos Case (2)
Verification of Facts

Versailles Peace Treaty (1919) (4)
Veto (5)
Vienna Congress (1815) (7)
Vienna Convention on Consular Relations (1963)
Vienna Convention on Diplomatic Relations (1961)
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts
Vienna Convention on Succession of States in Respect of Treaties
Vienna Convention on the Law of Treaties (7)
Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (5)
Vietnam
Vital Interests
Vitianu Case
Voting Rules in International Conferences and Organizations (5)
Waiver (7)
Wal Wal Arbitration (2)
Walvis Bay
War (4)
War and Environment (4)
War Correspondent (4)
War Crimes (4)
War Damages (4)
War, Effect on Contracts (4)
War, Effect on Treaties (4)
War Graves (4)
War, Laws of (4)
War, Laws, of, Enforcement (4)
War, Laws of, History (4)
War Materials (4)
War, Ruses (4)
War, Theatre of (4)
War, Use of Propaganda in (4)
War Zones (4)
Warfare, Methods and Means (4)
Warning Zones at Sea
Wars of National Liberation (4)
Warsaw Treaty Organization (6)
Warships (4)
Waste Disposal
Water, International Regulation of the Use of
Weapons, Prohibited (4)
Weather Modification
Weighted Voting (5)
Western European Customs Union (6)
Western European Union (6)
Western Sahara (Advisory Opinion) (2)
Westphalia, Peace of (1648) (7)
Whaling Régime
Wildlife Protection
Wilson v. Girard (4)
Wilson's Fourteen Points (7)
Wimbledon, The (2)
World Bank Administrative Tribunal (5)
World Food Council (5)
World Food Programme (UN/FAO) (5)
World Health Organization (5)
World Intellectual Property Organization (5)
World Meteorological Organization (5)
World Population (8)
World Trade, Principles (8)
Wounded, Sick and Shipwrecked (4)
Yalta Conference (1945) (4)
Young Plan (4)
Young Plan Loans Arbitration (2)
Zeiss Cases
Zollverein (German Customs Union) (7)
Zones of Peace at Sea