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10

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10

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INTRODUCTORY NOTE

The tenth instalment of the Encyclopedia of Public International Law contains 120 articles concerning States, responsibility of States, and the relationship between international law and municipal law. Articles which relate to more than one subject area can be found in the most appropriate instalment of the Encyclopedia. Thus, for example, the various articles dealing with legal assistance between States were included in Instalment 9 together with the other articles on legal cooperation in general.

To facilitate the use of the Encylcopedia, 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 set of instalments of the 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 1987.

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LIST OF ENTRIES

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 Public International Law Cases
Australian YIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
BFSP	British and Foreign State Papers
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 SR	Martens Supplément au Recueil des principaux 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
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

ABANDONMENT OF TERRITORY *see* Territory, Abandonment

ACQUISITION OF TERRITORY *see* Territory, Acquisition

ACTS OF STATE

1. The American Act of State Doctrine

The Act of State doctrine has been applied in the United States primarily in the context of foreign expropriations in which a governmental act is alleged to have violated the applicable norms of international law (→ Expropriation and Nationalization). As originally formulated in Underhill v. Hernandez (168 U.S. 250 (1897)), the doctrine provided that "the courts in one country will not sit in judgment on the acts of another done within its territory" (→ States, Sovereign Equality). This essentially territorially based conception of State sovereignty and jurisdiction (→ Territorial Sovereignty) was restricted to circumstances involving property situated in the expropriating State's territory; thus, it left American courts free to inquire into the international legality of foreign expropriations in their purported extra territorial reach, allowing them eventually to deny effect to decrees found wanting at international law (see Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965)). In the later → Sabbatino Case (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)) this restriction on the scope of the doctrine was retained even though the Court's only concern was that judicial decisions may restrict executive discretion in the conduct of international relations. The retention of this distinction is somewhat puzzling, however, as the potential for judicial interference with executive policy options would appear just as great where the expropriated property was originally outside the expropriating State's territory.

Despite this inherent illogicality, the American judiciary has shown great resistance to the dismantlement of the principle, even in the light of the partial legislative "overruling" of Sabbatino in 1966 by the so-called Hickenlooper Amendment to the U.S. Foreign Assistance Act (22 U.S.C. § 2370(e)(2) (1982 Ed.)). While the courts have upheld the constitutional validity (e.g. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967)) of this congressional directive enjoining them from giving effect to a foreign act violating international law in cases involving "a claim of title or other rights to property . . . based upon . . . a confiscation . . . by an act of that state" (except where "the President determines that application of the act of state doctrine is required . . . by the foreign policy interests of the United States . . . "), they appear to have been at pains to retain a substantial field of application for the principle. The exception to the Act of State doctrine created by the Hickenlooper Amendment has thus been interpreted extremely restrictively (see Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F.Supp. 1175 (D.D.C. 1980)), "title or other right to property" being constructed narrowly (see French v. Banco Nacional de Cuba, 242 N.E.2d 704 (N.Y. 1968)) so as to exclude all claims based on governmental interference with contractual rights (see Menendez v. Saks and Company, 485 F.2d 1355 (2d Cir. 1973)) and, in particular, situations involving the "nationalization" of concession agreements (see Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322 (Tex. 1979)). Furthermore, there are indications that even clear cases of outright expropriation could fall outside the reach of the legislative exception, specifically where the property affected is not American owned (dicta in Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co., 396 F.Supp. 461 (W.D. Louisiana 1975)).

Still, this generally "conservative" attitude has not prevented American courts from developing some further exceptions to the Act of State doctrine. The first concerns cases in which the State Department has given a clear indication of executive policy opposing the validity of a given foreign act – the so-called "Bernstein exception" (→ Bernstein v. Van Heyghen Frères, 163 F.2d 246 (2d Cir. 1947)), the exact status of which was left somewhat uncertain by the split decision of the Supreme Court in First National City Bank v. Banco Nacional de Cuba (406 U.S. 759 (1972)). A second exception, approved by the Supreme Court in Alfred Dunhill of London, Inc. v. Republic of Cuba (425 U.S. 682 (1976)), holds the principle inapplicable where an essentially commercial transaction is involved, thus importing into the

Act of State area the same distinction now primarily relied upon in the United States in determining the scope of sovereign immunity (→ State Immunity) – though some doubts have recently been expressed by courts as to the existence of such an exception (see Braka v. Bancomer S.N.C., 762 F. 2d 222 (2d Cir. 1985)). Moreover, it would appear that the Act of State doctrine remains subject to a judicial assessment of possible embarrassment to the executive in the conduct of international relations (see Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981)).

2. *British and Commonwealth Practice*

The traditional approach in other common law jurisdictions bears a strong resemblance to the American pre-Hickenlooper attitude. While the notion of "Act of State" has generally not been formally utilized in this context – the term being usually reserved to denote the quite distinct immunity which the Crown enjoys at common law in its own courts for injury inflicted on aliens outside the realm (see e.g. Buron v. Denman, (1848) 154 E.R. 450) – such landmark decisions as Princess Paley Olga v. Weisz ((1929) All E.R. 513) and Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. ((1921) All E.R. 138) clearly require British courts to accept the effects of foreign expropriations. An attempt by the Aden Supreme Court in Anglo-Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary) (Decision of 1953, ILR, Vol. 20, p. 316; → Rose Mary, The) to qualify the traditional injunction against judicial inquiry into the validity of a foreign expropriation act by reference to the nationality of the ownership, allowing such investigation where the property of aliens is involved, has found little following. Instead, the proper restriction upon the scope of the principle has generally been considered, because of conflict of law principles, to depend on the location of the property (see Re Helbert Wagg & Co. Ltd. (1956) 1 All E.R. 129). Only in relation to an expropriation's purported extraterritorial reach would a court thus be entitled to refuse to uphold the effect of the foreign act, whether on the basis of an infringement of local → *ordre public* (public order) or of the requirements of international law (→ International Law and Municipal Law: Conflicts and Their Review by Third States).

The widely held view that the Act of State doctrine is an essentially American development, lacking general standing at common law, has had to be reconsidered in the light of the recent House of Lords decision in Buttes Gas & Oil Co. v. Hammer & another (Nos. 2 & 3)/ Occidental Petroleum Corp. & another v. Buttes Gas & Oil Co. & another (Nos. 1 & 2) ((1981) 3 All E. R. 616). While neither the rationale upon which the earlier expropriation decisions were based, nor their continued precedential value, were called into question, the decision contained an emphatic assertion of the existence, in British common law, of a broad Act of State principle modelled closely upon the American example. Despite extensive reliance on United States court opinions, Lord Wilberforce, deriving a basic principle of non-justiciability from the Act of State doctrine, proceeded to utilize the concept to justify a quite different result. Rather than acknowledging the formal validity of the foreign governmental act as a result of the refusal to question its international legality, the House of Lords expressly declined to pronounce on the issue at all. Hence, the court not only rejected the respondents' counterclaim, as it was premised on the international legality of, *inter alia*, the off-shore jurisdictional claim of a foreign State, but also ordered a stay of the plaintiff's libel action, as "to allow it to proceed but deny (the respondents) the opportunity to justify would seem unjust" (ibid. at 633). The court thus did not just rule out the claimant's challenge to the foreign act's legality, but equally prevented the other party from relying on its validity – a startlingly different outcome from that normally reached by American courts in Act of State cases (see e.g. D'Angelo v. Petroleos Mexicanos, 331 A.2d 388 (Del. 1974)).

3. *Civil Law Attitudes*

Courts in civil law countries have, generally speaking, eschewed the Act of State concept and tended to rely, instead, on conflicts of law principles in assessing, in particular, the effect to be given to foreign nationalization decrees (→ Recognition of Foreign Legislative and Ad-

ministrative Acts). Invoking the *lex rei sitae* rule, they have usually acknowledged in principle the effectiveness of foreign acts within the expropriating State's territory (see, e.g., the Société Hardmuth case, Decision of 1950, French Court of Appeal, Paris, Revue Critique de Droit International Privé, Vol. 44 (1955) p. 501), but refused to accept any extraterritorial effects at all (see, e.g., Société Potasas Ibericas v. Nathan Bloch, Decision of March 28, 1939, French Cour de Cassation, Dalloz Recueil Hebdomadaire de Jurisprudence, p. 257 and Svit N.P. v. Bata-Best B.V., Decision of February 28, 1975, District Court of 's Hertogenbosch, The Netherlands, ILM, Vol. 15 (1976) p. 670). However, even in relation to property situated within the expropriating State's territorial jurisdiction, civil law courts have been prepared to test the legality of foreign expropriation decrees in the light of the public order of the forum (see, e.g. Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R. Co. (The Miriella), Decision of March 11, 1953, Court of Venice, Italy, ILR, Vol. 22, p. 19 and Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, Decisions of 1953, District and High Courts of Tokyo, Japan, ILR, Vol. 20, p. 305) and eventually to deny them even internal effect where the governmental action was found to be "confiscatory" in nature (see e.g. → Etat russe v. La Ropit, Decision of 1928, French Cour de Cassation, Ann. Dig., Vol.4, p. 67 and Svit v. Bata-Best (*supra*)). Similarly, but reflecting a rather more cautious concept of the desirable scope of application of local public order considerations, West German courts have relied on this criterion in assessing foreign expropriation acts, though only in circumstances where a sufficiently direct "national" interest appeared to exist in the forum (see e.g. Sociedad Miniera El Teniente S.A. v. Norddeutsche Affinerie A.G., Decision of March 13, 1973 of the District Court of Hamburg, Federal Republic of Germany, English translation in: ILM, Vol. 12 (1973) p. 251; → Chilean Copper Nationalization, Review by Courts of Third States).

4. Conclusion

The preceding analysis of judicial practice would seem to indicate that the governmental nature of legislative or executive decrees does not invariably play a central role in deciding what effect, if any, such decrees are to be given by the municipal courts of other countries. With the (now partial) exception of the United States and, to a lesser extent, of other parts of the common law world, the Act of State concept does not appear to have a determinative impact on the disposition of expropriated property. In civil law jurisdictions, the basic territorial limitation of sovereign authority and the overriding effect of local public order – even in relation to transactions taking place within the expropriating State's own boundaries – seem to be the primary considerations affecting the outcome of this category of cases. As such, this practice probably reflects the same, more limited view of the sovereign character of State authority as accounts, e.g., for the readiness with which these jurisdictions have accepted the restrictive theory of sovereign immunity, while the common law world persisted for a much longer period of time in upholding the theory of absolute sovereign immunity.

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J.-P. FONTEYNE

ADMINISTRATIVE, JUDICIAL AND LEGISLATIVE ACTIVITIES ON FOREIGN TERRITORY

1. Historical Evolution of Legal Rules

Every → State may exercise sovereign acts in all territories where no other nation has previously established exclusive jurisdiction or where no other prohibition is valid (→ Sovereignty). In contrast, however, every nation has a right to expect that its → territorial sovereignty will be respected by other nations. Modern European rulers strived to eliminate the pre-existing territorial patchwork of Europe to achieve territorially unified, self-contained and integral nation-States. This development was finally completed in the 19th century. In the course of this development, Grotius and Althusius made no distinction between the terms *territorium* and *jurisdictio* because only the State possesses *terrendi potestas* within its unified territory.

2. Current Legal Situation

The prohibition against the undertaking of sovereign acts on foreign territory follows naturally not only from the basic principle of territorial sovereignty, but also from the principle that all States are independent (→ Territorial Integrity and Political Independence). Max Huber stated in the → Palmas Island Arbitration: "Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, a function of a State" (RIAA, Vol. 2, p. 829, at p. 838). The → International Court of Justice expressed the same view in the → Corfu Channel Case. These rules are valid not only for the State as a → subject of international law, but also for all public institutions endowed with governmental authority. The exercise of sovereign acts on foreign territory is criminally punishable in some States, for example under Arts. 269 and 271 of the Swiss Criminal Code.

International law distinguishes between the exercise of sovereign acts on foreign territory and sovereign acts within a State having an effect outside its territory (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). In the → Lotus Case, the → Permanent Court of International Justice defined the issue in the following manner:

> "In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law" (PCIJ, Series A, No. 10 (1927) pp. 18–19).

International law also distinguishes between actual sovereign acts on foreign territory and requests for assistance to foreign public authorities. In the first situation, representatives of State X perform an official act within the territory of State Y with the permission of State Y. In the second situation, officials of State X request officials of State Y to perform an act within the territory of State Y. The second scheme does not involve sovereign activity on foreign territory but is rather an example of international cooperation between agencies (→ Legal Assistance between States in Administrative Matters). Most such matters of cooperation concern the police and health authorities as well as border and immigration measures.

Exceptions to the prohibition against the exercise of sovereign acts on foreign territory can be found in → customary international law. On freighters passing through coastal waters the command and criminal powers necessary to preserve peace and order on board are exercised by the flag State according to established practice in customary international law (→ Ships, Nationality and Status). Also excepted from the sovereign power of the coastal State are foreign → warships and foreign military → aircraft in flight. Sovereign acts on foreign territory may be justified as measure of → self-help or → self-defence or for humanitarian purposes (→ Use of Force; → Humanitarian Intervention).

Permissible sovereign acts on foreign territory can also find justification in international treaties, express understandings or the simple tolerance of extraterritorial acts. Codified customary internationl law (→ Codification of International

Law), as found in Art. 3 of the → Vienna Convention on Diplomatic Relations (1961) and Art. 5 of the → Vienna Convention on Consular Relations (1963), regulate the conditions under which diplomatic and consular sovereign activities take place (→ Consular Relations). In the event of military occupation, an occupying power has the right to issue regulations for the preservation of safety and order, according to Art. 43 of the Hague Regulations Respecting the Laws and Customs of War on Land (Martens NRG, Vol. 3, p. 461). After completion of the military occupation the continuing presence of foreign troops and the extent of their rights are usually determined through bilateral agreements (→ Military Bases on Foreign Territory). In order to ensure authority over its own troops, the dispatching State may retain criminal authority over its military personnel, whereas in other matters it may agree to concurrent jurisdiction (see Art. VII of the Agreement of June 19, 1951 between the parties to the → North Atlantic Treaty Organization regarding the status of their forces).

Multilateral treaties have been entered into whereby one State granted an administrative concession to another State. In these cases the exercise of sovereign authority on foreign territory was usually granted for a determined period of time. An historical example of the granting of such authority for an unlimited time was the empowering of Austria under Art. 25 of the Berlin Treaty of 1878 (→ Berlin Congress (1878)) to occupy and administer the Turkish provinces of Bosnia and Herzegovina. The → Potsdam Agreements on Germany (1945) gave Poland and the Soviet Union the right to administer the German eastern provinces for an undetermined period of time after the end of World War II although Germany was not a party to the negotiations.

In contrast to the concession of the right to exercise territorial sovereignty, international law has also witnessed the recognition of individual, geographically limited territorial rights in favour of foreign States. Such limitations on territorial sovereignty are called → servitudes. The Permanent Court of Arbitration, in the → North Atlantic Coast Fisheries Arbitration, interpreted the term as "an express grant of sovereign right . . . on the express evidence of an international contract" (RIAA, Vol. 11, p. 167, at pp. 181–182). Economic servitudes include → free ports, → free trade areas, and → fishery zones.

Servitudes are also possible in the field of international traffic because an → enclave has no claim to a right of passage *vis-à-vis* the transit State (→ Traffic and Transport, International Regulation; → Transit over Foreign Territory). Because of its special situation → Berlin (West) is not considered an enclave of the Federal Republic of Germany. The Federal Republic and the German Democratic Republic signed the binding inter-German Transit Agreement on December 17, 1971, covering the transportation of private persons and goods, without providing the Federal Republic with sovereign rights in the transit routes (German Bundesanzeiger Nr. 174 (1972) Beilage 24/72). Other examples of the concession of certain sovereign rights are the trust territories (→ United Nations Trusteeship System) and → mandates and certain leasing agreements (→ Territory, Lease), especially those the United States enters into for military purposes.

In the practice of nations there are numerous areas where the exercise of sovereign power on foreign territory has been permitted. Hereto belong bilateral agreements concerning customs and passport control at border railway stations (→ Railway Stations on Foreign Territory) as well as the creation of commissions to regulate border waterways (→ Ems-Dollart). In social security agreements there are provisions for the taking of information from witnesses and victims of accidents as well as medical consultations and controls (→ Social Security, International Aspects). A → government-in-exile can exercise sovereign acts with the permission of the host nation, for example, in issuing identification papers, the creation of military units and the outfitting of ships.

3. Special Legal Problems

The above-mentioned rules also apply to the sovereign acts of international organizations. Therefore, membership of a State in a → supranational organization may be characterized by the direct effect of organization decisions on member States. According to Art. 189 (2) of the Treaty establishing the → European

Economic Community and Art. 161 (2) of the Euratom Treaty, a regulation is directly applicable in all member States (→ European Atomic Energy Community).

Also included in the exercise of sovereign acts on foreign territory are activities that serve the establishment of foreign State organs. There is no obligation in international treaties or customary international law that requires a State to tolerate foreign voting rights. A State need not allow → aliens to participate in the political life of their native land from the territory of the host nation. Rather, each State is completely free to permit or prohibit participation in foreign elections from its territory, or to notify foreigners of impending elections.

4. Evaluation

A view into the historical past makes it clear that the traditional forms of sovereign activity on foreign territory have undergone a fundamental change in meaning. In the past certain activities on foreign territory, for example, trust and lease agreements, resembled colonial activity (→ Colonies and Colonial Régime). The dissolution of these agreements, as in the Panama Canal Treaty of September 7, 1977, which returned the Canal to the sovereignty of Panama, can be seen as the end of an historical epoch (→ Panama Canal; → Decolonization; see also → Consular Jurisdiction).

In light of increasing international cooperation, sovereign acts on foreign territory can serve as instruments of → international control. Examples are the confirmation of the peaceful use of atomic energy according to Art. III of the Statute of the → International Atomic Energy Agency and the safeguard agreements based on Art. III of the → Non-Proliferation Treaty. A second example is the observation of military manoeuvres on foreign territory according to Art. II of the Helsinki Final Act on Security and Cooperation in Europe.

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AUTONOMOUS TERRITORIES

1. Introduction

Autonomous territories are entities which can be investigated from the point of view of both constitutional and international law. In many cases the administration of an autonomous territory has been arranged solely by means of constitutional law, although some autonomous territories also have a distinct connection with international law, for instance because of a → guarantee treaty which will be interpreted primarily on the basis of international law.

During the 19th century autonomy was a means of giving protection to → minorities, although the term was also used to describe the legal relationship between, for instance, Finland and Russia when in 1809 Finland was annexed to Russia after a war between Sweden and Russia. Finland remained an autonomous Grand Duchy until its Declaration of Independence in 1917.

Autonomous territories differed so much from one another during the 19th century that they could not be given a general definition. It was,

however, generally agreed that an autonomous territory – to have any importance from the point of view of international law – had to have some distinct feature to distinguish it from a solely internal constitutional arrangement. This feature was either a → treaty on which the autonomy of the territory relied or a guarantee treaty whereby third States guaranteed the autonomy of a certain territory. It could also consist of an independent power to enter into treaties with other → subjects of international law or to enter into diplomatic relations with other entities.

These features were always important in analyzing the legal nature of a particular entity, and it was at times difficult to decide whether an entity was an autonomous territory or a → State. These difficulties are not uncommon even today, although comparison in a specific case need not be restricted to the two alternatives of an autonomous territory or a State. There are several other alternatives, including → protectorates, mandated territories (→ Mandates), → federal States, trusteeship territories (→ United Nations Trusteeship System), and → condominiums, to mention only a few (see also → Non-Self-Governing Territories).

2. Recent Examples

There are several autonomous territories which are usually regarded as models for autonomy. For example, the → Aaland Islands, in comparison with the other administrative districts of Finland, are in a privileged position as the only district with its own legislative organs. Another difference is that the → demilitarization and → neutralization of the Aaland Islands is based on a treaty concluded on October 20, 1921 (LNTS, Vol. 9, p. 211) between Austria, Denmark, Estonia, Finland, France, Germany, Latvia, Poland and Sweden. A comparable treaty was concluded on October 11, 1940 (UNTS, Vol. 67, p. 139) after the Winter War between Finland and the Soviet Union.

Although the Aaland Islands have no right to diplomatic representation or diplomatic negotiations with foreign States, they are, nevertheless, entitled to representation in the Nordic Council as are two other autonomous territories, the → Faeroe Islands and → Greenland (→ Nordic Council and Nordic Council of Ministers). This is a significant feature of these three territories, which originally sought an equal footing with the five Nordic States as members of the Council. Their claim was based on extensive autonomy and the need to look after the interests of their populations in so far as → Nordic cooperation was concerned.

Although the Nordic Council did not go as far as to accept the principle of equality between States and autonomous territories, it was decided that as of January 1984 the three territories should each have the right to send two elected representatives to meetings of the Council. Whereas Greenland was admitted to the Nordic Council for the first time, the Aaland Islands and the Faeroe Islands had previously been entitled to one representative each.

The three territories are now allowed in addition to participate in the work of the Nordic Council of Ministers and the Committees of the Nordic Council. They are also entitled to put items on the agenda of the Nordic Council. As a consequence of these amendments it was decided that decisions of the Nordic Council of Ministers would become binding on the three territories in those cases where the latter agreed to their implementation on the basis of decisions reached by their governing organs.

It may be mentioned that in 1983 the Legislative Assembly of the Aaland Islands adopted a new draft Autonomy Act which is now under discussion by a Mixed Committee consisting of representatives of the Government of Finland and the Local Government of the Aaland Islands.

Another autonomous territory, the Faeroe Islands, is a self-governing community within the Kingdom of Denmark. The autonomous powers of the Faeroe Islands are based on the Home Rule Act of March 23, 1948, which specifies the territory's legislative powers. As for → international relations, the basic rule is that the Danish Government decides on all questions concerning the foreign relations of the Kingdom. In matters related to international economic relations of the Faeroe Islands, the Ministry for Foreign Affairs appoints an expert to assist in the decision-making whenever Faeroese interests are at stake. As a matter of practice the Ministry for Foreign Affairs also allows representatives of the Faeroe Islands to be included in the personnel of

missions in countries where the territory has considerable economic interests.

As far as the treaty-making power is concerned, the Government of Denmark is in principle entitled to enter into treaties on behalf of the Faeroe Islands. It is, however, possible to exclude the territory from the application of a particular treaty by means of a statement to this effect in the treaty concerned. A territorial limitation may be made at the latest when the treaty is signed or ratified. Thus Denmark, when adhering to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, excluded the Faeroe Islands by a → notification on May 15, 1968. By another notification, on October 30, 1968, she extended the application of the Convention to the Islands as of January 1, 1969 (→ Investment Disputes, Convention and International Centre for the Settlement of).

As far as international organizations are concerned, the Danish Government decides in each case whether the membership of Denmark also covers the Faeroe Islands. Where an international organization has only States as its members, the Faeroe Islands have not been admitted. This was the case, for instance, when in 1976 the Faeroe Islands wanted to join the → Universal Postal Union.

An interesting feature of the treaty-making capacity of the Faeroe Islands is that the Government of Denmark follows a very flexible policy whenever the interests of the Faeroe Islands are especially at stake. Thus, Faeroese representatives are often included in the delegations negotiating such treaties and in some cases the Faeroe Islands have been authorized to negotiate directly with the State which is to be the other party. This was notably the case in 1977 when there were direct negotiations with Norway concerning the fishery legislation of the Faeroe Islands.

These examples show that the Faeroe Islands also enjoy important privileges in the conduct of international relations. The capacity of an autonomous territory to negotiate directly with foreign States naturally depends decisively on the willingness of the latter to treat an autonomous entity on an equal basis. The experience of the Faeroe Islands proves that an autonomous territory may be favourably dealt with in this respect by sovereign States.

By the Danish Constitution of 1953, Greenland became an integral part of the Kingdom of Denmark. In 1978 the Danish Parliament adopted a Home Rule Act on Greenland which was approved in 1979 by Greenland's population. As in the case of the Faeroe Islands, the home rule is based not on an international treaty but solely upon internal legislation. Some legislative powers have been granted to the Greenland authorities, which have to ensure that their internal legislation complies with the treaties concluded by the Danish Government. In practice, the Government of Denmark usually consults the Greenland authorities during the preparatory stages of negotiation.

It is likely that similar ways of safeguarding Greenland's interests in the conclusion of treaties will be adopted as in the case of the Faeroe Islands. A notable difference between the two autonomous territories has been that Danish membership in the → European Economic Community (EEC) has not covered the Faeroe Islands but has covered Greenland regardless of a negative vote by the population of Greenland. Dissatisfaction in Greenland was followed by a fresh vote forcing Denmark to comply with the territory's demand that its membership in the EEC be ended. The admission of Greenland to the Nordic Council is also likely to strengthen its autonomous status in future.

3. Special Situations

Puerto Rico is one of the few Latin American territories which have not as yet gained independence, but is an autonomous territory with important local self-government. It has its own legislative organs, and the population is not entitled to vote in the national elections of the United States. What is important from the international law point of view is that the United States conducts Puerto Rico's foreign affairs and military defence. In the light of the recent exchange of views on the future of Puerto Rico several new alternatives are available. At this stage one may, nevertheless, conclude that the autonomy of Puerto Rico is quite different from the autonomies of the Aaland Islands, the Faeroe Islands and Greenland (→ United States: Dependent Territories).

An area often referred to as autonomous is the → South Tyrol, a region of Italy bordering

Austria with a significant German-speaking minority. The First Autonomy Statute of February 26, 1948, following the De Gasperi-Gruber agreement between Austria and Italy of September 5, 1946 (UNTS, Vol. 49, p. 184), has been superseded by a New Autonomy Statute of August 31, 1972. While this Statute specifies the limits of local legislative powers, the autonomy of South Tyrol does not differ to any considerable extent from the autonomy of the 18 other provinces of Italy (see also → Trieste and cf. → Saar Territory).

As far as federal States are concerned, it is as a rule the federal government which represents the State in its international relations. There are, however, important exceptions to this rule. Some entities belonging to a federal State have entered into treaties with comparable foreign entities, for example the Cultural Cooperation Agreement between Louisiana and Quebec of September 1969 (AJIL, Vol. 64 (1970) p. 380). Byelorussia and the Ukraine belong to the original members of the → United Nations. The Soviet Constitution of 1977 is among the most recent constitutions of the federal States and it allows the autonomous Federal Republics to engage in international affairs to a great degree (→ Soviet Republics in International Law). According to Art. 80, a Federal Republic has the right to enter into relations with foreign States, to conclude treaties with them, to exchange diplomatic and consular representatives, and to participate in the work of international organizations. Thus, the legal status of the Soviet Republics appears to lie between that of a sovereign State and an autonomous territory.

4. Impact of the League of Nations and the United Nations

During the drafting of the → Versailles Peace Treaty (→ Peace Treaties after World War I) it was decided that the colonies should, in due course, become independent as a result of efforts directed to this goal. The mandate system was created by Art. 22 of the Covenant of the → League of Nations. The object was to put the mandated territories under the guidance of developed States which were called Mandatory States.

Art. 1 of the → United Nations Charter mentions as one of the purposes of the organization the development of friendly relations among nations based on respect for the principle of equal rights and → self-determination of peoples. Art. 75 provides that the United Nations shall establish under its authority a system for the administration and supervision of trust territories, which may be placed thereunder by individual agreements.

The trusteeship system has turned out to be effective, and by 1975 all trust territories had become independent States except for the strategic trust territory of the Pacific Ocean. It is important to notice that the principle of self-determination, continuously underlined in resolutions and declarations of the → United Nations General Assembly, aims at independence rather than autonomy. This has led to the creation of a multitude of sovereign States which have subsequently become members of the United Nations.

5. Concluding Remarks

As independence has in recent years become the goal of peoples striving for self-determination, one may conclude that the practical importance of autonomy has diminished. Existing autonomous territories are also as a rule interested in becoming independent, unless they find autonomy sufficient. This is the case if the population is small or if for any other reason the territory cannot conceivably fulfil the requirements of a sovereign State. Autonomy, however, continues to be suitable as a model for small entities and those where the main purpose of the autonomy is to guarantee various kinds of protection to the population. The present autonomous territories seem to be constantly striving to extend their particular form of local government and their right to participate in the decision-making concerning foreign policy, the power to conclude treaties and membership in international organizations.

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BENGT BROMS

BANCO DE BILBAO v. SANCHA AND REY

The Banco de Bilbao was a Spanish company with headquarters at Bilbao. It had a branch office in London under the management of Sancha and Rey. Until the beginning of 1937, the affairs of the bank were conducted by a board of directors elected by the shareholders according to the articles of association. In December 1936, the Basque State, which had been constituted as an autonomous entity within the Spanish State, issued a decree, under which, a few weeks later, a new board was composed by the Minister of the Treasury. The new board appointed a new manager of the London office and brought civil actions against Sancha and Rey to gain control of the branch. Lewis, J., held that, having regard to the Spanish Constitution, the decrees of the Basque State were ineffective and that the new board had no right to act for the bank.

While the appeal was pending, Bilbao was occupied by the Nationalist insurgents under General Francisco Franco (→ Spanish Civil War), the new board having withdrawn to Barcelona. The President of Republican Spain issued a decree that the registered offices of all Basque companies should be deemed transferred to either Valencia or Barcelona; another decree purported to validate all decrees of the Basque State. A meeting of the shareholders in Bilbao confirmed the authority of the defendants. Shortly afterwards, Nationalist legislation nullified the recent changes in the constitution of such companies as the Banco de Bilbao. A certificate of the British Foreign Office stated that the Nationalist régime was recognized as the → *de facto* government of the Basque country by the British Crown (→ Recognition of Insurgency); nevertheless, the Foreign Office confirmed the status of the Republican Government as the recognized *de jure* government of the whole of Spain.

By a judgment of March 17, 1938, the Court of Appeal held that the determination of the legal right to represent the bank depended on the construction of the articles under which the bank was constituted and therefore on the law in force at the place where the company had been set up ((1938) 2 K.B. 176). The Court held that the acts of the government recognized by the British Crown as the *de facto* government must prevail over the legislation of the rival *de jure* government and that the acts of the *de jure* government (i.e. the decrees of the Republican Government) must be treated as a "mere nullity" in the area controlled by the opponent *de facto* administration (→ Recognition of Foreign Legislative and Administrative Acts). The appeal was therefore dismissed.

The rule laid down in the Banco de Bilbao case, that in a conflict between the laws of territorially competing systems the acts of the recognized *de facto* government must prevail, does not extend to assets which are situated outside the territory in dispute (→ Haile Selassie v. Cable & Wireless Ltd.; → Civil Air Transport Inc. v. Central Air Transport Corp.).

The decision in the Banco de Bilbao case follows the traditional English doctrine that the executive certificate on recognition is conclusive as to the status of two rival systems and that recognition or non-recognition by the British Crown governs the choice of law and determines the validity of their acts before an English court. However, in the light of new developments the test of → effectiveness seems to be determinative. Thus in the recent case of Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd. ((1978) 1 Q.B. 205, Court of Appeal) Lord Denning, M.R., held the laws of the separatist Turkish State on → Cyprus to be applicable as the relevant *lex loci* with respect to the area under its effective control despite non-recognition by the British Government. On April 28, 1980 the Secretary of State for Foreign and Commonwealth Affairs declared in Parliament that the British Government would no longer express recognition of governments but only recognition of States. According to a further statement of the Foreign and Commonwealth Office, the status of a new régime as a → government is to be inferred from its dealings

with the British Government (see, BYIL, Vol. 51 (1980) pp. 367–368). Subject to these changes, the decision in the Banco de Bilbao case still seems to stand up to scrutiny.

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MATTHIAS HERDEGEN

BANTUSTAN POLICY *see* South African Bantustan Policy

BARCELONA CONFERENCE (1921)

1. Historical Background

The Barcelona Conference of 1921 dealt with navigation on international waterways and freedom of transit (→ Internal Waters; → Navigation, Freedom of; → Navigation on Rivers and Canals; → Transit over Foreign Territory).

The freedom of navigation on certain → international rivers goes back to the → Vienna Congress of 1815. The → Versailles Peace Treaty of 1919 provided for the further → internationalization of a number of European rivers and for a "General Convention" to be drawn up (Art. 338). It laid down principles concerning freedom of navigation on Germany's navigable rivers and equality of treatment. This agreement also dealt with → ports, railways and related matters of international transport (→ Railway Transport, International Regulation; → Traffic and Transport, International Regulation). The conclusion of several conventions was again foreseen (Art. 379).

Underlying these arrangements was the assumption that the causes of World War I could be traced back partly to economic and social conditions. The general welfare had to be improved, *inter alia*, through the liberalization of traffic and by securing and maintaining "freedom of communications and transit and equitable treatment for the commerce of all Members of the League" (Art. 23 (e), Covenant of the → League of Nations).

2. The Conference

The First General Conference on Communications and Transit was summoned under the auspices of the League of Nations and assembled at Barcelona on March 10, 1921. It lasted about six weeks and was attended by 44 countries, with Germany and Hungary represented in an advisory capacity only. Important countries like the United States did not attend.

The preparatory work was undertaken by a committee appointed several months before. The agenda consisted of the following: a permanent technical organization, a draft convention on freedom of transit, a draft convention on international waterways, a draft convention recognizing the right of land-locked States to their own maritime flag, a draft convention on international railway traffic and a draft recommendation embodying regulations for the commercial use of internationalized ports.

The Conference first adopted the Rules for the Organization of General Conferences on Communications and Transit and of the Advisory and Technical Committee, containing rules for organizing similar conferences in the future (M.O. Hudson, International Legislation, Vol. I, 1919–1921 (1931) p. 617). A second conference was held at Geneva in 1923 and, at the third which took place in Geneva in 1927, a Statute was adopted which superseded these rules.

The Advisory and Technical Committee became a permanent organ of the League of Nations, charged with preparing future conferences, reporting on their working and inquiring into matters in dispute between members of the League.

Only two conventions were adopted: the Convention and Statute on Freedom of Transit (April 20, 1921, LNTS, Vol. 7, p. 11) and the Convention and Statute on the Régime of Navigable Waterways of International Concern (April 20, 1921, LNTS, Vol. 7, p. 35). In each case the Convention and Statute are together referred to as the Convention. To the latter agreement an Additional Protocol was added. A Declaration Recognizing

the Right to a Flag of States having no Seacoast, a series of recommendations relating to ports placed under an international régime and a Final Act were also adopted.

The Convention on the Freedom of Transit applies to traffic in transit only. It deals with persons or goods transported across the territory of a State where the place of departure and destination lie outside that State. The agreement only governs traffic by rail or waterway and not traffic by air or road. The basic aim is to achieve equality of treatment and a general liberalization of this kind of traffic. No distinction based on nationality of the persons involved, the flag of the vessel, origin, the place of departure or destination is permitted. Tariffs must be reasonable and may only be levied for supervision and administration. Reasonable precautions may be taken with respect to safety of routes and communications and in order to ensure the actual completion of journeys. Transit of goods may be refused on any of the following grounds: danger to public health or security (→ Public Health, International Cooperation), danger of disease to animals or plants (→ Plant Protection, International), other international agreements concerning, for example, the trade in arms (→ Arms, Traffic in) or opium (→ Drug Control, International), and the protection of trademarks or copyright. Persons may be refused transit on any ground.

In cases of emergency affecting the safety or → vital interests of a State, departure from the provisions is permitted for as short a period as possible, provided that freedom of transit is observed "to the utmost possible extent" (Art. 7). In times of → war the agreement will remain in force as far as the rights and duties of belligerents and neutral parties permit. A party may be temporarily relieved of its obligations on the ground of grave economic conditions caused by war devastation.

Settlement of disputes is first to be sought through the Advisory and Technical Committee. Ultimately they are to be brought before the → International Court of Justice as successor to the → Permanent Court of International Justice.

The Convention on the Régime of Navigable Waterways of International Concern deals with navigation on international waterways. Art. 1 of the Statute declares the following to be "waterways of international concern": Firstly, "All parts which are naturally navigable to and from the sea of a waterway which in its course . . . separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States" (Art. 1(1)); secondly "waterways, or parts of waterways, whether natural or artificial, expressly declared to be placed under the régime of the General Convention regarding navigable waterways of international concern either in unilateral Acts of the States under whose sovereignty or authority these waterways or parts of waterways are situated, or in agreements made with the consent, in particular, of such States" (Art. 1(2)). After a lengthy discussion, a naturally navigable waterway was defined as such if "now used for ordinary commercial navigation, or capable by reason of its natural conditions of being so used" (Art. 1(1)(b)).

Freedom of navigation is to be accorded to vessels of other contracting parties on navigable waterways under the sovereignty or authority of a member State (Art. 3). Treatment is to be on "a footing of perfect equality" (Art. 4). No distinction is to be drawn between riparian and non-riparian States, except in the case of local transport (the so-called *petit cabotage*) which the riparian State may reserve for its own flag (→ Cabotage). In the case of waterways under the control of international commissions this reservation is limited to goods of national origin only.

Dues may only be levied for services rendered or as required for maintenance.

The contracting parties may exercise policing powers and enforce laws concerning customs, public health or immigration; they may withdraw water for irrigation and power stations and may control the movement of prohibited goods. These powers must be exercised reasonably and with due regard to the principles of equality and freedom of navigation. Emergency measures are permitted under the same circumstances as in the former Convention. The limited departure from strict application in times of war is repeated. Vessels of war or those used for police or administrative tasks fall outside the scope of this Convention (→ Warships).

3. Significance

Efforts at liberalizing international trade and traffic by imposing limits on the traditional scope of sovereignty regularly meet with resistance. This conference too has only achieved limited success. Diverging national interests have remained an obstacle and universal adherence proved impossible, largely because of different approaches adopted to the → internationalization of rivers. At Barcelona the chairman of the Sub-Committee on Navigable Waterways referred to the European approach of "almost absolute" freedom of navigation, which contrasted sharply with the approach followed in the American hemisphere.

Both these Conventions have been in force since October 31, 1922 but ratification has remained limited. In December 1984 the Convention on Freedom of Transit had 48 and the Convention on Navigable Waterways 32 ratifications and accessions. A relatively important contribution has nevertheless been made by the → codification of international law in the areas concerned and by improving the machinery for the settlement of disputes.

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GERHARD ERASMUS

BERNSTEIN v. VAN HEYGHEN FRÈRES

Arnold Bernstein had been the owner of all the shares of stock of two shipping lines in Germany which in turn had owned several ships. Because of his Jewish origin, he had been arrested in 1937 by the Gestapo, detained until 1939 and compelled by means of duress and threats to surrender his shares to a designee. The designee had sold the ship *Gandia* to Van Heyghen Frères S.A., a Belgian corporation, and the other vessels to the Holland-America Line, a Dutch corporation. During the war the *Gandia* and one other vessel were sunk, and another was sold by the Holland-America Line. In 1939 Bernstein emigrated to the United States. He brought suit against the designees to recover the proceeds of the insurance and the sale respectively, claiming conversion of the ships, damages for their detention, and profits from their operation. Bernstein argued that the coerced transfer to the designee, the circumstances of which had been or should have been known to the defendants, was void even under the German law then in force. In 1945 and 1946 a New York Court ordered attachment of the proceeds of the insurance and the sale.

In Bernstein v. Van Heyghen Frères S.A. the United States District Court quashed the State court writ of attachment; its decision was affirmed by the United States Circuit Court of Appeals (163 F.2d 246 (2nd Cir. 1947); *cert.* denied 332 U.S. 772) which declined to inquire into the validity under German municipal law of the alleged acts in question which it qualified as official acts of the German State. The court relied on the → act of State doctrine that "a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the act of officials of that state". Since the cessation of hostilities with Germany, the President of the United States, who had "the final word in such matters", had not declared that this doctrine did not apply to acts of German officials during the period in question. No grounds for an exception to the act of State doctrine could be deduced from the Four Power Declaration on Germany of June 5, 1945, the → Potsdam Agreements on Germany of August 2, 1945, the legislation of the Allied Control Council or of the United States → military government in its zone of occupation (→ Germany, Occupation after World War II), nor from the Charter or Judgment of the International Military Tribunal at Nuremberg (→ Nuremberg Trials). The plaintiff's claim had to be reserved for adjudication along with all other such claims as part of a final settlement with Germany.

In later litigation, Bernstein omitted his former allegations of duress by German officials and set forth duress in general terms and without revealing its source. The court however held that these allegations were insufficient, stating that the plaintiff had to allege that the duress was not caused by State officials and that he also had to specify with reasonable detail the persons who exercised the duress (Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij (173 F.2d 71 (2nd Cir. 1949); *cert.* denied 332 U.S. 771, 820)).

Bernstein's attorneys then sought and obtained a letter of April 13, 1949 from the Acting Legal Adviser of the United States State Department stating that it was the policy of the Executive "with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials" (DeptStateBull (1949) p. 592, at p. 593). Thereupon the Court of Appeals amended its order "by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question" (210 F.2d 375, 376 (2nd Cir. 1953); ILR, Vol. 20, p. 24).

The decision in the Van Heyghen Frères case has been criticized as an overextension of the act of State doctrine. From the letter of the State Department in the Nederlandsche-Amerikaansche case has been developed the "Bernstein exception" to the act of State doctrine. In First National City Bank v. Banco Nacional de Cuba (406 U.S. 759 (1972)) the Department of State advised the Supreme Court that the "Bernstein exception" was a principle not limited to the Bernstein case; this was agreed to by a slim majority of the Supreme Court (→ Sabbatino Case). The American version of the act of State doctrine (Underhill v. Hernandez 168 U.S. 250, 252 (1897)), to which this exception is related, is neither prescribed nor forbidden by public international law; it rather reflects a certain distribution of functions between the political and the judicial branches of government on matters bearing upon foreign affairs.

Bernstein v. Van Heyghen Frères S.A., 163 F.2d 246 (2d Cir. 1947); *cert.* denied 332 U.S. 772.

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HELMUT STEINBERGER

BORDER CONTROLS

1. Notion

Border controls are a physical manifestation of the principle of → territorial sovereignty. Sovereignty includes the power to legislate and regulate the conditions under which persons, goods and even ideas may enter and leave a State. Any limitation on the authority to control borders is a matter of consent by the State concerned. Besides reflecting the exercise of sovereignty, however, border controls may function as instruments of international cooperation, for example where they serve to regulate plant and animal diseases, fight → terrorism or detect the move-

ment of criminals (→ Criminal Law, International).

With the end of military rivalry between many nations, particularly in Western Europe, and with increased mobility of whole populations, both for work and leisure, the significance of border controls as a method of maintaining the integrity of national territory has diminished. Regional agreements between several Western European nations and between the Nordic States have, for example, largely eliminated the control functions of the borders between those States (→ Nordic Cooperation). However, despite increasing contacts between nations, a State may, by reason of its territorial sovereignty, seal its borders to the world and prohibit international traffic in goods and persons (→ Traffic and Transport, International Regulation). There is no customary right of international law to travel to or trade with foreign nations. Thus, a nation may use border controls to effect a policy of national isolation or protectionism.

On the other hand, multilateral treaties and political agreements such as the 1975 → Helsinki Conference and Final Act on Security and Cooperation in Europe and the 1966 Covenant on Civil and Political Rights (→ Human Rights Covenants) represent the position that States do not have an absolute right to seal their borders, particularly in the free movement of persons wishing to leave a State. Border controls which arbitrarily deny exit to an individual conflict with the above documents.

2. *Current Legal Situation*

(a) Control of goods

Goods moving in international commerce are subject to numerous controls, often involving bilateral and multilateral treaties (→ Customs Law, International). Inspection of goods and accompanying documents may occur at borders wherever goods are transported by automobile, lorry, rail or ship. Goods and documents may also be inspected at inland points, such as → airports, inland harbours, or even at their point of origin, if customs officials of one country are permitted to act in another country (→ Administrative, Judicial and Legislative Activities on Foreign Territory). Inspections typically look to see whether duties, import taxes, and other fees have been paid or are to be paid; whether products meet national health, safety, and pollution standards; and, where quotas have been established, whether those quotas are being exceeded. In recent times, controls have served the practical purpose of making trade more difficult for the exporting country, for example, where complicated import forms must be filled out at the border or where goods are required to enter a country at particular points. Where → embargoes or trade → sanctions have been imposed, border controls are one aspect of the effort to assure compliance.

(b) Control of private persons

Current border control procedures for individuals involve → passport control, including a visa control where necessary. This is to distinguish between the tourist, who stays for only a short time and who brings in welcome foreign currency (→ Tourism), and the migrant, who seeks permanent residence and employment (→ Migrant Workers). Passport and visa controls also serve to keep out unwanted individuals such as criminals and political undesirables. Moreover, these controls can also be used to regulate the exit of citizens and foreigners. On the other hand, cooperating nations have sometimes eliminated control of passports altogether, as, for example, for Canadian and American citizens crossing their common border.

In addition to passport and visa requirements, individuals may be required to present border officials with any of the following: proof of vaccinations against certain diseases or health certificates attesting to the absence of contagious diseases, affirmations from public officials that the individual has not been convicted of a crime involving moral turpitude, and proof of adequate funds for the journey to another country. Currency laws dealing with the import and export of money are also typically enforced at the border.

(c) Control of diplomats

Diplomatic agents and mission property are generally permitted to cross borders free of control (→ Diplomatic Agents and Missions, Privileges and Immunities). According to Art. 36

of the → Vienna Convention on Diplomatic Relations, the receiving State is obliged to exempt from inspection the personal baggage of the diplomatic agent unless there are serious grounds for presuming that the diplomat is in possession of articles whose import or export is prohibited by the receiving State. Employees of international agencies enjoy many of the same privileges and immunities as diplomats on the condition that they can demonstrate the functional necessity of such privileges (→ International Organizations, Privileges and Immunities).

(d) Waterways

Rivers that flow through several nations and open out into a sea or form the border between two States (→ International Rivers), are often the subject of international treaties guaranteeing free passage for ships (→ Internal Waters, Seagoing Vessels in). For example, all nations through which the → Danube River flows, except for the Federal Republic of Germany, are members of the Belgrade Convention of 1948 (UNTS, Vol. 33, p. 181), and traffic on the river is largely controlled by the Danube Commission, not by the individual nations. Some degree of control is given up by the riparian States in order to facilitate traffic on the Danube. In addition, → canals may be the subject of treaties making them international waterways. By treaty, the → Suez Canal and the → Panama Canal are open to all ships of all nations, although each canal is completely within the territory of a single nation, Egypt and Panama respectively. Because there is no → customary international law granting access to inland waterways, any limits on the authority of a nation to control water traffic passing through its borders is always a question of treaty or consent.

(e) Land-locked States

Customary international law recognizes the obligation of littoral States to negotiate with land-locked States over access to the sea (→ Land-Locked and Geographically Disadvantaged States). The question arises as to what extent a littoral State may control the movement of persons and goods to and from the land-locked State once a right of passage has been granted (→ Right of Passage over Indian Territory Case). If this question is not elaborated in a treaty, the transit State may exercise such controls which can be justified by legitimate consideration of its own interests, as outlined in the 1965 United Nations Convention on Transit Trade of Land-Locked States (UNTS, Vol. 597, p. 3). Thus, littoral States need not permit transit of → contraband or diseased plants and animals nor allow transit to persons whose admission into its territory is forbidden. Border controls that merely impede traffic to the land-locked State, without having such justification, are a misuse of territorial sovereignty.

3. Special Legal Problems

Border controls are also exercised within the territorial waters of a nation (→ Territorial Sea). Because of the varying extent of the claims regarding territorial waters, there is no consensus on how far out to sea a State may implement control procedures. For example, although ships have the right of free passage through coastal waters, they generally may not fish in those waters in the absence of agreement (→ Fishery Zones and Limits; → Coastal Fisheries). The exercise of border controls up to two hundred miles from the coast, as is the practice of some States, is a point of contention in international law.

The → use of force in controlling borders has been and continues to be a controversial issue. Nations have the right to protect borders when those borders are violated by force. Difficulties arise, however, in cases of non-violent intrusions.

Between 1952 and 1986, six airliners on regularly scheduled flights were fired upon after having made unauthorized intrusions into national airspace, the most recent involving the Soviet downing of Korean Airlines Flight 007 (→ Korean Air Lines Incident (1983)). All six incidents have resulted in death to some or all passengers and crew members. Every State has sovereignty over the airspace above its territory (→ Air, Sovereignty over the), but international law has established different rules for violations of airspace by civil → aircraft and for violations by military aircraft. Governments have for the most part condemned the use of force to protect airspace from intrusions by civil aircraft (→ Aerial Incident Cases (U.S. v. Hungary; U.S. v. U.S.S.R.; U.S v. Czechoslovakia)), while there

seems to be little consensus regarding intrusions by → State aircraft.

A third contemporary problem in border controls is whether a State is obliged to open its borders to individuals and groups seeking asylum (→ Asylum, Territorial). This issue has come into sharp focus since the Chinese, Cuban, and Haitian "boat people" problems of the past few years (→ Aliens, Admission and Expulsion). The argument that a State is required to accept → refugees conflicts with the fundamental principle of territorial sovereignty over → immigration and, therefore, with the right of a State to control its borders.

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BOUNDARIES

1. General. – 2. Boundaries as Limits of State Jurisdiction: (a) Categories. (b) Determination: (i) Substantive rules. (ii) Procedures. (c) Functions: (i) The boundary as a limit of State jurisdiction. (ii) The boundary as a line of protection. (d) The boundary and third States. 3. The Permeability of Boundaries and Transboundary Cooperation: (a) General. (b) Transboundary cooperation as a substitute for boundary delimitation.

1. General

In international law, the term "boundary" means a line which determines the limit of the territorial sphere of → jurisdiction of States or other entities having an international status. The development of boundaries in this sense presupposes the modern territorial → State. In the Middle Ages, when governmental powers were more diluted, the notion of exclusive and comprehensive jurisdiction over a given territory was absent. A boundary to define the outer limits of such jurisdiction was not necessary or meaningful, or was even contrary to the system of mutual personal obligations which characterized European feudalism (→ History of the Law of Nations: Ancient Times to 1648). The concentration of all governmental powers in one sovereign, mostly in the person of one sovereign ruler, rendered the territorial delimitation of these powers decisive. Thus, the use of notions like "boundary", *frontière* and *Grenze* can be traced back to the late Middle Ages, the time of origin of the modern State. In the parts of the world where the concept of exclusive territorial jurisdiction was unknown until the age of colonization, a determination of modern boundaries based on precolonial domination patterns thus is impossible or fictitious (→ Western Sahara (Advisory Opinion)).

The land areas of the world today nearly all belong to the territory of States. These areas have thus been completely divided among States by the drawing of boundaries. As a rule, any given territory belongs to only one State. Cases of territory belonging to two ore more States are rare (→ Condominium). The process of distribution and redistribution of land areas among States, however, has a different history in different parts of the world. In Europe, the current distribution is the result of a long process of changing territorial allocations resulting from → war, inheritance or consensual arrangements. Important points in this process were multilateral peace arrangements, in particular the treaties of Munster and Osnabruck (→ Westphalia, Peace of 1648), the treaty of Utrecht (1713), the → Vienna Congress (1815), the → Paris Peace Treaty (1856), the Treaty of Berlin (→ Berlin Congress (1878)), the → Peace Treaties after World War I and the → peace settlements after World War II.

In America and Africa, the current boundaries have been largely determined by divisions created in the age of European colonial expansion (→ Boundaries in Latin America: uti possidetis Doctrine; → Boundary Disputes in Latin America; → Boundary Disputes in Africa; → Frontier Dispute Case (Burkina Faso/Mali). In Asia, the current territorial situation is also a

result of the colonial expansion; it also stems from historic roots in ancient Asian political organization and religious or ethnic divisions.

Boundaries are lines artificially drawn by man. Physical phenomena and social interactions cut across these lines. The regulatory problem thereby created is complicated by the fact that the relevant jurisdiction is divided by the boundary. Thus, the solution of these problems calls for international cooperation. Boundaries are not only dividing lines but also, depending on the political circumstances, the reason for the need for international cooperation.

2. *Boundaries as Limits of State Jurisdiction*

(a) Categories

International boundaries are mainly boundaries of States. However, other entities possessing territorial jurisdiction of some kind may also have boundaries, for example international administrations for territories with a special status, or international organizations which exercise territorially defined jurisdiction as do the → European Communities.

Boundaries are permanent lines dividing spheres of *de jure* jurisdiction. Provisional dividing lines delimiting → spheres of influence or areas of *de facto* authority, such as zones of belligerent occupation, are called → demarcation lines.

Boundaries can be categorized according to the kind of areas they separate. There are boundaries between different spheres of national jurisdiction, i.e. between land areas, between areas of internal waters, between sea areas subject to different kinds of national jurisdiction (→ Territorial Sea; → Continental Shelf, Outer Limits; → Exclusive Economic Zone; → Maritime Boundaries, Delimitation). There are also boundaries between the spheres of national jurisdiction and areas not subject to national jurisdiction, i.e. the → high seas and outer space. While the former boundaries have become certain with the recent development of the → law of the sea, the latter still remain controversial.

A boundary, except in the last-mentioned case, is a (fictitious) line on the surface of the earth. It extends, however, below and above the surface, down to the centre of the earth and up to the other limit of national jurisdiction or the beginning of outer space, respectively. Thus, the underground area of a State's territory is also subject to the exclusive jurisdiction of that State, the combined surface and sub-surface area of State jurisdiction thus forming an inverted irregular cone whose tip is the centre of the earth.

(b) Determination

(i) Substantive rules

The essential international legal question relating to boundaries is which rules determine the drawing of boundaries and thus the delimitation of the territorial scope of State jurisdiction.

As to the legal basis of boundaries, two issues must be distinguished: first, general rules relating to the drawing of boundaries, and second, the legal basis of specific boundaries.

There are few general rules on the drawing of boundaries. The first principle is that the determination of a boundary falls within the exclusive sphere of jurisdiction of the bordering States (see *infra* section B.4). The second principle is that boundaries are drawn by agreement between the bordering States, usually in the form of an international treaty. As a boundary treaty aims to achieve a stable régime for a boundary, the → *clausula rebus sic stantibus* may not be invoked as a ground for suspension or termination of the treaty (→ Vienna Convention on the Law of Treaties, Art. 62(2)(a)).

A variant of consensual boundary determination is the possibility of a unilateral claim expressly recognized, or acquiesced to, by the other State concerned. Only in the absence of such a consensual determination may recourse be had to other principles. However, where a treaty or other documents forming the basis of a consensus are not clear, other rules may serve as a means of interpretation. In particular, a treaty has to be interpreted in the light of applicable rules of → customary international law (cf. Vienna Convention on the Law of Treaties, Art. 31(c)). Thus, the few pertinent rules of customary law are to a certain extent also relevant where a boundary treaty exists.

In the absence of a treaty or other consensual arrangement, recourse must also be had to customary international law. On the basis of the first principle just mentioned, this means primarily a

specific custom established between the two States concerned, or between relevant predecessor States, in relation to the territory in question. The → International Court of Justice (ICJ) has expressly recognized this possibility of bilateral custom (→ Right of Passage over Indian Territory Case). In other words, this approach amounts to the recognition of → historic rights in relation to territorial jurisdiction. The question arises in this regard how such a bilateral custom or historic rights can be proven. Here, the undisturbed exercise of effective domination, the performance of acts of sovereignty not challenged by other parties concerned, is decisive (→ Palmas Island Arbitration; → Minquiers and Ecrehos Case; → Territory, Acquisition).

It may be asked whether principles of private law relating to the acquisition and delimitation of private property, being general principles of law within the meaning of Art. 38(c) of the ICJ Statute, can be relied upon for the determination of inter-State boundaries. Such principles governing the scope of private real property are, however, hardly adequate to determine the question of the territorial scope of States' jurisdiction.

In addition, some general principles are often discussed as elements governing the determination of State boundaries. For each of these principles, it should be asked whether they constitute a rule of customary law, applicable in the absence of treaty rules, or whether they constitute considerations of political expediency underlying a consensual boundary determination. The first of these principles is the notion of "natural" boundaries. There is, in fact, no rule of general international law that States are entitled to natural boundaries, whatever that could mean. Natural phenomena may, however, in certain cases determine the possibility of acts of effective domination and thus constitute an element in the determination of a relevant custom. Such phenomena, in particular a watershed, a mountain range, or a watercourse may be referred to in a treaty in order to describe a boundary. This natural phenomenon then becomes relevant by virtue of the treaty provision which refers to it.

The same considerations apply to the notion of "secure boundaries". There is no general right to secure boundaries, whatever is understood by that term. However, such a right could exist by virtue of specific rules applicable to a concrete case. It is thus possible that a binding decision of the → United Nations Security Council, adopted under Chapter VII of the → United Nations Charter, makes the principle of secure boundaries a legal requirement of territorial settlement.

As to the role of equity, there is no rule providing for "equitable" boundaries. But equitable principles may be used for the interpretation of instruments which are relevant for the drawing of a boundary (→ Equity in International Law; Frontier Dispute Case (Burkina Faso/Mali)).

Finally, it may be asked whether and to what extent there is a nexus between common traits of the population of a given area and the course of boundaries. The development of the national State in the last century has led to political pressure towards the establishment of boundaries coterminous to the settlement area of a nation. In legal terms, it could be argued that the right of peoples to → self-determination also grants a right to specific boundaries. There is, however, no sufficient evidence for a right of this kind in international practice. There are cases where boundaries were drawn according to the ethnographic situation or even in conformity with the wish of the population concerned as expressed by → plebiscites. These cases are not sufficiently general to prove a universal acceptance of the principle. Other cases point in quite a different direction. In some cases, the popular will has been discarded.

A fundamental and wide-spread problem of actual boundary determination is the reference to pre-existing territorial divisions. Such pre-existing divisions may become relevant in different ways. For certain regions, they constitute a political principle of territorial delimitations in a given area. Both in Latin America and in Africa, the principle of the maintenance of colonial boundaries, or colonial administrative divisions, is at least a political principle. However, as boundary dispute settlements are generally based on the application of this principle, it can also be considered as a legal principle (→ Uti possidetis Doctrine; Frontier Dispute Case (Burkina Faso/Mali)).

Previous delimitations may also become relevant where they are referred to in legal acts relating to the drawing of boundaries, such acts may be bilateral or multilateral, for example boundary

treaties or agreements relating to the cession of territory, or they may be unilateral, for example acts relating to the creation of new States, such as a declaration of independence or the granting of independence by a former colonial power (→ Unilateral Acts in International Law). Such unilateral acts may then form the basis for → recognition or → acquiescence by other States concerned. A special case of this kind is the border between the Federal Republic of Germany and the German Democratic Republic, which derives from the delimitation of occupation zones created by the Allied Powers through the London Protocol of Sept. 12, Nov. 14, 1944, July 26, 1945 (UNTS, Vol. 227, p. 279; amendments at p. 286, p. 297), which in turn is largely based on previous intra-German boundaries (→ Germany, Occupation after World War II).

In all these cases of reference to previous geographic divisions, problems and disputes arise from the fact that the lines referred to are far from uncontroversial, whether for lack of knowledge of the relevant geographical features, because of the imprecision of → maps and charts, or owing to ambiguities of earlier government documents, etc.

Another consideration relevant to the determination of boundaries is practical expediency. This consideration has several aspects. As a rule, consensual border determinations are made where there is a dispute or some kind of change. Expediency will then require that the determination reflects the actual position in military, political and economic terms of the parties concerned. It is only in situations where such positions are not concrete enough, for example in unpopulated areas, that recourse is made to simple devices such as straight boundary lines along certain degrees of longitude or latitude, or straight connections between certain geographical features or known points. The great disadvantage of such lines is that they are sometimes difficult to implement in physical reality.

(ii) Procedures

The process of actually determining the course of a given boundary in theory and quite often in practice includes three steps: allocation, delimitation and demarcation. Allocation means a decision to assign a particular piece of territory to a State. Delimitation means the actual description of a border in a written document. Demarcation means the actual marking on the ground. This process being completed, the fourth step is implementation, that is behaviour by the States concerned to limit the exercise of their sovereign rights as required by the course of the boundary.

Delimitation may be effected in steps. A description in a document may not be precise or the exact content of a document may only be determined after further clarification, for example through surveying on the surface. When surveying, delimitation and demarcation may be effected simultaneously.

Many border disputes have their origin in the relationship between these steps. In the process of demarcation or implementation it may become clear, or may simply be alleged, that the allocation or delimitation decision was ambiguous. Reference is thus made back to the prior stages of the process.

The procedural question raised in particular by the first problem is that of settlement procedures for boundary disputes. The fundamental principle is that of → peaceful settlement of disputes. Disputed boundaries may be determined by any peaceful means.

Bilateral → negotiation leading to the conclusion of a treaty determining the boundary is still the most common procedure. Third party settlement, however, is also a very common means of border dispute settlement, be it by arbitration (→ Argentina-Chile Frontier Case; → Beagle Channel Arbitration; → Buraimi Oasis Dispute; → Palmas Island Arbitration; → Rann of Kutch Arbitration (Indo-Pakistan Western Boundary); → Timor Island Arbitration), or by a decision of the PCIJ or ICJ (→ Arbitral Award of 1906 Case (Honduras v. Nicaragua); → Eastern Greenland Case; → Honduras-Nicaragua Boundary Dispute; → Minquiers and Ecrehos Case; → Monastery of Saint-Naoum (Advisory Opinion); → Sovereignty over Certain Frontier Land Case (Belgium/Netherlands); → Temple of Preah Vihear Case; → Frontier Dispute Case (Burkina Faso/Mali)).

The tasks of actual delimitation or demarcation are often given to → mixed commissions.

In procedures for the determination and delimitation of borders, the question of evidence is often crucial. Maps play an important role. The proba-

tive value of maps depends on a number of circumstances: geographic exactness, precision in relation to controversial points, scale, author and kind of information used by the author, publicity, and the attitude of relevant governments towards a particular map. If a map is attached to a treaty or international decision, it shares the binding force of that document, any contradictions then being a matter of interpretation of the documents as a whole (→ Palmas Island Arbitration, → Jaworzina (Advisory Opinion), → Eastern Greenland Case; → Minquiers and Ecrehos Case; → Sovereignty over Certain Frontier Land Case (Belgium/Netherlands); → Temple of Preah Vihear Case; Frontier Dispute Case (Burkina Faso/Mali)).

(c) Functions

The function of boundaries is twofold. They limit the sphere of jurisdiction of a State; and they constitute lines of protection.

(i) The boundary as a limit of State jurisdiction

The boundary circumscribes the outer limit of → territorial sovereignty. Beyond that limit, a State has no comprehensive claim of jurisdiction. It would, however, be an oversimplification to say that the boundary defines the outer limit of the territorial scope of validity of the legal order of a State. A State may not perform acts of public authority on the territory of another State without the latter State's consent. Whether, and if so under which conditions, there exists a right of → hot pursuit of criminals across the boundary is controversial. A State may, under certain conditions, perform acts of public authority in areas not subject to States' jurisdiction. It may be entitled or even required to apply its law to situations occurring outside its boundaries (→ Lotus, The; → War Crimes; → International Crimes). It may in particular be required to protect, by its law, interests situated outside its boundaries (→ Lac Lanoux Arbitration; → Transfrontier Pollution). The rule that a State may not perform acts of public authority on other States' territory also does not exclude certain → extraterritorial effects of administrative, judicial and legislative acts.

On the other hand, the fact that State sovereignty ends only at the boundary means that a State is free to extend all its activities, subject to its international obligations, up to the boundary. There is, under general international law, no such concept as frontier zone where a State is subject to specific limitations. If a State has to protect or take into account interests situated on the territory of other States, the decisive criterion is the effect on the interest in question, not the fact that the activity as such takes place close to the border. As a matter of fact, not of law, the duty to take into account effects on interests situated beyond the border may be felt more intensely in areas close to that border. This is quite often reflected in international treaties providing for special duties, for example duties of information, for activities taking place in the vicinity of the border. International treaties may also provide that a State must abstain from certain activities, in particular military ones, in the vicinity of the border (→ Demilitarization).

In cases where a boundary cuts across the settlement areas of one or more ethnic, linguistic, religious or similar groups, minority rights on either side of the border may also be subject to special arrangements (→ Minorities).

(ii) The boundary as a line of protection

On the other hand, the boundary defines the sphere of territorial integrity (→ Territorial Integrity and Political Independence). Military invasion across a State's boundary constitutes an act of → aggression. The performance of acts of public authority by the agents of another State without the consent of the State on whose territory they take place, or similar violations of the boundary, constitute an illegal act giving rise to the responsibility of the former State (→ Responsibility of States: General Principles). At some borders, the prevention or investigation of border violations, or even the settlement of disputes arising therefrom, has been entrusted to permanent institutions such as mixed frontier commissions.

In principle, a State is entitled to stop and control the movement of goods and persons at its boundaries (→ Boundary Traffic; → Overflight). In particular, a State may subject persons and goods entering its territory to controls in order to assure compliance with immigration requirements as well as health and fiscal regulations. The → customs frontier may, however, not

always coincide with the boundary (→ Free Zones of Upper Savoy and Gex Case).

The rules just described apply to the normal situation of a single whole territory, that is to say where the territory of one State constitutes one single area. These rules should be modified to a certain extent where parts of the territory of one State are completely surrounded by the territory of another State and have no connection with the rest of the former State's territory (→ Enclaves). In such cases, the State in whose territory the enclave is situated must not cut off the lines of communication between the enclave and the other State. There should be rights of access and transit (→ Transit over Foreign Territory). These questions may be regulated by treaty or local custom.

(d) The boundary and third States

The actual course of a boundary is a matter to be determined by the two adjacent States, a question subject to the exclusive competence of the two States. Other States cannot but accept what these two States decide. If there are special rules concerning activities in the vicinity of the border, it is also up to the two adjacent States to decide upon such rules. In this sense, the two adjacent States create an objective situation which is valid *erga omnes*. If other States expressly recognize such a situation, the function of such recognition is political rather than legal.

The situation is somewhat different in relation to control measures at the border. Here, third States are involved to the extent that these measures are applied to their nationals. Thus, the two bordering States may agree on border control facilities. The actual measures of control which are permissible, however, are not a matter of their exclusive sphere of competence.

Nevertheless, there are some exceptions to the rules just stated. Where the boundary is the result of a multilateral agreement, other States parties to the agreement also have a legally protected interest in respect of the boundary. Thus, the two bordering States may not be free to alter the boundary at their will. There may even be some kind of international → guarantee for boundaries thus defined or an internationally agreed demilitarization of border areas. For similar reasons, third States or international organizations may be involved in the actual delimitation process, for example through the control of a plebiscite, or through the supervision of a boundary or, more frequently, demarcation lines (→ Observers; → Versailles Peace Treaty (1919); → Rhineland Occupation after World War I).

A different ground on which a boundary may be treated as illegal and void arises in the case where the determination violates a norm of → *jus cogens*. A primary example of this are boundaries which result from an illegal → use of force, even where the victim has consented to the territorial change (→ Stimson Doctrine).

3. The Permeability of Boundaries and Transboundary Cooperation

(a) General

International boundaries are never entirely closed. To a differing extent, there is always interaction across borders. Natural phenomena, in addition, do not respect borders. Thus, problems have a transboundary character in the sense that they constitute a single problem, parts of which are subject to different jurisdictions. In these cases, the problems can only be solved by transboundary cooperation. The requirement for transboundary cooperation varies according to political circumstances. The more intercourse there is across boundaries, the more the boundary loses its function of dividing spheres of State activity. It would, however, be wrong to speak in this context of a defunctionalization of boundaries. Transboundary intercourse, the tendency that exists, at least in certain parts of the world, towards the permeability of boundaries, together with the recognition of transboundary problems cannot just make the boundary disappear as a legal and political phenomenon. But these facts change the significance of boundaries. They call for common action by States. They change the function of the boundary from one of separation into a reason for cooperation.

Major areas of such transboundary cooperation are the movement of persons or goods in border areas, especially in the interest of local matters, transboundary provision of services such as health services and sanitation, concerted planning in border areas, protection and management of shared natural resources (→ International Watercourses, Pollution), the fight against transfrontier

pollution, and mutual aid in emergency situations (→ Relief Actions). In some cases, permanent institutions have been created for the purposes of such transboundary cooperation, for example the International Joint Commission between the United States and Canada (→ American-Canadian Boundary Disputes and Cooperation). Transboundary cooperation takes place not only between central governments, but also between lower levels of government (→ Transfrontier Cooperation between Local or Regional Authorities).

(b) Transboundary cooperation as a substitute for boundary delimitation

In a political climate of transboundary cooperation, border disputes or the uncertainty of the actual situation of the boundary become less important because it is possible to solve particular issues of State jurisdiction which otherwise would depend on a solution of the boundary problem. This is the basis of that State practice which leaves the general question of a disputed boundary line open and regulates practical and concrete transboundary problems instead. Thus, in the Ems estuary (→ Ems-Dollart; → Boundary Settlements between Germany and Her Western Neighbour States after World War II) and on → Lake Constance, the boundary line is controversial up to the present day, but such questions as exercise of police powers, customs control and exploitation of certain resources are regulated without reference to the boundary line.

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BOUNDARY TRAFFIC

1. Definition

Boundary traffic generally means movement in a tangible sense of persons or goods across international → boundaries. In a larger sense, the term can also be used for the transboundary movement of invisibles (e.g. services). The general rule is that a State has the right to refuse admission of any goods or person to its territory (→ Territorial Sovereignty). However, this rule has numerous exceptions based on treaty or customary law as regards persons or goods in general, particular kind of persons or goods, or particular means of transport. These exceptions supply the legal basis for boundary traffic.

2. Movement of Persons

States do not completely close their borders to the movement of persons except in extraordinary circumstances. There are cases, however, where

States completely close their borders, or purport to do so, in order to express displeasure with certain developments in → neighbour States or to exert pressure on such States. Subject to the following qualifications, such a closure may be considered as an → unfriendly act, but not as an illegal act. As a matter of principle, States have a right to prohibit persons from leaving or entering their territory. Nevertheless, this right is not unlimited. Art. 12 (2) of the International Covenant on Civil and Political Rights stipulates a freedom to leave any country (→ Human Rights Covenants; → Emigration). In accordance with the principle of *non-refoulement* → refugees may not be turned back. A State is also obliged to admit its own nationals.

Although a general duty of States to allow the entry of foreigners does not exist as a matter of general customary law (→ Aliens, Admission), it frequently does so as a matter of local custom or of treaty law. In particular, such a duty arises out of treaties providing for freedom of movement within the framework of regional integration schemes (e.g. → European Communities) or → treaties of friendship, commerce and navigation.

In order to regulate the transboundary traffic of persons, States have established certain control procedures and formalities (→ Border Controls). As a rule, persons crossing a border must at least be in possession of a → passport and must show it if so required by authorized personnel. In relations between some countries, the passport must carry the visa of the diplomatic or consular representation of the State where entry is sought. In relations between other countries a simple identity document is sufficient.

Special facilities may exist in relation to → enclaves, and for the inhabitants of certain border areas under local frontier traffic rules (see → General Agreement on Tariffs and Trade (1947), Art. XXIV 2(a)).

3. *Transboundary Movement of Goods*

Although there is no general customary right to bring goods across a border, numerous bilateral and multilateral treaties relating to international intercourse limit the right of States not to admit goods to their territory (→ Traffic and Transport, International Regulation) and establish a régime of freedom of international commerce instead (→ World Trade, Principles). In principle, however, a State remains free to impose conditions on the entry of goods. This is a natural corollary of the State's right to regulate commerce and marketing of goods within its territory. Therefore, goods may be subject to inspection at the border and to the imposition of customs or taxes. In some border areas, special facilities exist for the local inhabitants. In particular, the boundary line of a State drawn for customs purposes may not necessarily coincide with the State boundary. So-called free zones have been created where goods may be imported or exported without being subject to any customs requirement (→ Customs Frontier; → Free Zones of Upper Savoy and Gex Case).

Special rules apply to the transboundary movement of particular goods, for example, hazardous wastes (→ Waste Disposal), in the sense of subjecting them to tighter controls and restrictions, or in the sense of facilitating safe and speedy traffic, for example of mail (→ Postal Communications, International Regulation).

4. *Rules for Specific Means of Transport*

(a) Road traffic

Each State being free to regulate the conditions on which it admits vehicles to its roads, a certain harmonization of rules relating to construction of automobiles, insurance, working conditions of professional drivers and the like are essential to enable free transboundary road traffic. In Europe, this is largely achieved by regulations adopted in the framework of the United Nations Economic Commission for Europe (→ Regional Commissions of the United Nations). There are also rules concerning the documentation which commercial vehicles must possess. Bilateral agreements between neighbour States often regulate road border control facilities. Special agreements also exist on the construction and maintenance of transboundary traffic lanes, in particular tunnels and bridges.

(b) Railways

A number of bilateral and multilateral conventions as well as agreements concluded between railway enterprises concern such questions as construction and junction of railway lines across boundaries, → railway stations on foreign terri-

tory, customs control on border stations or in trains, the situation of railway employees operating in foreign territory, and conditions for the international transport of goods and passengers (→ Railway Transport, International Regulation). These rules developed partly in the framework of the UN Economic Commission for Europe.

(c) Navigation

Rules concerning boundary traffic by boat vary according to the status of the waters in question (see also → Cabotage).

At sea, there is a right of innocent passage through the territorial waters of a State (→ Innocent Passage, Transit Passage). Furthermore, there is a general right of access to harbours subject to reciprocity. This right is also granted by a number of international treaties of friendship, commerce and navigation (→ Ports). It may be limited on the basis of State security, health, customs control or similar reasons.

A number of → international rivers are subject to special régimes providing for freedom of navigation (→ Navigation on Rivers and Canals). This is in particular the case for the → Rhine River, the → Moselle River, the → St. Lawrence Seaway, and the → Niger River Régime. Bilateral treaties may also provide for freedom of navigation on → boundary waters (e.g. the United States – Canadian Boundary Waters Treaty of 1909, Martens NRG 3, Vol. 4, p. 208). For certain lakes situated between two or more countries there are also rules providing for navigation between the countries and for border formalities, for instance in the case of → Lake Constance and → Lake Geneva.

Special rules apply to transit between land-locked States and the sea (→ Land-Locked and Geographically Disadvantaged States).

(d) Aviation

There is no general right of → overflight either under general international law or under the → Chicago Convention. Under that Convention, a limited right of overflight and non-commercial landing exists for private aircraft carrying out non-scheduled flights. In all other cases, the rights to overfly State territory and to land at an → airport are dependent on specific authorization or on bilateral → air transport agreements. Boundary traffic by air is still regulated by a network of bilateral inter-State agreements.

5. Rules Related to Special Activities

There are certain traditional local rules relating to specifical activities in border areas, such as cattle driving. More modern regulations, developed in an age of intensified transboundary intercourse, relate to persons acting in official duties, such as customs officials, policemen and railway employees.

A further category of norms concerns emergency assistance in border areas. A number of States have concluded bilateral agreements in order to facilitate transboundary communications in emergency situations as well as the transboundary movement of emergency assistance services (→ Relief Actions).

6. Transboundary Transactions concerning Invisibles

Different kinds of invisibles, in particular capital transactions and the rendering of services (→ Capital Movements, International Regulation), are subject to different legal régimes. Transboundary services have only recently evolved as a specific subject of international legal regulations (see → European Economic Community). Traditionally, they were regulated by implication under rules on transboundary movement of persons and on the activities of → aliens. However, due to modern means of communication (→ Telecommunications, International Regulation), the physical transboundary movement of persons or goods is no longer necessary for many kinds of economically important services. Thus a new issue has arisen in respect of the freedom or limitation of → transborder data flows.

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BOUNDARY WATERS

A. Notion

The terms "boundary waters" or "frontier waters" do not have a single generally accepted meaning and are often given specific meanings for the purposes of a particular → treaty (e.g. the 1949 Treaty between the Soviet Union and Norway UNTS, Vol. 83, p. 342). A useful general definition, given in the context of → American-Canadian boundary disputes and cooperation, is found in the 1909 Boundary Waters Treaty (CTS, Vol. 208, p. 213), namely "the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary ... passes, including all bays, arms, and inlets thereof". Tributaries and waters flowing across the boundary are expressly excluded from this definition. Boundary waters give rise to two principal legal problems, their delimitation and demarcation on the one hand, and their utilization for navigation and other purposes on the other.

B. Delimitation

1. Watercourses other than Inlets of the Sea and Lakes

Treaty descriptions broadly fall into one of four categories:

(*a*) *Watercourse entirely within one riparian State*

This occurs either expressly (e.g. the 1780 Treaty between France and Basel in respect of the River Doubs, CTS, Vol. 47, p. 331) or by necessary implication where the treaty provides that the boundary follows one of the banks (e.g. the 1907 and 1911 Treaties between France and Liberia, CTS, Vol. 205, p. 17 and Vol. 213, p. 2). Unless such a boundary is related to a particular water-level, e.g. mean high-water mark (1930 Treaty between Guatemala and Honduras, LNTS, Vol. 137, p. 231), uncertainty will exist over its location if the level fluctuates through natural changes in flow or through the extraction of water.

Boundaries delimited in this category tend to be politically unstable where the watercourse becomes economically or strategically important to both riparians. Thus the treaties whereby the whole course of the Shatt-al-Arab was placed under Iraqi sovereignty were altered by the Iraq-Iran Protocol of 1975 (ILM, Vol. 14, p. 1133) to provide for the boundary to follow the line of the thalweg (described below).

(*b*) *The median line* (medium filum aquae)

This concept, adopted from Roman private law, was stated by Grotius (De jure belli ac pacis (1625), Book 2, Chapter 3, Section XVIII) and Vattel (Le droit des gens (1758), Book 1, Chapter 22, Section CCLXVI) to be the rule in case of doubt in boundary rivers. It has been the basis of numerous treaty delimitations, particularly of non-navigable watercourses. In the → Peace Treaties after World War I, Arts. 30 of the → Versailles Peace Treaty (1919), → Saint-Germain Peace Treaty (1919), → Neuilly Peace Treaty (1919), → Trianon Peace Treaty (1920) and the → Lausanne Peace Treaty (1923) defined the international boundary in such watercourses as "the median line of the waterway or of its principal arm". If not more specifically defined, the median line refers to the width of the watercourse between the shorelines. To avoid uncertainty where the water-level fluctuates, some treaties refer to a standard level, e.g. the 1908 Treaty between France and the Netherlands (CTS, Vol. 221, p. 168).

The terms "middle of the river" or "mid-channel" when used in respect of non-navigable watercourses may often be regarded as synonymous with the *medium filum aquae*, but when used in respect of navigable rivers, e.g. the 1763 Peace Treaty between Great Britain, France and Spain (CTS, Vol. 42, p. 279) and the 1795 Treaty between the United States and Spain (CTS, Vol. 53, p. 9) in respect of the Mississippi, may be interpreted to refer to the deepest channel (1848 Treaty between the United States and Mexico, CTS, Vol. 102, p. 29) or the centre of the navigable channel (Iowa v. Illinois, 147 U.S. 1 (1893)).

(c) *The thalweg*

This term, literally meaning the downstream route, is said to have been elaborated at the Congress of Raestadt in 1797 and was first used in treaty language in the Treaty of Lunéville in 1801 (CTS, Vol. 55, p. 475) in respect of the Rhine and the Adige. The term has since been included in many treaties referring to boundary watercourses elsewhere in Europe as well as in South America, Asia and Africa. Some writers, such as Verzijl, consider the thalweg to be the general rule of → customary international law where the treaty is silent and no contrary practice exists. Some caution is needed, however, for there is no generally accepted standard definition of the term. Definitions in treaties – although many give none – fall into one of at least four types: (i) The line of deepest soundings, e.g. the 1808 Treaty between Baden and Aargau (CTS, Vol. 60, p. 217), the 1936 Treaty between the United Kingdom and Portugal (LNTS, Vol. 185, p. 205). (ii) The median line of the main navigational channel, e.g. the 1908 Treaty between Great Britain and the United States (CTS, Vol. 206, p. 377), the 1961 Treaty between Argentina and Uruguay (UNTS, Vol. 709, p. 338). The peace treaties after World War I mentioned above describe the boundary in navigable rivers as "the median line of the principal channel of navigation" without mentioning the term thalweg, an omission due perhaps to political considerations. (iii) The median line of the main navigational channel for downstream navigation, e.g. the 1827 and 1840 Treaties between France and Baden (CTS, Vol. 77, p. 97 and Vol. 90, p. 31). (iv) The navigational channel itself, e.g. the 1811 Treaty between Prussia and Westphalia (CTS, Vol. 61, p. 327). The thalweg here is a zone, so the boundary line will have to be demarcated by further provision, usually by following the centre of the channel.

International tribunals have not pronounced definitively on the meaning of the term thalweg. The → Permanent Court of Arbitration in the → Grisbadarna Case seemed to equate it with "the most important channel". The Award of the King of Italy in the boundary dispute between Britain and Brazil (RIAA, Vol. 11 (1904) p. 21) stipulated that some portions of the boundary should be the thalweg but did not define it. The Award of the King of Spain in the → Honduras-Nicaragua Boundary Dispute in 1906 used the expression "watercourse or thalweg" but neither it nor the → Arbitral Award of 1906 Case (Honduras v. Nicaragua) defined its meaning. The Supreme Court of the United States, however, stating itself to be applying international law, has frequently considered the meaning of thalweg in boundary disputes between states of the Union. In Iowa v. Illinois (147 U.S. 1 (1893)), it considered that as a general rule "the middle of the main channel of the stream" was the boundary. In Louisiana v. Mississippi (202 U.S. 1 (1906)), it held that this description was indeed "the rule of the thalweg" and applicable in the dispute before it. In Minnesota v. Wisconsin (252 U.S. 273 (1920)), the same Court defined thalweg to be "the middle of the principal channel of navigation" and distinguished it from the line of deepest water. In New Jersey v. Delaware (291 U.S. 361 (1934)), thalweg was defined as "the track taken by boats in their course down the stream, which is that of the strongest current".

Where the thalweg is defined in terms of a navigational channel, it will often vary in location during tidal or seasonal cycles. Thus a standard, such as the mean low-water level, is sometimes inserted in treaty provisions, e.g. the 1827 and 1840 Treaties between France and Baden, cited above. Where a river divides into more than one navigational channel, as in a → river delta, the boundary is sometimes expressed either to follow one of the channels, e.g. the 1879 Act of the European Commission defining the Frontiers of Bulgaria (CTS, Vol. 155, p. 261) or so as to leave each riparian its own channel to the sea, e.g. the 1893 Treaty between Portugal and Spain (CTS, Vol. 179, p. 141).

(d) *Condominium*

Very exceptionally, the entire watercourse has been created as a → condominium of the riparian States, e.g. the 1816 Treaty between Prussia and the Netherlands (CTS, Vol. 66, p. 187) as continued by the 1960 Treaty between the Federal Republic of Germany and the Netherlands (UNTS, Vol. 508, p. 14).

(e) *Special legal problems*

Movement in the line of the watercourse gives rise to particular problems of demarcation. In the

Chamizal Arbitration between the United States and Mexico the Mixed Commission, in the context of the Treaty of Guadalupe Hidalgo (CTS, Vol. 102, p. 29), referred to the "well-known principles of international law" (→ American-Mexican Boundary Disputes and Cooperation; → Mixed Commissions). It held that:

> "this fluvial boundary would continue, notwithstanding modification of the course of the river caused by gradual accretion on the one bank or degradation on the other bank; whereas, if the river deserted its original bed and forced for itself a new channel in another direction the boundary would remain in the middle of the deserted river bed" (RIAA, Vol. 11 (1911) p. 320).

Although many treaties have provided for the boundary to follow the natural and gradual movement of the thalweg, e.g. the 1842 and 1843 Treaties between Belgium and the Netherlands (CTS, Vol. 94, p. 37 and Vol. 95, p. 223), contrary practice is not unknown, e.g. the 1811 Treaty between Prussia and Westphalia and the 1840 Treaty between France and Baden (both cited above), where the original line of the thalweg remained the boundary until changed by subsequent agreement. If the line of the thalweg or the *medium filum aquae* changes through rapid and natural avulsion so that the watercourse follows a new bed, or perhaps if only the thalweg so alters, the boundary remains the line of the original *medium filum aquae* or thalweg. This has been stated by the United States Supreme Court in a number of cases (e.g. Arkansas v. Tennessee, 310 U.S. 563 (1940) and 397 U.S. 88 (1970)). Treaty provisions, however, sometimes derogate from this general rule to stipulate that the boundary line shall follow the thalweg even in the case of avulsion, e.g. the 1811 Treaty between Prussia and Westphalia, cited above, and the 1934 Treaty between the United Kingdom and Siam (LNTS, Vol. 154, p. 373), the 1940 Treaty between the United Kingdom and Brazil (UNTS, Vol. 5, p. 71). In such treaties it is not uncommon to find provisions empowering the State which has thus lost territory to take steps within a certain time to cause the watercourse to revert to its former channel, e.g. the 1843 Treaty between Belgium and the Netherlands, cited above, and the 1932 Treaty between the United Kingdom and Brazil (LNTS, Vol. 177, p. 127).

Particular problems are caused by → islands in boundary watercourses. Some treaties allocate them to one riparian State or the other depending on which side of the thalweg or median line the islands lie. Treaties may provide either that sovereignty shall be independent of any subsequent displacement of the boundary line in the river (e.g. the 1891 Treaty between the Congo and Portugal, CTS, Vol. 175, p. 131) or make detailed provision in the event of such displacement (e.g. the 1932 Treaty between the United Kingdom and Brazil, cited above). An island already recognized as being under the sovereignty of one of the riparian States may be a reason for departing from the thalweg boundary in order to avoid the island becoming an → enclave, e.g. the 1908 Treaty between Great Britain and the United States, cited above.

2. Inlets of the Sea

An initial question is to determine whether a particular feature is juridically a river estuary – in which case it may be divided by agreement (e.g. Cross River estuary (CTS, Vol. 218, p. 23), River Plate estuary (ILM, Vol. 13 (1973) p. 251; → La Plata Basin)) – or a → bay or gulf, in which case there is a lack of clear authority on delimitation. The Convention on the Territorial Sea and the Contiguous Zone (UNTS, Vol. 516, p. 205) applies only to single-State bays. Some inlets of this type have been delimited by agreement either on the basis of a median line, e.g. the Straits of Juan de Fuca (CTS, Vol. 100, p. 39), or by reference to islands, e.g. Passamaquoddy Bay (CTS, Vol. 206, p. 377). In the Gulf of Fonseca Case, the → Central American Court of Justice placed the Gulf, beyond the belt of three miles from the shore, under the condominium of the three riparian States, but it is doubtful if this solution reflects customary international law (→ Fonseca, Gulf of).

Many multi-State inlets remain without formal delimitation, e.g. Lough Foyle and Carlingford Lough between the United Kingdom and the Republic of Ireland, Gibraltar Bay, the Ems estuary (→ Ems-Dollart), the Gulf of Aqaba (→ Aqaba, Gulf of) and the Gulf of Venezuela.

3. Lakes

The prevailing view is that in the absence of treaty provisions the waters of a multi-State lake are divided among the riparian States, although in respect of the waters of part of → Lake Constance; Austria claims that a condominium exists. In some treaties concluded between colonial powers in respect of African lakes the boundary was stipulated to follow one bank of the lake, thus excluding one or more of the riparian States from the waters. Most of these treaties have been superseded by new agreements providing for a boundary line to run through the waters, although on a literal reading of one treaty (the 1890 Treaty between Great Britain and Germany, CTS, Vol. 173, p. 271) Tanzania is still excluded from the waters of Lake Nyasa on the border with Malawi (→ Boundary Disputes in Africa). Many lakes have been delimited according to the concept of a median line measured from the banks, e.g. → Lake Geneva, Lake Lugano, the → Great Lakes of North America, Lake Albert, Lake Tanganyika (in part), and Lake Titicaca. The median line concept is implemented either by providing that the median line is the boundary without demarcating it or by defining a boundary line which in fact represents the median line. In some lake delimitations the median line has been modified to avoid islands becoming enclaves, e.g. the 1894 Treaty between Great Britain and the Congo (CTS, Vol. 180, p. 153) in respect of Lake Mweru. On other lakes median lines have not been used at all, e.g. on Lake Victoria where astronomical straight lines, in places modified to avoid islands, are used and on → Lake Chad where unmodified straight lines separate the waters of the four riparian States.

C. Utilization

Apart from the exceptional case of a → condominium, a riparian State has sovereignty over boundary waters on its side of the boundary line. In 1895, Attorney-General Harmon of the United States concluded from this that in the absence of agreement each State was free to utilize its boundary waters as it wished, in the particular instance to divert water for irrigation purposes thereby necessarily reducing the amount available to the other riparian States. Subsequent developments, however, have thrown doubt on this conclusion as reflecting a rule of customary international law. In the → Jurisdiction of the International Commission of the Oder Case the → Permanent Court of International Justice, basing itself on provisions in the → Vienna Congress of 1815 advanced the concept of "a community of interest of riparian States" which founded "a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others". Although the Court was specifically considering navigation by an upstream riparian on a river falling within Art. 331 of the Versailles Peace Treaty, it expressly mentioned rivers which separated States and its language was sufficiently general to apply to uses other than navigation. In this same context, the law relating to → international rivers and such formulations as the Helsinki Rules of the → International Law Association in 1966 are pertinent.

A substantial number of treaties regard boundary waters as a shared natural resource of the riparian States for navigational purposes (e.g. the 1811 Treaty between Prussia and Westphalia, cited above, and the River Plate Basin Treaty (UNTS, Vol. 875, p. 1; → Natural Resources, Sovereignty over). Others see them for power generation and water extraction purposes (e.g. the 1946 Treaty between Argentina and Uruguay (UNTS, Vol. 671, p. 17), the 1950 Treaty between the United States and Canada (UNTS, Vol. 132, p. 223), the 1957 Treaty between the Soviet Union and Norway (UNTS, Vol. 312, p. 257), and the 1973 Treaty between Brazil and Paraguay (UNTS, Vol. 923, p. 57)). Still other treaties view boundary waters in the context of pollution protection measures, such as the Rhine Treaty of 1976 (UNTS, Vol. 994, p. 3; → Rhine River; → Environment, International Protection; → Water, International Regulation of the Use of).

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GEOFFREY MARSTON

BREDA FUGITIVES CASE

1. Facts

On December 26, 1952, H. Bikker, S. Borgers, K. Faber, J. de Jonge, W. van der Neut, W. Polak and A. Touseul escaped from the Breda prison in the Netherlands. All seven were serving life sentences imposed for collaboration offences such as aiding the enemy, enlisting with enemy forces, maltreatment and manslaughter, all committed during World War II (→ Occupation, Belligerent). That same evening they reached the territory of the Federal Republic of Germany, where they applied for political asylum (→ Asylum, Territorial).

At first the Dutch Government urged the Government of the Federal Republic to arrest the seven and expel them to the Netherlands (→ Aliens, Expulsion and Deportation). The three Allied Occupying Powers were also approached, in the event that they were still entitled to resort to measures of expulsion (→ Germany, Occupation after World War II). For various reasons the Dutch Government subsequently withdrew its request for expulsion and instead formally requested → extradition.

German authorities then apprehended the fugitives, and the competent courts proceeded to examine each case individually. The extradition of J. de Jonge was held inadmissible by the Oldenburg Superior District Court in its decision of May 18, 1953, because it regarded as political the offence for which he had been convicted, i.e. rendering assistance to the enemy. After de Jonge was released, the British occupying authorities arrested him and expelled him to the Netherlands. The Government of the Federal Republic made a formal → protest. The requests for the extradition of the six other fugitives were rejected by the German Superior District Courts of Düsseldorf (Faber), Cologne (Touseul), Hamm (Bikker), Celle (Polak and van der Neut) and Oldenburg (Borgers), because the defendants were considered to have acquired German → nationality.

2. Applicable Law

All the fugitives except de Jonge had voluntarily entered the *Waffen-SS* during World War II. After the war they claimed German nationality on the basis of the following "Führer decree" (German Reichsgesetzblatt, 1943 I, p. 315) of May 19, 1943:

> "I. 1. Foreigners of German origin (*deutschstämmig*), who have entered the German army, the *Waffen-SS*, the German police or the *Todt* Organisation, shall acquire German nationality at the time of promulgation of this decree.
>
> 2. Foreigners of German origin who may enter the German army, the *Waffen-SS*, the German police or the Todt Organisation, shall acquire German nationality from the day of their enlistment.
>
> II. Further rules to implement and supplement this decree shall be established by the Minister of the Interior, in accordance with the services concerned."

The Minister of the Interior issued an instruction on May 23, 1944 (German Reichsministerialblatt, 1944 V, p. 551), providing in para. 2 that:

> "Foreigners of German origin coming under the Führer decree shall acquire German nationality by virtue of the Führer decree. However, claims to such nationality require the establishment of its acquisition by the central immigration office (*Einwandererzentralstelle*). This office may in a particular case determine that German nationality has not been acquired."

Further it provided that only a male with at least two German grandparents could be considered as being of German origin or that if he had fewer German grandparents, he must be accepted as German by the local German population in his

own country (*deutsche Volksgruppe*). One reason for promulgating the 1943 decree had been to protect soldiers of German origin, who had deserted from the Romanian army to join the German army or the *Waffen-SS*, against punishment by the Romanian Government (→ Deserters).

The question posed in the case of these six Breda fugitives was whether Dutch nationals who had voluntarily entered the *Waffen-SS* could claim German nationality directly on the basis of the 1943 decree, or whether a certificate of naturalization issued by the Central Immigration Office was required to that effect. On January 30, 1953 the German Federal Constitutional Court ruled in another case concerning a request for extradition made by the Swiss Government that an administrative decision of the Office was a prerequisite for obtaining German nationality. None of the six escapees could prove that he had received a certificate of the Office confirming German nationality. Yet, their extradition was refused, based on the ruling of December 29, 1953 by the German Federal Supreme Court which interpreted the relevant rules in a different way than the Constitutional Court and held that the acquisition of German nationality followed automatically from the 1943 decree and that the actions of the Office were only of a declaratory character. Moreover, the local courts hearing the extradition pleas had found on the basis of witnesses' oral statements that all persons of "Germanic descent", such as inhabitants of the Scandinavian countries, the Netherlands and Flemish Belgium, were to be considered as being of German origin and that it was irrelevant whether they possessed one or more German grandparents. The incorrectness of this opinion has become apparent now that the archives of the Office are accessible, revealing its administrative practice.

In 1953 there was thus conflicting jurisprudence of the two highest German courts. The (lower) extradition courts followed the jurisprudence of the German Federal Supreme Court, whereas German administrative bodies (Ministries of Justice and Interior) observed the jurisprudence of the German Federal Constitutional Court. This conflict was resolved by the revision of the (West)German Nationality Act of February 22, 1955. Paragraph 10 of that Act repudiated the jurisprudence of the German Federal Supreme Court by stating:

> "The Service with the German army, the *Waffen-SS*, the German police, the Todt Organisation and the Reich labour service (*Reichsarbeitsdienst*), has not in itself resulted in the acquisition of the German nationality. Only those who have received a certificate of naturalization by the competent authorities before the entry into force of this Act have become German citizens."

3. Promise of Reciprocity

The Dutch Government requested the extradition of the Breda fugitives, giving a → guarantee of → reciprocity. It is questionable whether it was entitled to make such a promise, because the application of the Dutch-German extradition treaty of 1896 (German Reichsgesetzblatt, 1897, p. 731) was still suspended as a consequence of World War II and, according to common opinion, it was unlawful under Dutch constitutional law to comply with extradition requests which were not based on a treaty. The political tension between the Netherlands and the Federal Republic of Germany caused by the Breda fugitives case was one of the reasons why the 1896 extradition treaty was revived only in 1957 (German Bundesgesetzblatt, 1957 II, p. 22; superseded by the European Convention on Extradition of December 13, 1957, in force for the Netherlands as of May 15, 1969 and for the Federal Republic of Germany as of January 1, 1977, German Bundesgesetzblatt, 1976 II, p. 1796).

Further legal problems concerning (West-) German extradition law and conflicts of jurisdiction between the Allied Occupying Powers and the Government of the Federal Republic in the field of extradition will not be considered here.

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BRIDGES *see* River Bridges

BRITISH COMMONWEALTH

The Commonwealth is the present name of what was formerly the British Empire, comprising the United Kingdom of Great Britain and Northern Ireland, the self-governing Dominions, and the dependent colonial territories beyond the seas (→ Colonies and Colonial Régime; → Decolonization: British Territories; → United Kingdom of Great Britain and Northern Ireland: Dependent Territories). The name was employed in the Royal Titles Act (1 & 2 Eliz. 2, c.9), enacted in 1953 as a result of the decision of India to become a republic while remaining a member of the Commonwealth. At the latest from the time of this statute, the various members of the Commonwealth are entitled to preserve whatever form of relationship to the Crown, the former legal head of the Empire, they consider desirable. Today 18 members of the Commonwealth are monarchies recognizing the sovereign of the United Kingdom as their own; five are kingdoms under their own monarch, who in the case of Malaysia does not succeed by hereditary title but is elected from among the sultans of the states constituting the federation of Malaysia; while 26 Commonwealth countries are republics having no relationship of a legal character with the sovereign of the United Kingdom or other Commonwealth countries. However, the sovereign of the United Kingdom remains "Head of the Commonwealth". Because of the multi-racial character of the member States and to emphasize the complete sovereign independence of each of the members, the adjective "British" has been dropped from the title.

Prior to the conclusion of the → peace treaties after World War I or the enactment of the Statute of Westminister (22 & 23 Geo. 5, c.4) in 1931, the British Empire constituted one legal whole under a single sovereign: When the United Kingdom became a belligerent in 1914 its declaration of → war extended to the entire Empire. The Empire was considered a single → subject of international law. The British Empire was listed in the Covenant of the → League of Nations as an original member of that organization, although Australia, Canada, South Africa and New Zealand (the Dominions) and India were also accepted as original members, but as constituent parts of the Empire. Gradually, individual Dominions were able to assert their right to operate on the international stage as independent entities free of imperial control or participation. In practice, however, it was customary to inform the British Government as well as the governments of other Commonwealth countries of the measures likely to result from such activities, especially if they might in any way affect the rights of Great Britain or such other Commonwealth countries. At the same time, it was customary for Great Britain to ensure that Commonwealth countries would, whenever possible, have the right to accede to any agreements made by Great Britain. Further, when Great Britain entered into → commercial treaties, the British Government sought to include a provision that if a Commonwealth country extended to the other party the concessions granted by Britain, then that Commonwealth country would become entitled to any privileges enjoyed by Britain.

By the time of the outbreak of World War II the separate identity of Commonwealth countries had developed to such an extent that the British declaration of war on September 3, 1939 was effective only for the United Kingdom and the non-self-governing parts of the Commonwealth (→ Non-Self-Governing Territories). Each Dominion decided for itself whether to become a belligerent and issued its own declaration of war, although Australia and New Zealand regarded themselves as automatically involved in the declaration made by Great Britain. This meant that George VI, still then ruler of the entire Commonwealth, remained at peace with Germany in respect of some parts of his territory while at war in respect of other parts. In fact, Ireland, then still a Dominion, remained neutral throughout the war. As a result, it was necessary for each of the

Dominions to issue, in the absence of a German peace treaty, its own declaration restoring peace with that country and to sign the peace treaty with Japan in its own name (→ Peace Settlements after World War II; → Peace Treaty with Japan (1951)).

Unlike the situation with the League of Nations, each of the Dominions that had been a belligerent against the Axis Powers signed the → United Nations Charter and became a member in its own right, as did the United Kingdom. While the United Kingdom became a permanent member of the → United Nations Security Council, by virtue of a → gentlemen's agreement drawn up by the permanent members one of the elective seats on that Council was reserved for the Commonwealth, an arrangement that was only broken when the → United Nations decided in 1965 that it was necessary to give more adequate representation to African and Asian members. With the enlargement of the Security Council in that year, the concept of the Commonwealth as a group entitled to non-permanent membership ceased, and today the non-African and non-Asian members of the Commonwealth are grouped together with Western Europe and others. African and Asian members of the Commonwealth are now entitled to compete for the five seats reserved for Asia and Africa.

Another token of the unity of the Commonwealth that has disappeared relates to → extradition. Extradition treaties govern the procedure by which a wanted alleged offender is returned from one State to another. In the case of the British Empire the concept of unity applied and affairs were conducted in accordance with the terms of the Fugitive Offenders Act, 1881 (44 & 45 Vict. c.69), under which the defence of political offence was not recognized. With the increase in the number of Commonwealth members, and the feeling among many that this legislation tended to be a limitation upon their → sovereignty, the Commonwealth Law Ministers' Conference recommended in 1966 that there should be a unification of extradition laws among Commonwealth countries. The United Kingdom passed a new Fugitive Offenders Act in 1967 (c.68), which applies to a minority of Commonwealth members. Many Commonwealth members now have their own extradition legislation and the position now is that extradition among Commonwealth members *inter se* is virtually the same as for extradition from foreign States, with the procedure dependent upon the 1881 or 1967 legislation or local national legislation enacted by a particular Commonwealth country in accordance with its own legislative processes. It now depends on the particular legislation involved whether a fugitive requested by one Commonwealth country from another is able to plead the political character of his offence in order to secure immunity from extradition.

Despite the separate membership of Commonwealth members in the United Nations, there is still one instance of the apparent unity of the Commonwealth in so far as international law is concerned. Even though each member which has accepted the compulsory jurisdiction of the → International Court of Justice in accordance with the "Optional Clause" (Art. 36 of the Statute) has added its own selection of reservations to the jurisdiction of the Court, a number of Commonwealth members, especially the older ones, but also including some new members such as India and Malta, have reserved from the Court's jurisdiction disputes arising between themselves and other members of the Commonwealth. This reservation is a legacy of the period when it was thought that the Judicial Committee of the Privy Council might serve as an inter-Commonwealth court (→ Inter se Doctrine).

Rather than exercising any such jurisdiction, however, the Judicial Committee of the Privy Council has served as the supreme appellate tribunal for overseas territories of the Empire, including independent Commonwealth members until such time as the latter have enacted legislation cancelling this jurisdiction in favour of their own Supreme Court. This ultimate jurisdiction of the Judicial Committee has stemmed from the fact that, subject to any local legislation enacted in an overseas territory to the contrary, English law has been the legal system to apply in that territory.

Each independent Commonwealth country owes its independence to an English statute terminating the colonial status of the territory. In so far as the older Commonwealth countries are concerned, any residual authority remaining with the British Parliament was terminated by the Statute of Westminster enacted as a result of Imperial Conferences, so long as the Common-

wealth country concerned requested the British Government in accordance with that statute to waive its residual authority. In the case of Canada, however, this residual authority remained so that any attempt by Canada to amend its constitution embodied in the British North America Act, 1867 (30 & 31 Vict. c.3) could only be effected by the British Parliament, although such action was only undertaken at the request of the Canadian Parliament. In 1982, at the request of Canada, Britain enacted the Canada Act (c.11) whereby the United Kingdom abandoned all residual rights of legislation, so that the Canadian Parliament, sometimes together with the provincial legislatures, is now the sole authority in so far as any legislation in respect of Canada is concerned. Since the British Parliament cannot bind itself, in strict law it is open to that Parliament to amend or even repeal the Canada Act, or for that matter any other statute confirming the independence of any Dominion. From the point of view of political reality, however, this would never occur. Any Commonwealth country affected by any such purported exercise of jurisdiction would disregard the legislation and would leave the Commonwealth. It is also possible that other members, rather than waiting for any such abusive action in respect of themselves, would also leave.

Another example of the unity of the Commonwealth as a whole is to be seen in relation to British → nationality (→ British Commonwealth, Subjects and Nationality Rules). Dating from the days of empire, British nationality legislation has been based on the concept that all nationals of the United Kingdom and any overseas territory, including the independent Commonwealth countries, were to be considered British nationals in every sense of that term, regardless of the fact that they might also possess the nationality of a particular Commonwealth country in accordance with its own legislation. As a result of a Commonwealth Conference, all members of the Commonwealth agreed that they would recognize the nationals of all Commonwealth States as British subjects or, in the case of Commonwealth Republics, as Commonwealth citizens, each reserving the right to regulate the conditions of immigration and residence. In accordance with the British Nationality Act, 1948 (11 & 12 Geo. 6, c.56) all colonial and Commonwealth nationals enjoyed equal rights of → immigration, residence, franchise and employment with British nationals and were exempt from deportation from the United Kingdom, even with regard to the nationals of a Commonwealth country not granting such rights reciprocally. With the great increase in the number of independent Commonwealth countries and of immigration into the United Kingdom by their nationals, a new British Nationality Act was enacted in 1981 (c.61). Instead of the unity of citizenship in so far as the United Kingdom as the mother country was concerned, there now exists a British citizenship for those whose links to the United Kingdom satisfy the immigration regulations, with the concomitant right of residence in Britain; a British Dependent Territories Citizenship for those whose links lie with a dependency and whose right of abode rests on each territory's immigration laws; and a British Overseas Citizenship for all other former citizens of the United Kingdom and her Colonies with no right of abode anywhere. Thus the last direct link between the United Kingdom and overseas nationals was severed in so far as concrete rights were concerned.

Despite the realization that all Commonwealth countries were now equal sovereign States, both in imperial and international law, there were still common features that tended to bind the members of the Commonwealth together. Despite the separate declarations of war, the separate membership in international organizations, as well as the membership by some Commonwealth countries in regional organizations like the → North Atlantic Treaty Organization or the → Organization of African Unity to which other members did not belong, certain links still suggested a common bond among Commonwealth members. Representatives of Commonwealth countries have tended to meet together before sessions of the → United Nations General Assembly to coordinate policy as far as possible. In addition, periodic meetings of, for example, Attorneys General or Ministers of Education of Commonwealth countries are frequently held, although these have become similar to the meetings of specialist ministers of any group of independent States. When former colonies became independent there was a general view among the older Commonwealth members that there still remained

a bond based on language and a common concept of the rule of law. However, more and more of the newer members of the Commonwealth have encouraged the study and use of a national language and have rejected many of the principles of English common law and the English legal heritage in favour of an indigenous system.

Although there is now no legal link uniting the countries of the Commonwealth, other than the formal link that lies in the sovereign as Head of the Commonwealth, there is still a great deal of functional cooperation, channelled through such bodies as the Commonwealth Fund for Technical Cooperation. This and smaller organizations are an emanation of the Commonwealth Secretariat established in 1964, largely to satisfy the desire of the newer Commonwealth countries to move the focus of influence from Britain, while preserving such links, assistance and guidance as the members might find useful. The Secretariat possesses no executive functions, but it does serve to organize meetings of Commonwealth chief and other ministers, as well as coordinating and extending the functional activities of the Commonwealth. The Secretariat is headed by a Secretary-General who has been able to exercise a measure of quiet diplomacy and discreet leadership, as well as providing a means of communication between Commonwealth members, facilitating the smoothing over of a variety of problems.

The Commonwealth today is more a historic than a formal organization. It has none of the characteristics of a federation or confederation (→ Confederations and Other Unions of States). Its links are emotional, historical and psychological and, despite the existence of the Secretariat, it lacks any of the characteristics of an international organization (→ International Organizations, General Aspects). It is a group of States which has certain interests in common and is served by a Secretariat that is able to convene meetings and serve as a convenient means of communication whenever desirable. The lack of any formal machinery or true organizational links may be seen from the way in which the Organization of Eastern Caribbean States, all Commonwealth members, invited the United States rather than the Commonwealth to assist them in coping with the *coup* that took place in Grenada in 1983 (→ Caribbean Cooperation).

Regardless of the absence of any organizational or constitutional framework, the Commonwealth remains unique. It is the result of an historic evolution that defies imitation. That this is so may be seen from the fate of the French Union and Community or the Netherlands-Indonesian Union, which purported to be based on the Commonwealth. It is an arrangement that cannot be duplicated, that lacks any true legal links and depends for its existence on the goodwill of its members, which are increasingly looking to other organizations and non-members for their defence and their alliances. However, so long as there is any sentiment of loyalty to the Sovereign and any conviction that concrete advantages by way of advice or assistance may be gained, it is likely that the Commonwealth will continue to exist.

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BRITISH TERRITORIES, DECOLONIZATION *see* Decolonization: British Territories

CANALS

1. Notion

A canal is an artificial waterway used for navigation. There are several kinds of canals (internal, transboundary, interoceanic, or those built in connection with → international rivers), which according to their geographical location and their respective significance for international navigation give rise to different questions in international law. Although some of these canals are also employed for non-navigational uses, such as irrigation, drainage, or the transmission of water from a river or lake into another watercourse, navigation remains the principal purpose of any canal of international significance.

Because of their artificial nature, canals are to be distinguished in international law from natural waterways, such as → straits or international rivers. The meaning of artificial works for the legal qualification of a waterway was recognized in the → Fisheries Case (U.K. v. Norway) (ICJ Reports 1951, p. 116, at p. 132).

According to the distinction mentioned, a canalized river such as the → Moselle River remains a natural waterway, whereas a lateral canal is an artificial waterway (see the French-German-Luxembourg Convention of 1956, German Bundesgesetzblatt 1956 II, p. 1838). A natural watercourse which has been made navigable by significant works of regulation, such as the → St. Lawrence Seaway, may, however, be considered an artificial waterway.

2. Canals in International Law

(a) Navigational régime

There is no uniform legal régime of navigation for the different kinds of canals, nor are the canals of the same kind subject to the same legal rules of navigation. Therefore, the rules governing the use of any single canal have to be ascertained from the domestic laws and international → treaties applying to it.

(b) Construction and operation

A canal is subject to the → territorial sovereignty of the State where it is located. No State is obliged to construct a canal on its territory. Nor does it have to maintain the navigability of the artificial waterway. Yet there may be agreements to this effect, such as the Belgian-Dutch Treaty of 1963 concerning the connection between the → Scheldt River and the → Rhine River (UNTS, Vol. 540, p. 3).

In the absence of treaty stipulations to the contrary, the territorial State is not required to place an artificial waterway under an international régime. In fact, most canals are operated by the territorial State (such as the → Kiel Canal, or the → Suez Canal). Nevertheless, a canal may also be under the administration of a private company (formerly the Suez Canal), or of a foreign State (→ Panama Canal; Saimaa Canal), or an international commission (mainly lateral canals to international rivers). It may also be operated by cooperation of the → neighbour States such as the St. Lawrence Seaway.

The initial filling of a canal and possibly also its later supply require large quantities of water. If that water is taken by an upstream State from a river traversing several countries, or from a boundary river or a lake shared by more than one State, the State has to ascertain that this does not violate the principle of equitable utilization of the water (→ Water, International Regulation of the Use of). This issue was considered by the → Permanent Court of International Justice in 1936 in the context of the 1836 Treaty between Belgium and the Netherlands, which governed the feeding of navigation canals and irrigation channels with water from the Meuse (→ Meuse, Diversion of Water Case (Belgium v. Netherlands)).

(c) Charges

General international law forbids the levying of charges of any kind on the navigational use of a natural waterway other than those for services rendered and intended to cover, in an equitable manner, the cost of maintaining and improving the navigability of the waterway, or to meet expenses incurred in the interest of navigation. Accordingly, a charge is normally levied for navigation on a canalized section of a river, or on the use of locks, → ports or other engineering works. The above-mentioned principle is contained in Art. 7 of the Statute of the Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern of 1921 (LNTS, Vol. 7, p. 37, at

pp. 53–54; → Barcelona Conference (1921)). The basic principle that expenditure made in the interest of navigation gives a right to levy charges applies as well to canals, which are artificial constructions. In practice the rate of the charges, dues, or tolls for the use of a canal is normally established in relation to the size of the vessel and the frequency of use. A distinction based upon the flag of the vessel would amount to discrimination which is prohibited for waterways of international concern by several international instruments, see e.g. Art. 9 of the Barcelona Statute (→ States, Equal Treatment). Economic considerations, such as the desire to subsidize shipping or to gain profits, may influence the rates. Yet they may not be so excessively high as actually to bar shipping on an artificial waterway.

3. *Canals as Internal Navigable Waterways*

In the absence of treaty stipulations to the contrary, a canal is an internal (national) waterway governed exclusively by the laws of the State where it is located. As there is no general obligation to open its internal navigable waterways to foreign ships, the territorial State retains discretion to open or close its internal canals; the Additional Protocol to the Barcelona Convention requiring the opening of internal waterways has remained of purely academic interest.

Although → warships and → State ships always need special authorization, several States unilaterally open their waterways in time of peace to foreign → merchant ships on condition of → reciprocity. There are stipulations to this effect in several agreements on shipping and commerce, and in other types of bilateral treaties, such as Arts. 17 to 23 of the 1972 Treaty on Questions relating to Traffic between both German States (ILM, Vol. 11 (1972) p. 726; → Germany, Federal Republic of, Treaties with Socialist States (1970 – 1974)). Third States may benefit from these agreements by way of → most-favoured-nation treatment without, however, directly attaining their own right to free navigation on the respective internal waterways. Under Art. 327 of the → Versailles Peace Treaty (1919), vessels flying the flag of the Allied and Associated Powers temporarily enjoyed the same treatment as German vessels on the inland navigation routes of Germany. A canal may also be a "route in use convenient for international transit" under the Barcelona Convention and Statute on Freedom of Transit of 1921 (LNTS, Vol. 7, p. 13). Yet only by express declaration would a canal be placed under the régime of the Barcelona Convention on the Régime of Navigable Waterways (Art. 1, para. 2 of the Statute).

4. *Transboundary Canals*

Unlike a river separating or traversing different States, a canal which extends across national → boundaries consists of separate national sections, each being an internal waterway of the State where it is located. Therefore, in order to guarantee freedom of navigation, Belgium and the Netherlands included a provision to that effect into their treaty of 1963 concerning the construction of a connection between the Scheldt and the Rhine (→ Navigation, Freedom of). Similar agreements exist for artificial waterways which, as a result of territorial changes, have been intersected by a boundary (e.g. Art. 10 of the Separation Treaty between Belgium and the Netherlands of 1839, Martens NR, Vol. 16, p. 773).

An interesting arrangement concerning the Saimaa Canal, which has been intersected by the Finno-Soviet boundary confirmed in their Peace Treaty of 1947, is provided in the Agreement of 1962 between Finland and the Soviet Union (UNTS, Vol. 479, p. 122). After having been closed temporarily, the Soviet part of the Saimaa Canal has been leased to Finland for fifty years in return for an annual rental. The canal is open to Soviet vessels of any kind, non-military vessels of Finland as well as trading vessels of third States engaged in commercial shipping to and from Finland (Art. 2).

5. *Canals and International Rivers*

(*a*) *Lateral canals*

A lateral canal either duplicates or improves naturally navigable sections of a river system; alternatively, it may connect two naturally navigable sections of the same river. Lateral canals of the first type merely serve to remedy the defects of a navigable waterway, whereas those of the second type create the navigability of formerly non-navigable sections. State practice tends to apply the navigational régime of an international river

also to its lateral canals. For example, the Central Commission for Rhine Navigation extended the régime of that river with French consent to the Great Canal of Alsace which was constructed lateral to the Rhine between Basle and Strasbourg. Some agreements applying to certain international rivers stipulate this for both kinds of lateral canals (e.g. Art. 331 of the Versailles Peace Treaty, or Art. 14 of the Agreement of 1964 concerning the → Niger River Commission (UNTS, Vol. 578, p. 19)). Yet the 1921 Barcelona Statute on the Régime of Navigable Waterways of International Concern applies only to lateral canals of the first type (Art. 1, para. 1 (d)). And it is only with respect to such canals that authors tend to regard the extension of the regime of an international river to its lateral canals as a rule of → customary international law.

(*b*) *Canals connecting international river systems*

An artificial waterway of this kind may or may not be a transboundary canal. Yet it is by definition neither a lateral canal nor a navigable waterway under the Barcelona Statute of 1921. Furthermore, general international law does not extend the navigational régime of one or both international river systems to the canal which connects them. And in the absence of an agreement to the contrary, the territorial State is not required to place the canal under international law. A case in point is the → Rhine-Main-Danube Waterway. Constructed between Bamberg and Kehlheim within the territory of the Federal Republic of Germany, this canal connects the international river system of the Rhine and the Danube. Since the Federal Republic of Germany is not bound by Arts. 353 and 331, para. 2 of the Versailles Peace Treaty requiring Germany to declare international any future deep-draught Rhine-Danube navigable waterway, it considers the canal an internal navigable water to which neither the revised Rhine Navigation Act of 1868, nor the Belgrade Convention on the → Danube River of 1948 (UNTS, Vol. 33, p. 197), nor any other international agreement, applies.

6. Interoceanic Canals

An interoceanic canal is an artificial waterway connecting one part of the → high seas or an → exclusive economic zone with another part of the high seas or an exclusive economic zone. Without an act of → internationalization, an interoceanic canal is merely an internal navigable waterway, as the Kiel Canal was before 1919 and the Canal of Corinth is today. Internationalization entails the opening of a canal by treaty, unilateral → declaration or otherwise to free access and unimpeded navigation by ships of all nations. At present only the interoceanic canals of Suez and Panama have been declared international, whereas the international status of the Kiel Canal, internationalized under Art. 380 of the Treaty of Versailles, is now in some doubt.

The scope of the internationalization of a canal is to be ascertained individually for each canal from the relevant legal acts and instruments and the sovereign's customary practice. Especially the question whether the ships of a third State have a genuine right to pass through the canal, or whether their passage is merely tolerated by the territorial State cannot be answered in general (→ Innocent Passage, Transit Passage). Nevertheless, as the Permanent Court of International Justice (PCIJ) demonstrated in the → Wimbledon Case, the rules and practice concerning other interoceanic canals may provide useful precedents for the interpretation of the navigational régime of an internationalized canal. In addition the rules for international rivers, especially those established by the Barcelona Convention and Statute of 1921, may offer appropriate analogies for cases involving internationalized canals.

According to general practice, in time of peace merchant vessels of all nations may pass unimpeded through international canals, whereas warships may only do so if expressly permitted. There exist today general permissions for all international canals. A territorial State may, in time of → war or → armed conflict to which it is a party, close the canal to enemy flag ships, as Egypt temporarily did with the Suez Canal. In addition it may seize enemy ships within the canal. The PCIJ reasoned in the Wimbledon Case with respect to the Kiel Canal that "such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie" (PCIJ, Series A, No. 1 (1923) p. 15, at p. 28). This

viewpoint is, however, open to serious doubts as expressed by Judges Anzilotti and Huber (ibid., pp. 35–42).

As an international canal remains under the sovereignty of the territorial State, foreign ships within the canal are subject to territorial jurisdiction as they would be elsewhere in → internal waters or ports. Accordingly, in the Kiel Canal Collision Case the Supreme Court of the British Zone of Germany applied German law to proceedings involving the collision of a Norwegian with a Danish vessel (ILR, Vol. 17, p. 133). However, the application of police, customs, sanitary, → immigration or → emigration laws of the territorial State must not reasonably impede traffic on the international canal.

Whether or not the internationalization of a canal creates an "objective régime", which is unaffected by → State succession as defined under Art. 12, para. 2 of the → Vienna Convention on Succession of States in Respect of Treaties and interpreted by the → International Law Commission (YILC (1974 II, Part I) p. 204), depends again on the legal régime of the individual canal and cannot be determined in general.

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CESSION OF TERRITORY *see* Territory, Acquisition

CHOICE OF LAW *see* Private International Law

CIVIL AIR TRANSPORT INC. v. CENTRAL AIR TRANSPORT CORP.

During 1949 the recognized Government of China led by the Nationalist Party (the Kuomintang) rapidly lost ground on the Chinese mainland to the insurgent Communist forces. In April 1949, the Nationalist Capital moved east from Nanking to Canton, in October to Chungking, in late November to Chengtu and finally, on December 9, across the water to the island of → Taiwan. As Communist forces extended their control over the whole country, the *de facto* Communist government then existing proclaimed itself the government of China on October 1, 1949 (→ De facto Régime).

Already in September of the same year the Nationalist Government had ordered 40 → aircraft belonging to the State-owned China Air Transport Corporation (CATC) flown to Kai Tak airfield in the British colony of → Hong Kong. By November 9, the CATC staff in Hong Kong had pledged their loyalty to the new government in China and purported to take actual and legal control of the aircraft in the name of the *de facto* Communist government. The Nationalist Government, on December 12, 1949, still the *de jure* Government of China, sold the aircraft to two United States citizens, Messrs Chennault and Willaner, in exchange for US $1.5 million in promissory notes and this partnership in turn sold the assets to Civil Air Transport, a company incorporated in Delaware on December 19, 1949. At midnight, January 5, 1950, the Government of the United Kingdom recognized the Communist government as the *de jure* Government of the Republic of China (→ Recognition).

In the light of the above events it was clear that the ownership of the Chinese aircraft at Kai Tak was going to be a matter of dispute; special legislation was enacted in May, 1950, which enabled the courts in Hong Kong to hear cases on the ownership and the right to possession of the aircraft. The fact that an action might implead a foreign sovereign State was not to be a bar to the courts' jurisdiction under the legislation. Pending clarification of the ownership issue, the aircraft were to remain in Hong Kong. The legislation allowed for an appeal from a single judge to the

Full Court in Hong Kong and from there to the Judicial Committee of the Privy Council in London.

The case began with a writ issued by the appellant company claiming a declaration under the special legislation that the 40 aircraft in question were the property of the company. Both the first instance judge and the Appeal Court of Hong Kong ruled that the aircraft were the property of the new government. Both courts considered the sale of the aircraft a violation of the principle of → continuity defined in an *obiter dictum* by Lord Denning in Buguslawski v. Gydynia Ameryka Linie ((1951) 1.K.B. 162, 182). This principle required

> "that the new government should stand in the shoes of the old government in all respects except in respect of acts by members of the old government which were *ultra vires* or acts which were done by them not in good faith as trustees for the State, but for an alien and improper purpose".

The view taken by the trial judge and affirmed on appeal was that "the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by the United Kingdom Government", that the sale was a "device" to prevent the aircraft from falling into the hands of the Communist government. The Privy Council reversed the judgment of the lower court. Viscount Simon, giving the reasons of the Court, ruled that the sale was no more alien and improper than would have been the act of blowing up a store of ammunition in a place in China where the Nationalist forces were on the point of being driven out. Whether a government's action in selling chattels was against the interests of those it was supposed to serve was a political rather than a legal question.

All the courts took judicial notice of an executive certificate, i.e. information supplied in the usual way by the United Kingdom Government, in clarification of the date when the Communist Government was recognized *de jure* by a United Kingdom Government. At the time of the sale, the Nationalist Government was still recognized as entitled to sell assets belonging to it which were still subject to its jurisdiction. The Privy Council also had to rule on another contention made in the lower courts that the retroactive effect of recognition operated in support of the respondent's claim. The Court held that "[p]rimarily, at any rate, the retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the de jure government and not to invalidate acts of the previous de jure government" ((1953) A.C. 70 at 93). The action of the employees in support of the Communist authorities was not, in the absence of consent by the Governor of Hong Kong, lawful, since the relevant legislation required such consent for any person to act on behalf of any foreign power, defined as including "the government whether legal or de facto of any foreign State"; this absence of the lawful authority for taking possession of the aircraft was crucial to the Court's decision. However, the Court at least recognized that its answer might have been different had both governments purported to sell the goods and its decision was also clearly placed in political and geographic context; Lord Simon concluded:

> " . . . it might be too wide a proposition to say that the retroactive effect of a de jure recognition must in all cases be limited to acts done in territory of the government so recognized, for the case of a ship of the former government taken possession of by insurgents on the high seas and brought into a port which is under the control of the de facto government would also have to be considered . . . " ((1953) A.C. 70 at 94; → Banco de Bilbao v. Sancha and Rey).

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COLONIAL CLAUSE *see* Federal Clause, Colonial Clause

COLONIES AND COLONIAL RÉGIME

1. Notion

The colony is a typical legal, political and economic product of the epoch of imperialism.

Towards the end of the 20th century, colonies constitute the exception amongst the types of dependent territories.

The colony is in principle a territory in which a part of the population – known as colonists – has taken up residence and settled, whereas the larger part of the population has inhabited the territory prior to the colonists' arrival. During the establishment of the colonial status of a territory the native population did not enjoy the right of → self-determination. The colony is an entity which is subject to the → territorial sovereignty of a State and which is a part of that State. The law in the colony is that of the colonizing State; the colony is represented by this State in → international relations. All public undertakings within the colony are imputed to the State which has jurisdiction over the colony. This State is internationally responsible for public undertakings made within the colony and by the colony. The colony serves the economic and political aims of the colonizing State.

The status of a colony is a legal status. The → United Nations Charter presupposes this status. Such status differs from that of a territory under foreign or alien domination. Foreign or alien domination in present international law involves a factual but illegal status which has some resemblance to the status of a colony and is, therefore, considered as a kind of neo-colonialism. In neo-colonialism there are relations of subjection and domination as in a colony, but these are factual situations and not of a legal nature. Neo-colonialism is a political concept; the colony, however, involves a status under international law.

The legal relationship between a colony and the colonial power is not a contractual relationship but a relationship of supremacy and subordination. This kind of relationship is also present when the colony receives more delegated powers or when there is some degree of integration of the colony into the colonial power. In the legal relationship between the colony and the colonial power the latter is a kind of *Oberstaat*; the colony is subordinated but without creating a confederation (→ Confederations and Other Unions of States). However, in cases where the colonial power creates a contractual relationship with the colony by which there exists a further dependence of the latter, this relationship has mostly taken the form of a → protectorate.

The extent of the colony's dependence on the colonizers State has from the point of view of international law only a quantitative rather than a qualitative significance. From the constitutional point of view differentiations based on the extent of such dependence have led to the identification of different colonial structures which today belong to the past. Such structures, in particular within the United Kingdom, have been called colonies, crown colonies and dominions (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories). In France, territories of this nature have been called overseas territories (*territoires d'outre mer*; → France: Overseas and Dependent Territories). In Portugal before 1974 such territories in Africa were called "African territories". In the United States there exist colonial-like territories which are referred to by the United States Constitution as "colonial dependencies" (→ United States: Dependent Territories). In the German Reich up to 1918 colonies were called *Schutzgebiete*.

Colonies have also had designations which indicate certain functions, for instance statal colonies or private colonies. Statal colonies referred to conquest colonies (*Eroberungskolonien*), trade colonies, agricultural colonies, military colonies, and penal settlements (*Strafkolonien*). Private colonies were colonies which were established by private organizations or individuals. An effort typical for the establishment of such colonies was the acquisition of land for the Jewish population in the beginning of the 20th century in → Palestine by the Jewish Agency.

The existence of colonies necessitated the creation of specific administrative organizations in the mother countries. Accordingly, a special office in the Ministry of the Marine was established in France, a Colonial Office in Great Britain, and a *Kolonialamt* in the German Reich. In the colonies themselves different forms of self-administration developed; the most important form of self-administration by the native population was practiced in British territories under the so-called Lugard Rule.

From the point of view of contemporary international law the use of the term "colony" is no longer justified and has, therefore, given way to

the designation "dependent territories" (see *infra*).

2. *The Significance of Colonies*

Besides colonies' strategic significance for the colonial power and their enhancement of the reputation of the colonial power and their rulers, the establishment of colonies has had, in particular, an economic significance as attested by the history of colonialism (see *infra*).

The economic and political importance of colonies for the colonizing State and its relationship with other States, which has been seen in market-labour policy, in commerce and in the production of goods for the colonial power, was analysed in its philosophical dimension by G.F. Hegel in Grundlinien der Philosophie des Rechts (1821).

The Marxist-Leninist Declaration of the Rights of the Operative and Exploited People of July 10, 1918 represents an attack on modern colonialism which foreshadows the modern → human rights perspective. This declaration refers to the free right of self-determination. The latter notion is the theoretical basis for the decolonization process which has been developed in particular through the policies of the → United Nations.

Today the importance of existing colonies (i.e. dependent territories) does not lie in their economic contribution but in the colonizing State's aims and armaments policy. Territories which are still dependent are often used for experiments in the field of new technical weapons.

3. *Historical Development*

The German jurist v. Liszt in 1841 depicted the history of colonies. Colonies have been founded since the time of the ancient civilizations of the Phoenicians, Greeks and Romans. Venice, the Hanse, Portugal and Spain belong to the list of colonizing powers. The British colonial era started in 1591; France has been a colonial power since the 17th century; the German Reich became a colonial power after 1884, Belgium after 1885, Italy after 1885, Japan after 1895 and the United States after 1898.

From a legal and political point of view there are three phases in the historical development of colonies: The phase up to the → Berlin West Africa Conference of 1884/1885, the phase up to the establishment of the → mandate system within the → League of Nations after World War I, and the phase since the entry into force of the UN Charter.

In the first phase the colonization process was marked by the unorganized → conquest of land according to the → power politics of the States. In several early cases, white settlers under colonial status formed a political movement to end such status and achieved the independence of the colonial territories from the colonial powers (e.g. the Declaration of Independence of the United States of America in 1776, and the secession of the Spanish and Portuguese colonies in Latin America from 1810 to 1825). In the early movement toward self-determination the politically highly developed British territories achieved self-government similar to independence. The Berlin Conference of July 13, 1885 started to coordinate the colonial process in Africa. The relevant documents as well as the Acts of the Conference of Brussels on July 2, 1890 contained important human rights provisions for the → indigenous populations.

In the second phase, Art. 119 of the → Versailles Peace Treaty of 1919 withdrew from the German Reich any authority over its colonies; a similar process took place in regard to the Ottoman Empire concerning its territories in North Africa, Asia Minor and the Middle East. A kind of → condominium of the → Great Powers was established over these territories through a series of secret agreements, concluded during World War I between the Allied Powers in regard to the former colonies of the German Reich and the Ottoman Empire. This agreement assumed a legal form in Art. 22 of the Statute of the League of Nations and created the mandate system. Art. 22, para. 1 of the Statute contains the famous provision that it is the sacred task of civilization to look after the welfare and the development of the peoples in these territories. The community of States did not, however, transmit unconditionally responsibility to the mandatory powers. Instead, an attempt was made to establish regular contacts between the mandatory powers and the League of Nations. A certain control over the mandatory powers and the mandated areas was thereby retained.

The mandate system in the period between the world wars may be considered as a compromise between different manifestations of power

politics. The Treaty of London of April 26, 1915, the agreement between Grey and Cambons of May 11, 1916, the agreement between Sykes and Picot, and the Balfour Declaration were specific instruments which governed the system. W. Wilson declared in his message of January 18, 1918 *inter alia* that:

> "A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned, must have equal weight with the equitable claims of the government whose title is to be determined" (Papers relating to the Foreign Relations of the United States, 1918, Supp. 1, Vol. 1 (1933); → Wilson's Fourteen Points).

The problems which arose in the time of the mandates over the former colony of German South-West Africa, today → Namibia, and Palestine continue. The developments under the mandate system may be considered as a first step toward → decolonization.

The third phase of colonialism may be described as that of universal decolonization. The problems of neo-colonialism and of still existing penal settlements does not fall under this decolonization process. The phase of universal decolonization was introduced by Chapter XII of the UN Charter which replaced the mandate system with a trusteeship system (→ United Nations Trusteeship System). Territories under the trusteeship system were intended to develop toward complete independence. On the other hand, so-called → non-self-governing territories are meant under Chapter XI of the UN Charter to develop toward self-government. Despite the presence of two different types of dependent territories within the framework of the Charter, the principle of self-determination has developed into a right of self-determination.

Regardless of the fact that the different provisions of the Charter concerning self-determination and self-government have invited conflicting interpretations, resolutions of the United Nations have indicated complete decolonization as the Charter's goal. The → United Nations General Assembly resolution of December 15, 1960 known as the Resolution on Decolonization (UN GA Res. 1514(XV)) has been referred to by the scholar Gros Espiell as "momentous and historic" and "the Magna Charta of decolonization . . . which marks the beginning of the modern attitude to the subject and . . . the irreversible trend towards full decolonization" (Gros Espiell, p. 8).

On the basis of this resolution the Special Committee of 24 (today 25) was established in 1961. The → United Nations Secretary-General reports regularly on the problems of decolonization to this Committee.

In the third phase of colonism, since 1953, about 90 dependent territories have attained the status of sovereign States. In 1986 about 20 territories which fall under the classical definition of colonies are still considered dependent territories. According to a list prepared by the United Nations, these territories are the following: American Samoa (population 32 000), Anguilla (6 519), Bermuda (54 670), British Virgin Islands (12 034), Cayman Islands (17 035), Cocos (Keeling) Islands (569), → East Timor (550 000), → Falkland Islands (Malvinas) (1 813), → Gibraltar (30 522), Guam (105 816), Montserrat (11 606), Namibia (1 500 000), Pitcairn Island (61), St. Helena (including Ascension and Tristan da Cunha) (5 881), Tokelau (1 554), Trust Territory of the → Pacific Islands (132 988), Turks and Caicos (7 411), U.S. Virgin Islands (95 214), and Western Sahara (73 497). The total population of these territories is about 2 639 190.

From the standpoint of the United Nations the notion of the colony has been replaced by that of the dependent territory. The criteria for identifying dependent territories are contained in the annex to UN GA Res. 742(VIII) of November 27, 1953. These criteria have been supplemented by UN GA Res. 1514(XV) of December 15, 1960.

4. Legal Status

The classical notion of colonies belongs to the past. Only about 20 dependent territories remain in existence. The role of colonial wealth has been replaced by atomic power and the use of high technology. The legal structures of colonies have only historical importance and value. It is therefore not necessary to examine elements of colonial status other than those concerned with the abrogation of such status. In this context there are three relevant parties. The State community as a whole, the former colonial power and the political forces

within the colony. The abrogation of the colonial system has developed in phases: The world community set the ultimate goal in Art. 22 of the Statute of the League of Nations, Chapters XI and XII of the UN Charter and the Decolonization Resolution of the UN General Assembly, through which attempts were made to convince the colonial power to agree upon a mandate or to a trusteeship. Where the colonial power entered into negotiations with the political forces of the colony, a constitutional conference was the most common form of these negotiations. The result of these negotiations was a constitutional agreement in which the colonial power granted the former colony independence. The process has thus been mainly determined by constitutional law and internal politics. Sometimes a → plebiscite followed the agreement of the political parties. This was a main feature of the decolonization process which was experienced by Great Britain (→ Decolonization: British Territories). A similar process took place in regard to the Portuguese African territories (→ Decolonization: Portuguese Territories) involving a recognition procedure within the United Nations as to the independence of the → liberation movements in Angola, Guinea Bissau, Cape Verde Islands and Mozambique. Such recognition amounted in effect to a legitimation of these liberation movements for purposes of their negotiations with the colonial power.

The territories which have been recognized by the United Nations as dependent territories only comprise those territories which were former colonies, thereby excluding those territories which, by a new treaty with the former colonial power, have entered into a new relationship of *de facto* dependency. In considering such new relations, for example in the case of New Caledonia the constitutional law of the countries in question as well as international law are relevant.

The dependent territories have a twofold legal status. The internal one is still the classical status of subordination towards the former colonial power; the external one is based on the law of the United Nations. The UN Charter has established the principle in Chapter XI that the interests of the inhabitants of the relevant territories are paramount and that the responsible States assume a sacred trust for the welfare of the peoples of these territories within the framework of the system established by the Charter to develop and to promote their capacity for self-government. According to the Charter, the political aspirations of these peoples should be respected and they should be assisted in the development of their free political institutions.

In this context, General Assembly Resolution 2621(XXV) of October 12, 1970 should be mentioned. This resolution contains a "Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", a full programme for further and far-reaching decolonization. Besides this resolution, the two clauses about self-determination found in the two UN → Human Rights Covenants contain provisions for self-determination in regard to natural resources (→ Natural Resources, Sovereignty over). These provisions have been further confirmed in UN GA Res. 32/154.

The colonial clauses contained in international treaties in regard to the dependent territories (→ Federal Clause, Colonial Clause) have been superseded by clauses developed under the law of the United Nations and found in multilateral agreements concerning dependent territories. This applies especially with respect to UN human rights instruments.

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COMMONWEALTH *see* British Commonwealth; Inter Se Doctrine

COMPARATIVE LAW AND EUROPEAN LAW

1. Historical Background

States within the geographical region of Europe have throughout their history drawn upon foreign sources in order to develop their own national legal order. Families of law developed especially within the Nordic, Anglo-Saxon and Romanic countries as well as within the German-speaking countries. Thus similarities of legal constructions existed long before a proper European law had developed. Whereas the method of comparative law until the 18th and 19th centuries served to establish the international law of nations amongst European States (→ Comparative Law and International Law), especially after World War II the comparative method became more and more important for the development of European law proper in various institutional contexts outside public international law (→ Comparative Law, Function and Methods).

2. Notion of European Law

European law may be defined as the sum of both institutional and substantive legal norms which have been developed by different groups of European States (→ European Law). These norms are of national origin in regard to the treaties establishing and developing the various European organizations. A strictly European origin can be attributed to those norms which are developed within the established institutional framework of one of these organizations. Such organizations exist – limited to a specific geographical area – between the Nordic States (→ Nordic Council and Nordic Council of Ministers) and between the Benelux States (→ Benelux Economic Union). The twelve States forming the three → European Communities have framed a new legal order affecting most of the economic and social fields of competence of their member States. The → Council of Europe consists of 21 European States. The conventions agreed upon within its institutions thus have the largest scope and can be considered as the most European in character. The → European Convention on Human Rights (1950) has become the nucleus of a common European constitutional law in the field of the protection of → human rights.

In regard to the legal effects of norms of European law, one must distinguish between norms which bind the individual States by their consent given under the rules of public international law and those norms which are of a supranational character as in the case of the European Communities. Thus the law of the European Communities must be applied directly within the member States of the Community and according to uniform standards which are secured by the priority of Community law over national law (→ European Communities: Community Law and Municipal Law).

In general, one may speak of a common European law or even of a European *ordre public*, to the extent that common European legal concepts have been developed in the various institutional contexts and are recognized by all States members to one or more of the aforementioned organizations. A prominent example of where such law comes into question occurs with regard to the search for the content of human rights and especially for the restrictions of those rights which are considered to be necessary in a "democratic society" (e.g. Arts. 8 to 11 of the European Convention on Human Rights).

3. The Functions of Comparative Law concerning the Creation and Application of European Law

Within the various European institutional frameworks, it is the applied comparative method which is of particular interest. For all organizations the respective law of the member States

serves as a source for the drafting of common rules harmonizing or even unifying the different national concepts (→ Unification and Harmonization of Laws). Each organization engages in law-making activities where it becomes evident that the differences between the various laws of the member States negatively affect cooperation within a given area. The comparative method then becomes relevant in the search for common rules which aim to overcome these differences. It is then not the least common denominator which is adopted, but rather a solution which, in the light of the existing differences, is best suited to overcome these differences under a long-term perspective in respect to the given institutional context.

The comparative method is more effectively used in an institutional context involving only a small or limited number of European States and in which each of the member States' national languages is at the same time one of the official languages of the organization. Within the Nordic Council and the Benelux Union the national law of each member State is taken into consideration in the process of developing a common European law. In the European Communities all the member States' national languages are at the same time official languages of the organization. This favours the development of the various rules of Community law against the background of the divergencies between the national legal orders of all member States.

Within the Council of Europe the comparative method is more difficult to apply owing to the large number of member States and the limitation of the official languages to French and English only. Nevertheless, even within the Council of Europe the participating member States have the opportunity to participate in the law-making proceedings in their national languages. It is only at the stage of application and interpretation of adopted rules that the two official languages may have a certain preponderance. Despite such preponderance, the decisions of the → European Commission of Human Rights and the → European Court of Human Rights reflect not only French and English legal concepts, but the common traditions of all the member States of the Council of Europe.

4. Comparative Law within the European Communities

The law of the European Communities may be considered as the core of European law, though limited so far to its 12 member States (1987). As has been pointed out above, Community law comprises common rules in the entire area of economic and social law and is thus particularly suited to use of the comparative method for the proper integration of the member States into the legal order of the Communities. Though the European Communities are developing a new integrated European legal order, this order is by far not yet as complete as the legal orders of the member States. Aside from the specific rules elaborated within the Community context, many gaps exist which must be filled by the institutions called upon to interpret and apply Community law. Often a comparative reference to the laws of the member States can fill these gaps. The comparative method is presently more important and generally respected than in the years immediately following the creation of the Communities in 1951 and 1957. Comparative law is most valuable for the framing of Community law by the Council and the Commission of the European Communities. It is, similarly, an essential tool and source for the → Court of Justice of the European Communities (CJEC), which may not deny justice and thus has a particular responsibility for the filling of gaps and shaping of a coherent legal order.

In the early years of the Communities especially the Court was rather reluctant to adopt a comparative method and to refer to national legal concepts. Above all the Court tried to stress the unique construction of the European Communities by underlining the autonomy and particular authority of the integrated supranational law. This approach, which elucidated the unique and particular character of the process of integration (→ European Integration), certainly helped to establish the new legal order, which is that of the Communities. The approach was first shared by the Commission which also had an interest in underlining the particularities of Community law in relation to public international law.

In this first period the treaties more or less only

had to be applied and barriers to be removed (negative integration). With the expansion of the law of the European Communities since the mid-sixties and the framing of a new legal order through the elaboration of secondary Community law (positive integration), the comparative method has become more and more important for the process of integration. In this context the Commission and the Council have had to base their decisions on comparative legal studies in order to agree on common solutions in the light of the aims of integration. National legislative experts and politicians, participating in the law-making process, commonly refer to their national concepts. The essential task of harmonization of the laws of the member States (Art. 100, Treaty establishing the → European Economic Community) can only be fulfilled on a comparative basis.

A changed legal philosophy seems to have given more weight to the comparative element: the Community at present has developed into a system of intense cooperation with the member States which execute the law of the Community domestically with the tools of their national legal orders. It is thus a condition for the effectiveness of Community law that it anticipates possible difficulties in the member States at the stage of execution and that it contains rules which will be acceptable within all members' national legal orders. The legal cohesion of the process of integration largely depends on the symbiotic interrelationship between the legal order of the Communities and the legal orders of all its member States. Only Community law based on comparative considerations has a good chance of being accepted by the member States as their proper common law.

The framing of Community law in the languages of all member States creates a permanent comparative atmosphere throughout the Community's institutions. Translation of Community law is *per se* often a process of interpretation in terms of national law.

In particular, the jurisprudence of the Court of Justice of the European Communities contains more and more comparative references. The Court does not, except in rare cases, refer to the law of third States or to concepts of general public international law. References to the laws of the member States are clearly predominant. This is especially true for the acknowledgement and reference to → general principles of law which are common to the member States. Thus, the Court has developed the protection of human rights and other general principles of administrative or legislative procedure or substantive law in various fields on the basis of the legal traditions of the member States.

Art. 215 para. 2 of the Treaty establishing the EEC obliges the Community to make good any damage caused by its institutions in the case of non-contractual liability "in accordance with the general principles common to the laws of the Member States" (UNTS, Vol. 298, p. 11). This article only reflects the underlying principle on which the process of integration is based. A particular example in the Community jurisprudence is the case AM & S Europe Limited (Case 155/79, ECR (1982) p. 1575) in which the Court developed a common principle regarding the confidentiality of the correspondence between attorneys and their clients on the basis of extensive comparative analysis. For the CJEC, of course, comparative references are not binding. It is still the Court's primary duty to interpret Community law in the light of the purpose of the treaties and the aims of the Community. Therefore, the "best" solution which may be compatible with the aims and the purposes of the treaties will emerge rather than a solution which may be found appropriate in the majority of the member States or a solution which reflects the least common denominator. Thus the Court does not follow a formal or mechanical comparative approach. However, comparative elements are not only a source of inspiration, but a necessary element in the Court's reasoning. Thus, the Court may even refuse to apply a common principle such as the "principle of necessity" if it appears clear that in the given context a specific Community law expressly excludes use of such a concept (Klöckner-Werke AG, Case 263/82, ECR (1983) p. 4143).

The CJEC is particularly well-situated to use the comparative method. It is composed of judges from all the member States; thus, all the members' legal systems and types of legal reasoning are represented. In its procedures the Commission and in many cases governments of the member

States often take part, referring to concepts of national law. Thus, the CJEC has rightly been referred to as a "working laboratory of comparative law", though in the final texts of its decisions detailed references to the law of the member States are relatively seldom.

5. Evaluation

In the limited regional context of Europe the comparative law method is of growing importance. The more the European States cooperate and become inter-dependant on each other, the more common solutions to commonly experienced problems must be found. The European States increasingly operate through different institutional frameworks which include either a few States only (e.g. Benelux Union) or, as in the case of the Council of Europe, the vast majority of European States. For the European Communities, the comparative method has a particular importance to the aim of integrating the member States. However, with the growing number of member States the actual consideration of the law of all member States has become more and more difficult. Owing to the principle of solidarity and cooperation, which underlies the process of integration, it is possible to speak of a legal obligation of the Communities and the member States to respect and reflect the various legal traditions. A comparative approach is essential for the effective implementation of Community law within the member States and thus for the development of a law which is felt to be a *jus commune* throughout the Community. Basic European traditions are thus commonly expressed in all the institutional organizations and to the largest extent within the law developed and applied by the Council of Europe.

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MEINHARD HILF

COMPARATIVE LAW AND INTERNATIONAL LAW

1. Historical Background

European legal systems, in all probability without exception, were drawing upon foreign legal concepts and rules long before the application of systematic comparative analysis achieved formal recognition as a "scientific method" in legal studies, and the same may be true of non-European legal orders. The law of nations was among the several types of law applied in general or special courts throughout Europe as part of the law of the land; municipal courts had a prominent role in shaping the → law of the sea, → prize law, the law of → neutrality, and the law merchant, among others. Although much remains to be learned about the development of the law of nations in other civilizations, the evidence is strong that Europeans encountered developed concepts of international order when they "discovered" the East Indies, China, Japan, India, and other regions, and that attitudes toward municipal law in those civilizations influenced their ideas about rules of conduct *vis-à-vis* other entities (→ History of the Law of Nations).

The emergence in the latter 19th century of comparative law as a "discipline", or a branch of "legal science", or as an area of systematic study led to concentration upon the comparative description and analysis of past or present municipal legal systems. International law for its part came increasingly to be regarded as a distinct legal system rather than a body of moral maxims, a system of positive rules rather than theoretical admonitions. Although in fact international lawyers often employed the comparative method to considerable advantage in international legal research, the realms of comparative law and of → international law as disciplines increasingly came to be regarded as totally separated from one another. Professor H.C. Gutteridge expressed the predominant philosophy of the inter-war era:

> "... any relationship or kinship between comparative law and the law of nations must ... be of a very shadowy nature, and the only possible link between the two disciplines is to be found in the extent to which the comparative study of private law can be regarded as an instrument to be employed in promoting the growth and development of the law of nations" (Gutteridge, p. 61).

International lawyers, Gutteridge believed, had a framework of reference that disposed them to look for the universality of rules rather than to undertake systematic analysis of differences within national legal orders (cf. → Comparative Law, Functions and Methods). Gutteridge found reinforcement in the utterances of another British international lawyer, of continental origin, Sir Hersch Lauterpacht, who claimed:

> "The fact that the rules of municipal law in one group of states differ from those in another group is on the whole irrelevant for the purposes of international law. International law is not concerned with matters of municipal law; it is concerned with relations between states" (The So-Called Anglo-American and Continental Schools of Thought in International Law, BYIL, Vol. 12 (1931) p. 31, at p. 38). Within international law in the post-World-War-II period, comparative analyses of approaches to international law began to be undertaken on a significant scale, prompted not least by the growing bipolarity of the international legal system and the need to identify and clarify opposed approaches to international law. From the mid-1950s, the attainment of independence by dozens of former colonies and territories enlarged the numbers of equal → subjects of

international law appreciably, which in turn has contributed to the formation or re-emergence of several bloc, cultural, or national approaches to international law (→ Decolonization; → New States and International Law). Greater functional → interdependence in the international community has led to international → unification and harmonization of national law through the medium of international treaties in all branches of international law, ranging from → arms control and → disarmament agreements (requiring harmonization of export control regulations and nuclear safety standards, for example), to environmental and → human rights conventions (requiring minimum acceptable national standards of compliance), to trade and commerce (→ Codification of International Law; → Environment, International Protection). International lawyers accordingly are more aware of the dependence of the international legal system upon national legal systems for the effective implementation of international rules, and this has led to a number of comparative studies of the procedures by which States give effect to international obligations and, in lesser measure, of institutional and normative obstacles to treaty implementation (→ Responsibility of States: General Principles; → International Obligations, Means to Secure Performance).

2. *Modern Perspectives*

In the 1970s international lawyers began to examine more systematically the role of comparison in public international law and the opportunities for its broader application. The general trend toward interdisciplinary studies has facilitated this development. At least two major international bodies, the International Academy of Comparative Law and the International Association of Legal Sciences, have devoted panels or symposia to the subject, as too have several nationally based international law associations. International lawyers of every orientation have acknowledged the value of a comparative approach, albeit for widely different, though not mutually exclusive, objects: for example, the history of international law (G. Schwarzenberger); the law of international organizations (W.L. Gould, R.H. Mankiewicz, N. Valticos); the study of law for policy purposes (M.S. McDougal); the use of comparative law by judicial organs (L. Prott, H. Mosler). In short, all the sundry methodologies employed by international lawyers embrace the comparative method as a necessary element.

3. *Functions and Methods*

The intense preoccupation with the purposes and methods of comparative legal study so characteristic of the traditional approach to comparative law has not been typical of similar deliberations by international lawyers. The latter look upon the comparative method as one analytical tool among many contributing to a more profound understanding of the international legal order and its relationship to other legal systems. Such literature as has addressed itself to the functions and methods of comparative analysis in international law dwells upon the variety of functions comparative analysis may perform. Method is left to the arts and devices of the investigator or subsumed as part of larger methodological considerations.

Among the functions of comparative analysis are:

(a) Analysis of "foreign relations" law, i.e. national legislation, judicial decisions, and State organs whose effect or actions directly engaged the international legal system, contribute to the process of norm-formation in international law, and facilitate or impede the implementation of international law.

(b) Analysis of the effects of international legal acts in municipal legal systems, that is, beyond foreign relations law itself, the actual functioning of the internal legal order in respect of international legal rules, an awareness of what one scholar has called "the substructures and the repercussions of international acts" (C. Kiss; → International Law and Municipal Law).

(c) Analysis of the → sources of international law, that is, an examination of the "general principles of law recognized by civilized nations" referred to in Art. 38(1) of the Statute of the → International Court of Justice (ICJ). Irrespective of what meaning is attached to the phrase, comparative analysis is indispensable for identifying municipal and international legal principles and for approaching the philosophical underpin-

nings of their respective relationship with one another. Beyond the ICJ itself, regional communities endowed with judicial organs and international arbitral tribunals often must have recourse to general principles of municipal law (→ European Communities: Community Law and Municipal Law).

State practice as a reflection of *opinio juris* with respect to international obligations offers evidence of the state of → customary international law and can be evaluated only by use of the comparative method.

(d) Analysis of harmonization and unification of law, that is, an examination of the interactive processes by which these ends are achieved. Rarely indeed is harmonization realized by the concordant enactment of national legislation. Commonly States reach → consensus recorded in an international treaty and then adjust their national legislation to treaty requirements.

(e) Analysis of national, regional, and other approaches to international law, that is, an examination of the substantive positions taken on international law and legal rules by individual States or groups of States and the reasons for them. Examples range from Soviet, Chinese, or → socialist conceptions of international law, Latin American (→ International Law, American), Islamic (→ International Law, Islamic), Buddhist, Hindu, and the like (→ Regional International Law).

(f) Analysis of values, processes and procedures, that is, elements shared by peoples and communities that can facilitate the identification, articulation, or creation of goals and preferences contributing to a democratic world order. An approach closely identified with Harold Lasswell and Myres McDougal, it finds the comparative method an indispensable tool (→ Sociology of International Law).

(g) Analysis of systems and subsystems of international law, past or present, but regarded systemically is particularly helpful in exploring the role of international law historically within different models of international order.

(h) Analysis of the comparative law of international organizations, that is, the structure, functioning, activities, procedures, and internal regulation of intergovernmental organizations with a view to identifying and extricating general principles or even rules. The same may be applied to other entities enjoying some measure of international legal personality.

(i) Application of the learning and lore of traditional comparative law to international law, that is, approaching the international legal system as a legal order to be analysed just as any other legal order within the usual purview of comparative law. This approach in no way rejects the uniqueness of international law, for the exercise is contrastive as well as investigative of shared elements. It emphasizes the municipal legal training and concepts of the role of the international lawyer and practitioner, the roots of the language of international law in all its senses in national terminologies and legal concepts, and the insights into the process of comparison gleaned from more than a century of systematic comparative legal studies that may have application in the relatively recent attention accorded to comparative approaches to international law.

4. Evaluation

The application of the comparative method in international law is one of the most promising methodological and substantive developments in international law of the past decade. Its contribution to teaching and research is likely to expand into areas of practical application, such as judicial or arbitral decision-making, the drafting of international treaties or resolutions of international organizations, and the enactment of foreign affairs legislation. Comparative legal training is becoming as essential for the international lawyer as it is for the European lawyer or others who practice in a transnational legal milieu. While the various orientations in international law applaud the use of the comparative method, all without exception have a great deal more to do by way of development and refinement of the method before it begins to reach its full potential.

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COMPARATIVE LAW, FUNCTION AND METHODS

1. Notion

Comparative law should be understood as the juxtapositioning and relating of entire legal systems or individual parts of them. It includes the delineation of similarities and differences in several legal systems and often also an evaluation of the solutions unearthed. These elements distinguish comparative law from the mere study and description of a foreign legal system, i.e. so-called foreign law studies.

When different legal systems or groups of legal systems are being compared, for example as to method and style, one speaks of macro-comparison. The treatment of individual legal institutions, norms or solutions is called micro-comparison. Sources of law and their relative significance in the various systems may also be the subject of legal comparison. This is characterized as formal comparative law in contrast to dogmatic comparative law which deals with specific legal institutions or problems.

The answer to the much debated issue whether comparative law is an independent discipline or merely a method should be that it is both. The general tenets of comparative law, especially as studies of its history and methods point out, suggest that it is an independent branch of legal science. Nevertheless, comparison of law also, and even primarily, serves as a method of research and exposition in every individual branch of the law.

2. Branches of the Law

The comparison of laws as a method of legal research is basically available and useful in all branches of the law. In the 19th century it played a role mostly in criminal law and to some extent in procedural as well as in patent and copyright law. In this century private law has come to the forefront and the basic methodological issues in comparative law are now usually expounded within the context of private law.

Nevertheless, in this century comparative research has also been broadened considerably in the sphere of public law. Whereas constitutional law was the centre of interest in the past, nowadays emphasis is shifting to the comparative treatment of administrative and social law. From a methodological point of view, comparative research in public law is confronted with many of the same problems as its counterpart in private law, although with certain peculiarities. These peculiarities result from the special characteristics of this branch of the law. Above all emphasis must be placed on the strong influence of politics in this area. Broad spheres of State and administrative law are determined more by the political will than by the nature of the objects concerned. In addition, historical and social conditions are also especially influential here.

Comparative law has a particularly important position in those areas which are by their very nature international, for example in European law (see → Comparative Law and European Law) and in public international law (see → Comparative Law and International Law). The → general principles of law, especially, could not have been discovered without comparative contributions.

3. Forms of Comparative Law

(a) Pure and applied comparative law

In comparative legal studies a distinction is made between pure and applied comparison of law

according to whether academic or practical goals are pursued.

Comparative law originated out of an interest in knowledge for its own sake. In its pure form, it is based on a desire to acquire a knowledge and understanding of more than one's own positive law system and thereby to achieve a more profound insight into the phenomenon of law in general. Even though pure comparative law, just as all pure scientific activity, should be free of notions of usefulness and goal-serving, it produces results. It liberates from the narrow confines of one positive law system through the recognition that other legal possibilities exist and are meaningful. It enhances the understanding of the legal systems compared and of the law as a cultural phenomenon. It may lead to an international dialogue on legal problems, to the abstraction of supranational notions and to the development of common values.

Comparative law has also been proven capable of accomplishing highly practical tasks.

Applied comparative law is directed towards the fulfilment of concrete needs such as the further development of one's own legal system by codification or interpretation, the → unification and harmonization of laws and the improvement of the teaching of law.

(b) Institutional and functional comparative law

Methodologically, institutional or structural comparative law, which starts with certain legal constructs or institutions, can be contrasted with functional comparison, which seeks solutions to specific legal problems.

Many of the problems of social life are essentially the same in every State, but the national legal systems solve these problems in quite different ways, although very often with similar results. Therefore, it is advisable to pose the question to what a comparative study is devoted in functional terms. The problem to be investigated must be formulated free of system-conditioned concepts, of dogmatic patterns of thought and without reference to the technical terminology of one's own legal system. Rules of law which fulfil the same task or function rather than statutory or doctrinal principles should be compared. The justification for this method is especially clear when certain local legal constructs are unknown to the foreign law, although the need for a legal solution is also recognized by such law and fulfilled otherwise. For example, instead of asking, "How does the foreign law treat the distribution of pension rights (*Versorgungsausgleich*) or the compulsory portion (*Pflichtteilsrecht*)?", the comparatist should ask, "How does the foreign law secure the economically weaker spouse in the event of divorce or the closest relatives of the deceased in the event of her or his death?"

(c) Internal, regional or universal comparative law

Depending on the geographical frame of reference, a distinction may be made between internal, regional and universal comparative law.

Internal or intra-state comparative law which is found in States in which different systems of law coexist (legal pluralism) has fewer difficulties to overcome than external comparative law since the different systems operating simultaneously in one State or in a federation are, as a rule, closely related. Many of the great civil law codifications, for example the French Code civil and the German or the Swiss civil code, are based on earlier domestic comparative analyses. In the United States of America the presence of internal or domestic comparative law in the academic curriculum is a necessity, since American common law rather than the law of the individual member states is taught. The Restatements and the uniform laws prepared by the National Conference of Commissioners on Uniform State Laws are products of this internal comparative law.

Regional comparative law is of course external comparative law. It is, however, subject to geographical limitations because of its specific purpose which is usually a regional unification or harmonization of law. This unification or harmonization of laws is usually undertaken by regional organizations such as the → Council of Europe, the → European Economic Community or the → Nordic Council and the comparison concentrates then on the laws of the member States.

Universal comparative law, which in principle encompasses all legal systems in the world, is, owing to the heterogeneity of its objects, the most difficult form of comparative law. In fact, comparative research here is often limited to selected legal systems which are regarded as leading either in general or for the particular problem at hand.

4. *Aims of Applied Comparative Law*

(a) National legislation

Comparative law is employed as an aid to the legislative process in almost all States, be it openly or tacitly. In some areas comparative research has revealed to the legislators internationally recognized leading principles on which they can orient their work. In this way, the enforcement of civil rights in criminal law or decriminalization (the rule of the *ultima ratio*) has become a guiding principle of many national law reform movements.

For ambitious reform projects in criminal law or in private and commercial law as well as in areas with international features, legislators in industrial as well as developing countries employ comparative research in order to take advantage of foreign solutions and experiences and, in this way, improve the quality of the domestic law. Comparative law supplies the legislator with ideas which he may choose or modify; it may also suggest a need for broad whole-sale adoption of a certain legislation (i.e. reception). To be sure, even foreign solutions which have stood the test and are respected as models can be successfully adopted only when they fit into the local political, social and legal situation.

Therefore in public law, comparison can most effectively urge the complete or partial reception of a foreign solution in those areas which are not strongly politically influenced, for example in traffic law or health law. On the other hand, comparative research in highly political areas must be limited as a rule to pointing out foreign solutions and evaluating the experiences with them. The choice, a political decision, must then be left to the authorities entrusted with the task.

(b) Interpretation

In a similar manner as that applicable to legislation, comparative law can be useful for the exposition of national norms and for the guidance of judges by searching out possible foreign model solutions and bringing them into the development of the local law where possible. The special characteristic of legal sources in public law, namely that the general clauses and broad provisions used often allow a certain latitude for action in their application, would itself permit the influence of foreign law even without the intervention of the legislature. On the other hand, the political, historical and social influences on public law are often so strong that it would seem difficult to seek definitive help for its interpretation in foreign laws.

To the extent that a comparative interpretation is useful, the courts and authorities are dependent upon the independent work of legal scholars. National courts and authorities generally have neither the time nor the resources to conduct their own comparative research. Moreover, the administrative courts and authorities are usually less knowledgeable in foreign law than the civil courts, which as a consequence of the rules of → private international law are not infrequently obliged to apply foreign private law directly.

(c) International uniform law

Preparatory comparative legal studies are indispensable for the unification of law. They aid in locating subject-matters amenable to unification and in finding the appropriate substantive solutions for the codification of the uniform law. They facilitate the preparation of drafts of the uniform laws which harmonize with the national legal systems concerned and promote an autonomous choice of notions and proper translation of uniform texts. The application of the codified international uniform law, when this is to be accomplished correctly, is also dependent upon comparative procedures (→ Codification of International Law). The interpretation and supplementation of the codification cannot be accomplished within the context of local law when uniformity is to be retained. Rather, a comparative survey including all those States which participate in the uniform law is necessary. Above all, resort must be had to foreign case-law and theory on the text to be construed and developed, for otherwise the preservation of uniformity will become a matter of chance.

(d) Teaching of law

Comparative law contributes to the improvement of legal education, for it provides liberation from the narrow borders of one legal system and directs the mind towards an abundance of other legal possibilities. It helps students of law to achieve the necessary intellectual distance from their own system, to recognize its conditional

character and to avoid a tendency to idealize it. Comparative law helps considerably to prevent would-be jurists from becoming mere legal technicians for it helps to broaden perspectives, which in a time of increasing internationalization of the law must be one of the goals of legal education.

Because of its significance comparative law should not only be offered in special classes for the interested, but the results of comparative legal research should also be an integral part of the material presented in regular courses dealing with individual branches of national law. Certainly this is a difficult task. The university curricula and courses on legal study tend to emphasize only the value of a knowledge of positive national law. Thus, the rank occupied by comparative law in the university curriculum continues to fall short of its potential importance.

5. Questions of Method

Comparative law does not have a set of fixed rules on method. The choice of method is dependent upon the problem to be solved in a concrete case. There are, of course, certain basic methodological principles and general points of view which arise often, some of which are discussed below.

(a) Sources of law

Sources of law in the comparative sense are in principle everything which affects or shapes the living law in the country in question. Comparatists must view the legal institutions in a foreign country with an open mind, not one blurred by the theory of legal sources prevailing in their own systems. As a rule, the comparatists must take cognizance not only of the literal wording of the foreign laws and regulations but also of the case-law and legal writing, of customary law, of trade usages and customs, of standard form clauses and, in general, of all conditions which serve to mould the law in the country in question, giving each factor the relative rank accorded to it in the respective country. For example, in common law systems case-law enjoys a higher, and statutory law a lower, status as a source of law than on the continent of Europe. Therefore, a comparative study of English and American law must have at the forefront a thorough analysis of the case-law in these countries.

In public law especially, where the written law is often fragmentary and case-law for the most part continues to be rudimentary, sources which are otherwise merely subsidiary gain in importance: In addition to the legal literature recourse must be had, above all, to the legal content of administrative practice.

Sometimes extra-legal elements must be included in the analysis. For example, the hierarchical structure of the apparatus of State authority is as a rule determined also by extra-legal factors so that a comparative study in organizational, constitutional and administrative law must, in addition to determining the formal rules of law, reach out as a matter of course to encompass social, historical and political factors.

(b) Sociological methods in comparative law

The relationship between comparative law and legal sociology has enjoyed increasing attention in the last decades (cf. also → Sociology of International Law). In fact the methods of these two disciplines do coincide somewhat. A sociological dimension to comparative law can be seen in the expansive concept of sources of law, which, as described earlier, is fundamental to comparative law. In keeping with this, the "living law" rather than the written law must be explored. For example, the results of a comparative study on → human rights in the Federal Republic of Germany and in the German Democratic Republic which failed to take into consideration their actual efficacy would be of little significance.

Sociology is becoming increasingly important because present day comparatists are no longer content to limit themselves to ascertaining and describing the resemblances and divergencies in the living law of different legal systems, but seek rather to explore and explain the origins and effects of these differences. In accomplishing this, comparative law aims to take into account the socio-cultural context of the legal rules being examined, thereby establishing a direct connection to legal sociology.

(c) Families of law

One organizational task of comparative law is the classification of the legal systems of the world into legal families in order to make the field manageable. For example, the Romanic, Ger-

manic, Anglo-American and Socialist law families, as well as the group of religious laws, are differentiated.

Such groupings are of course always subject to doubts and reservations. Even the question of which criteria should determine the division is controversial. Some authors rely on a single element, while, for example, Zweigert and Kötz consider the following five features of a legal system: (i) its historical background and development; (ii) its predominant and characteristic mode of thought; (iii) especially distinctive institutions; (iv) the kind of legal sources it acknowledges and the way it handles them; and (v) its ideology.

Surely none of the possible groupings can claim universal validity. One can, depending upon the goals pursued, either expand them (e.g. create a Romano-Germanic family as opposed to the common law family) or refine them (e.g. by splitting the Germanic laws into a German and a Scandinavian family). In the final analysis the choice of criteria and the propriety of a division are determined by the ends to be achieved by the division.

It should be noted that the concept of legal families has mostly been developed within the private law context. Accordingly, it is reliable only in the private law sphere, while in other branches of the law different groupings may be preferable. For example, whereas in the field of private law German law would certainly not belong to the same family as English and American law, it is conceivable that in constitutional law a criterion such as the existence of constitutional jurisdiction would be accorded such significance that the United States and the Federal Republic would belong to one and the same group, and England to another.

(d) Choice of the laws to be compared

The choice of the laws to be compared depends on the goal of the comparative study. For example, when the law of a group of States in a certain field is to be unified, primarily the legal rules currently in effect in these States must be compared.

When the various solutions in effect in a particular field of law are to be determined without geographic limitations, then, in principle, all legal systems in the world should be scrutinized for original responses. Yet these lengthy and difficult paths can be pursued only by large comparative law projects. As a rule the comparatist is condemned to the expediency of using selected legal systems representative of the legal families, even though there can be no guarantee that precisely in these particular systems the principles at issue have achieved their most characteristic form. Indeed the subject-matter of the research itself might at some point demand an expansion to other legal systems or a contraction; in the final analysis the criteria for choice must always be the quantity and quality of the probable fruits of the research.

For the comparison of highly political institutions, particularly in public law and in constitutional law, legal systems which have similar basic structures should be selected. For example, a detailed study comparing the legislative rules in a Western democracy having a multi-party system with those of the legislature of a one-party people's democracy would probably not be particularly productive.

(e) Comparison of systems

The question whether the Socialist legal systems can be compared with those of the Western world is sometimes answered in the negative due to the differences in the underlying social and economic structures of the countries concerned. However, dissimilar legal systems defy comparison, perhaps as a consequence of their different social and economic orders, only to the extent that no similar needs for regulation arise. Accordingly, in assessing the possibilities for successful comparative studies between Socialist and Western systems, one must distinguish between system-conditioned and system-neutral legal institutions. In the case of the latter, meaningful comparative analysis is quite possible and has proven to be fruitful with respect to family law and, with some qualifications, criminal and procedural law.

On the other hand, areas of public law such as administrative law and the law of State organizations are so singular in Socialist systems that functionally related and therefore comparable counterparts are hardly to be found in the Western world. Here one reaches the outer limits of comparison between systems.

(f) Evaluation

The most difficult and from a methodological perspective perhaps the least secure part of a comparative study is the critical assessment of the different solutions offered by the systems compared. Nevertheless, as a rule this assessment may not be omitted, especially as lawyers outside the area of comparative law are also accustomed to making value judgments without the aid of an assured methodological canon. Mere enumeration and juxtapositioning of different models without critical evaluation appears unsatisfactory in most cases. Certainly, whether an evaluation is necessary and how it should be accomplished is in the final analysis dependent upon the concrete task undertaken in the research.

Often a comparatist will attempt to demonstrate by rational arguments the superiority either of one of the solutions found or of a new solution derived from a combination of the principles discovered. Usually this is easier for comparative private law studies than for public law studies: In constitutional law and in large areas of administrative law experience has shown that historical tradition, social conditioning and political motives tend to obstruct rational comparative considerations.

In sum, the evaluation which is expected from a comparative study must by no means always be a delineation of the "best" solution. Rather, such a conclusion may be regarded as a policy decision which must be left to the appropriate decision-making organs, namely the legislature. Comparative evaluation can, in such a situation, be limited to enumerating the advantages and disadvantages of the different solutions to the problem under consideration.

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JAN KROPHOLLER

CONDOMINIUM

The emergence of condominium as a term of international law has largely been the result of Roman and civil law influences. A series of condominia created in the old German Reich to satisfy the requirements of feudal and inheritance law were in the main dissolved during the 19th century, e.g. Prussia and Lippe's common suzerainty (→ Sovereignty) over the city of Lippstadt, the condominium between Hesse and Baden over Kürndorf and finally the *Kommunion* of Unterharz, which was brought to an end by the Treaty of March 9, 1874 between Prussia and Brunswick (Martens NRG2, Vol. 1, p. 277).

According to Verdross, → Andorra constitutes a "feudal residuum", on the grounds that since 1278 it has been under the common suzerainty of the Spanish Bishop of Urgel and the French Count of Foix (then from 1589, the French Crown, later the President of the Republic). The French courts treat Andorra as a condominium between France and Spain.

One of the better known examples was the condominium between Prussia and Austria over Schleswig-Holstein and Lauenburg which was called into being after the Peace of Vienna on October 30, 1864 (Martens NRG, Vol. 17 II, pp. 470 and 474). The King of Denmark refrained from exercising all sovereign rights over the territories in question. The Gastein Convention of August 14, 1865 (Martens NRG, Vol. 18, p. 2) regulated relations so that sovereign rights over Schleswig were exercised by Prussia and those over Holstein by Austria. Lauenburg was ceded to Prussia on payment of compensation (→ Territory, Acquisition). Under the Preliminary Peace of Nikolsburg (Martens NRG, Vol. 18, p. 316) and Art. 5 of the Prague Peace Treaty of August 23, 1866 (Martens NRG, Vol. 18, p. 344), the Austrian Kaiser ceded his rights over Schleswig-Holstein to Prussia, thereby bringing the condominium to an end.

In Switzerland, the so-called common domains (*gemeine Herrschaften*) were a distinct feature of the old Confederacy arising out of the Swiss Confederation's policy of → conquest during the 15th century.

Ambiguities in the Border Treaty of June 26, 1816 (Martens NR, Vol. 7, p. 24) led to the creation of a condominium between Prussia and Belgium over Moresnet, which was only dissolved in 1920 (see Art. 32 of the Treaty of Versailles, CTS, Vol. 225, p. 188).

It is, however, doubtful whether a condominium existed between France and Switzerland over the Dappes Valley between 1815 and 1862.

Questions also surround the relations between Austria-Hungary and Turkey in respect of the territory of Bosnia-Herzegovina from 1879 to 1908. By the Treaty of April 21, 1879 (Martens NRG2, Vol. 4, p. 422), Turkey accepted the exercise of certain Austro-Hungarian jurisdictional rights over the territory whilst reserving Turkish sovereignty. Attempts have been made to characterize the situation as an "unequal condominium". The matter has also been seen in terms of a disguised form of territorial acquisition or as a veiled cession. After their → annexation in 1908, Bosnia and Herzegovina were governed as Austro-Hungarian territorial communities.

Also of importance is the former colonial condominium between France and Great Britain over the → New Hebrides (now Vanuatu; → Colonies and Colonial Régime), which was based upon the Treaty of October 20, 1906 (Martens NRG3, Vol. 1, p. 523) and the Protocol of August 6, 1914 (LNTS, Vol. 10, p. 333). The historical background to the arrangement goes back even further. In the Declaration of June 19, 1847, acknowledging the independence of the islands leeward of Tahiti (Martens NRG, Vol. 10, p. 598), the parties in Art. 2 undertook "[n]ever to take possession of the said islands, nor of any one or more of them . . . ."

From this prohibition of annexation, which removed the islands from the unilateral reach of either of the Powers, a common sovereignty arose gradually. The first stage in the process was the Treaty of November 16, 1887 (Martens NRG2,

Vol. 16, p. 820) which led to the establishment of a naval commission. Finally, the 1906 Treaty laid down *un régime commun* to guarantee the exercise of French and British sovereign rights. Although the French and British inhabitants were subjects of their own countries only, citizens of third countries had an → option of nationality. Native-born islanders, on the other hand, were subjects of the common régime exercised by two high commissioners.

A further condominium of historical importance is the relationship between Great Britain and Egypt with regard to the Sudan. The basis for the arrangement was the Agreement of January 19, 1899 (CTS, Vol. 187, p. 155) on the one hand and the joint pacification campaign and annexation on the other. Whether the 1899 Agreement was binding became a matter of controversy since Egypt, as a dependent State of Turkey, was not entitled to enter into such an agreement (→ Protectorates). The kind of common sovereignty exercised over the Sudan was described in various ways: some saw Great Britain exercising sovereign rights on Egypt's behalf, others saw the countries acting in common. By the Treaty of February 12, 1953 (UNTS, Vol. 161, p. 157) between Great Britain and Egypt, the condominium was lifted to the extent that it was left to the Sudan to choose between full independence and further association with Egypt.

After World War I, a large number of condominia arose as temporary arrangements or measures of last resort (→ Peace Treaties after World War I). Thus, by Art. X(b) of the Bucharest Peace Treaty of May 7, 1918 (CTS, Vol. 223, p. 241), a condominium administered by the Central Powers was set up for northern Dobruja. On the basis of the → Versailles Peace Treaty of June 28, 1919, an Allied condominium was established for the territory of Memel (until the transfer of sovereignty to Lithuania under the Memel Agreement of May 8, 1924, LNTS, Vol. 29, p. 86; → Baltic States) and for → Danzig (Art. 100; see also → Free Cities). Further of note were the Allied condominia established over eastern Galicia (Art. 91 of the → Saint-Germain Peace Treaty (1919)), over Fiume (Arts. 53 and 74 of the → Trianon Peace Treaty (1920)) and over western Thrace (Art. 48 of the → Neuilly Peace Treaty (1919)).

To this day, the division of sovereignty over → Lake Constance remains a matter of controversy. The official Austrian view is that a condominium exists between the three riparian States over a part of the waters forming the boundary (the so-called "Obersee") up to a zone near the shore (→ Boundaries). Switzerland disputes the view – as does nearly all of the recent writing on the subject – and instead argues in favour of a genuine division of the waters.

In an age when the idea of sovereignty is uppermost, the concept of the condominium is unlikely to attain greater importance since, within the dogma of sovereignty, the notion of an association of sovereignties over a single territory is incompatible with the idea of a territory subject to a community of States. In these terms, condominia appear as historical relics from the age of feudal and patrimonial States or as patently inadequate anomalies. However, even during the 20th century, when the dogma of sovereignty gradually grew less rigourous, the condominium did not establish itself as anything greater than an emergency or temporary solution or a measure of last resort. The condominia established after World War I testify to the point. Because of this, it is not now, nor has it ever been possible, to derive specific general rules from the existence of individual condominia, which might together make up an institute of international law. The special character of each individual case prevents any such attempt.

It is nevertheless possible to identify at least a number of basic notions. The condominium is an association of States in the widest sense. The existence of a condominium rests upon a title in international law pursuant to which a number of States are vested with sovereignty. Yet there are two factors which must be distinguished. The first is the legal title which binds the relevant States together in such a way that their sovereignty over a territory appears as a common sovereignty; the second is the title at the time when this common territorial sovereignty is acquired. Thus when J.L. Kunz writes in terms of an Austro-Hungarian condominium over Bosnia-Herzegovina from 1908 to 1918, the title effecting the association is the Union between Austria and Hungary whereas the title vesting common territorial sovereignty in the States arises out of the annexation of the territory

in question. The decisive element is that common territorial sovereignty is integral to the notion of a condominium.

The absence of this element in particular characterizes associations of States formed to exploit areas in common, e.g. the so-called fishery condominium operating in Lake Constance or the common exploitation of minerals under the Ems-Dollart Treaty of 1960/1962 (→ Ems-Dollart).

A condominium over a territory subject to the sovereignty of a third State is equally difficult to square with the notion itself. An unequal condominium is a contradiction in terms.

There are two approaches in deciding which of the parties is entitled to exercise power in a condominium. It is possible to talk in terms of the "division" of condominial powers or simply to note that the powers are vested collectively in the parties concerned, irrespective of whether there are common or parallel organs or whether the administration of parts of the territory are divided between one or other of the parties. The first approach is adopted by Oppenheim/Lauterpacht; the second, which is to be preferred, is advanced in particular by Verdross and Kunz. The responsibilities which flow from condominial power are segregable, but the power itself is not. The norms under which a condominium is organized and governed do not arise out of the legal order of one or the other of the States concerned, but rather rest upon the norms of international law which themselves underpin the existence of the condominium (for another view see P. Guggenheim, Lehrbuch des Völkerrechts (1948), Vol. 1, p. 397). No particular conclusions for the inhabitants may be drawn from the nature of the condominium in itself (→ Nationality). It is also not possible to assert that a new → subject of international law arises with the establishment of a condominium. This determination will depend not only on each individual case and how it is regulated, but also on the assumption that the list of subjects of international law is not exclusively confined to States.

The notion of the condominium played a part in discussions on Germany's legal status after World War II (→ Germany, Legal Status after World War II). It is doubtful whether the régime set up under the Allied Control Council could be described as a condominium as the latter can only be established on stateless territory. The Control Council can only be characterized as a condominium using the assumption (to which only a minority suscribes) that Germany was extinguished (→ States, Extinction) and became stateless territory (see R. Stödter, Deutschlands Rechtslage (1948) p. 69); it is best described as a *coimperium*.

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CONFEDERATIONS AND OTHER UNIONS OF STATES

1. Notion

Theoretically and logically the world community as a whole (today composed of about 170 sovereign States) can be considered as a confederation, that is, an association of States. This conclusion has previously been expressed by one of the first scholars to study the system of federations and confederations thoroughly (see G. Jellinek). Trade union confederations cannot be considered associations of States; their structure is not analysed in this context. The expression confederation is used here as a term of international and constitutional law.

The world community is a complex of juridical relations, created and recognized by sovereign States. The → State is also the basis of any confederation in the sense used here. In the above-mentioned complex the State should be considered a simple international person. As the bearer of → territorial sovereignty the State remains the primary independent subject of international law. Because the treaty is still the main instrument for governing the → international relations of sovereign States, it is obvious that any new form of a confederation must be based on an international treaty.

Since the 19th century the development of the world community and of international relations in particular shows that purposes of sovereign States may be fulfilled in a decentralized manner. The entities which States have created to achieve their common goals are composite international persons with limited competences dependent on the will of States, i.e. dependent → subjects of international law. Such entities are called → alliances, administrative unions, real unions, confederations in the narrow sense of the word (*Staatenbund*, associations of States) or, today, → international organizations. All of these bodies fall within the meaning of the term "confederation".

Confederations have legal personality and capacity only to the extent that the treaty which establishes them attributes such personality to them. Confederations do not possess legal personality *per se*, because they are inherently dependent personalities and entities. The absence of legal personality holds true, for instance, for confederations in the form of alliances.

It is justifiable to distinguish between confederations in the broad sense and confederations in the narrow sense. The latter may be called associations of States.

A confederation in the wider sense may consist of an international relationship in which two States expressly agree that one of them shall enter into a particular relationship of dependence on the other (→ protectorates) or in which factual dependence is accepted (*Vasallenstaat*). Former international legal doctrine considered States under permanent neutrality such as Switzerland, Luxembourg, Belgium, etc., whose status had been guaranteed by the world community, as being non-organized confederations (→ Permanent Neutrality of States). The → British Commonwealth of Nations can also be considered as a confederation in the wider sense.

In all the above-mentioned cases the → sovereignty of States which constitute the confederation, a composite international person, remains untouched.

To the confederation in the wider sense also belongs the federation (→ Federal States; *Bundesstaat*). A federation is a single sovereign State whose decentralization and internal structure depend solely on internal constitutional law. It is this constitutional order which also determines how far a federation and its member states (*Gliedstaaten*) may concern themselves with international matters.

Colonies (→ Colonies and Colonial Régime), dominions, mandate territories (→ Mandates) and trusteeship territories (→ United Nations Trusteeship System) are dependent on a State or an international organization to such a degree that their lack of sovereignty precludes designating them as confederations. The so-called "homelands" also cannot be considered as forming a confederation within the framework of the Republic of South Africa (→ South African Bantustan Policy).

The development of the international community and international relations in particular in the second half of the 20th century has led to new forms of confederations. These entities also involve new characteristics such as supranationality (→ Supranational Organizations), majority-rule, self-executing decisions of international organs within national jurisdiction, and regionalism.

Therefore it is necessary to distinguish between confederations of the classical type (administrative unions, States in real unions and alliances) and confederations of the modern type (associations of States and international organizations). The so-called personal union does not fall under the category of confederations because such unions have always come about accidentally through the person of a monarch.

Since sovereignty remains the decisive criterion for the existence of a State in the world community, regardless of the decline of absolute sovereignty, sovereignty of the member States must still also be considered as the main criterion for a confederation. A confederation, therefore, cannot have

sovereignty but may demonstrate supranationality.

2. *Survey of the Legal Doctrine*

The legal doctrine as to confederations is uncertain in regard to its object. It is the dynamic practice of → international relations which influences that doctrine. Therefore the doctrine of the 19th century is not necessarily valid for the development of confederations in the 20th century; however some former principles still apply.

The development of legal doctrine concerning confederations may be divided into several phases: the era of imperialism, technical development and cooperation between States (19th to 20th century), the era of → hegemony in international relations (first half of the 20th century) and the era of international cooperation after 1945, as divided regionally and ideologically.

G. Jellinek distinguished early between confederations as international persons and non-persons and between organized and non-organized federations. But particularly the development of confederations in Europe after the Second World War has led to the identification of new characteristics. I. Seidl-Hohenveldern has orientated his analysis of confederations mainly towards the new international organizations. Rather than upholding the former doctrinal emphasis on sovereignty as a decisive character of States and confederations, he introduces the feature of equality and inequality.

3. *Modern Classifications of Confederations*

It is necessary to adapt legal doctrine to the dynamism of confederations in the modern world community. The following types of confederations presently exist: administrative unions, alliances particularly for the purpose of common defence, and international organizations based either on unanimous or majority rule in regard to political matters. The last-mentioned may also be categorized according to their competences and regional scope: There are international organizations with universal character and global competences and there are international organizations with a regional character and limited competences.

(a) Administrative union

Administrative unions (*des Unions internationales*, *Internationale Verwaltungsvereine*) are confederations of States based on a treaty, equipped with separate organs, and having competence to decide on matters of jurisdiction (→ International Administrative Unions). Their competence is limited to the specific purpose of the union. Administrative unions have developed since the last century.

Such unions have been created particularly for the common administration of rivers. As early as the Acts of the → Vienna Congress of 1815, *un accord commun* was foreseen concerning navigation. There have been different provisions and treaties as to the Po, Prut and → Danube rivers. The → Versailles Peace Treaty (1919) established a Central Commission for the → Rhine river and similar commissions for other rivers in central Europe (Commission d'Elbe, Commission d'Oder).

Other administrative unions include for instance the International Telegraph Union (established 1865, which became the → International Telecommunication Union), the → Universal Postal Union (1874), the Universal Meter Commission (1874), the → World Meteorological Organization (1873), international trade organizations such as the → General Agreement on Tariffs and Trade (1947), the → International Monetary Fund (1944), the → International Civil Aviation Organization (1944), the Inter-governmental Maritime Consultative Organization (1958; → International Maritime Organization), and the → International Atomic Energy Agency (1956). These organizations have various types of organs such as a secretariat, a State conference, a commission or a council as governing bodies. The modern characteristic of these confederations is their threefold organization: assembly, council and secretariat. The modern world community is dominated by a coordinated system of such confederations which in fact have created an international world-wide administrative organization in the fields of traffic, health and technical matters. The → United Nations Specialized Agencies are specific forms of such administrative unions.

(b) Alliance

Alliances "in the strict sense of the term are treaties of union between two or more States, mainly for the purpose of defending each other against an attack in war, or of jointly attacking

third States, or for both purposes" (L. Oppenheim, International Law, Vol. 1 (8th ed. by H. Lauterpacht, 1955) p. 959). Alliances can be concluded by fully sovereign States only. A "neutralised State can conclude an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality" (ibid., p. 961). This is relevant in regard to the permanently neutral European States, Austria, Switzerland and Sweden. The → United Nations Charter expressly allows for alliances under Art. 52. There are presently various alliances of the kind envisaged by this article: the Pan American Union (1947), the Brussels Treaty of Economic, Social and Cultural Collaboration and Collective Self Defence (1948) (→ Western European Union), the → North Atlantic Treaty Organization (1949), the → Warsaw Treaty Organization (1955), the European Conference for Security and Cooperation (1975) (→ Helsinki Conference and Final Act on Security and Cooperation in Europe). Such alliances do not create necessarily new subjects under international law. Alliances may have separate organs for consultation and collaboration.

(c) International organizations

International organizations may be considered as confederations and as composite international persons. The doctrinal question is whether they are to be considered as a *Staatenbund* or whether they are entities of a *sui generis* nature. If one takes G. Jellinek's approach to the *Staatenbund*, which may also be called an "association of States" (Oppenheim/ Lauterpacht), it becomes clear that the so-called international organizations do fall under the concept of the classical *Staatenbund*. International organizations like the United Nations or the → European Communities are based on international treaties which have the purpose of achieving common results on matters of common concern to all member States forming the association. Such associations recognize the sovereignty of its members in principle. The treaties on which they are based create specific organs and a specific bureaucracy for the better fulfilment of the tasks of the association.

All these characteristics of a confederation (*Staatenbund*) have already been considered by G. Jellinek and are still relevant for modern international organizations. Where other forms of cooperation are established within an association, for instance independent organs, a majority-rule binding upon State members, the principle that decisions are binding upon individuals residing in the territory of the State members, these forms are modifications of the sovereign power of the member States of the organization. These specific organizational characteristics depend on the sovereign will of the member States when creating and entering the association. The only real difference between a confederation of the classical type and the modern international organization concerns the question of the right to withdrawal. If the right to withdrawal is expressly excluded in the constitution of the confederation, the confederation might change its character. However, G. Jellinek clarified the point that even if a confederation is concluded "eternally", it cannot be contested that a composite international person is liable to dissolution by a common agreement of all its members. Therefore the acceptance or rejection of a right to withdraw does not change the character of a community of States as a confederation or an association.

(d) Real union

A real union is a specific form of association of States (*Staatenbund*). It exists if two or more independent and sovereign States are united in the same physical person (monarch), who is mandated to exercise the sovereign power of such States, although the real union extends the common exercise of powers also to other functions. At present there are no real unions. The most famous historical example is Austria – Hungary from 1867 to 1918.

(e) Additional classifications

There are differences in degree between the various confederations with regard to decision-making procedure; for example there are alliances and international organizations which function on the basis of unanimous rule, whereas other international organizations make use of majority rule. Another differentiation lies in the realm of competences. Wengler distinguishes between international organizations of a global nature and international organizations of a limited nature; a differentiation as to the regional extent of jurisdiction is also possible.

International organizations governed by unanimous rule – i.e. organizations in which decisions of a binding character must be taken unanimously and the principle of decision by majority rule is the exception – are characterized by a global competence, by specific organs, such as assemblies, councils, tribunals, and their own bureaucracy, and by regional differentiations. The → League of Nations, the → United Nations, the → Council of Europe, the → Organization of American States (OAS), the → Organization of African Unity, and the Organization of the Islamic Conference, are associations of this kind.

These latter international organizations have contributed to the creation of so-called specialized agencies. These agencies are, on the one hand, decentralized entities of their respective international organization (of the United Nations in particular) and, on the other hand, administrative unions. They possess all the characteristics of confederations. Among the specialized agencies are in particular administrative unions which came into existence well before the creation of the United Nations but have now been organized within the UN family: the → World Health Organization (WHO), the → United Nations Educational, Scientific and Cultural Organization (UNESCO), the → Food and Agriculture Organization of the United Nations (FAO), the → International Labour Organisation (ILO), and the → United Nations Industrial Development Organization (UNIDO). All these specialized agencies have a similar organizational structure and their own constitution; they also have limited juridical personality.

Some confederations, in particular the United Nations, the Council of Europe and the OAS have organized sub-confederations for promoting and protecting → human rights. The International Covenant on Civil and Political Rights (→ Human Rights Covenants), the → American Convention on Human Rights and the → European Convention on Human Rights (1950) are examples of instruments which have allowed for the creation of such sub-confederations. The members of the parent confederation such as the United Nations, the OAS and the Council of Europe are not automatically members of the said human rights instruments. A separate adherence instrument is necessary for becoming a party to these instruments. Those States which became parties to these instruments thereby form specific confederations for collective responsibility for human rights. Although these confederations possess specific organs, e.g. the UN Committee on Human Rights, the European Commission of Human Rights and Court of Human Rights, the administrative work of these organizations is concentrated within the parent confederations. A particularity consists in the conditions for withdrawal from the European Convention on Human Rights. When membership in the parent confederation (i.e. the Council of Europe) terminates for one reason or the other, membership in the European Convention terminates as well, but not vice versa.

International organizations governed by majority rule are organizations in which decisions of a binding character may be taken even over the objection of a member State, especially the so-called supranational organizations. Their treaties, for example the Treaty of April 18, 1951 (UNTS, Vol. 261, p. 140) establishing the → European Coal and Steel Community, the Treaty of March 25, 1957 (UNTS, Vol. 298, p. 11) establishing the → European Economic Community and the Treaty of the same day (UNTS, Vol. 295, p. 259) founding the → European Atomic Energy Community, created confederations or associations of States which have elements of a federal nature. These treaties established four organs: a High Authority, now Commission, a Parliament, a Council of Ministers and a Court of Justice. Decisions of the Council of Ministers, of the Commission and of the Court have binding character upon the citizens, the individual enterprises and the member States within the territories of the parties to the treaty. Thus, the community exercises some of the powers normally invested in a federal State within a limited field. However, the member States still retain their sovereignty to a considerable extent.

Federations also exist in the communist world in Europe. These federations resemble classical alliances characterized by hegemony, but are grounded in Marxism-Leninism.

4. Conclusion

A confederation is an association of two or more sovereign States in which the sovereignty of the

members is upheld. A confederation has purposes common to the member States. The constitutional act of a confederation (treaty) determines whether it possesses an international personality or not. A confederation which possesses international juridical personality constitutes at the same time a composite international person. But no confederation has an international personality equivalent to that of a State.

There are different forms of confederations. The differences depend on the functions and the extent of the organizations' competences. The least organized form of confederation is a simple alliance; the most organized form of contemporary confederation is the international organization. However distinctions may also be made amongst international organizations, which may be categorized as follows: international organizations with a universal character, international organizations with a regional character, international organizations with extensive jurisdiction and with limited jurisdiction, and international organizations with limited elements of a supranational character which tend to concur with the sovereignty of member States.

International organizations with supranational powers have elements of a federal State.

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CONFLICT OF LAWS *see* Private International Law

CONTINUITY

1. Notion

A major change in State territory or in form of → government gives rise to the question whether the State concerned retains its identity in international law. According to the principle of continuity upheavals or revolutions within a State, changes in its form of government or in the extent of its territory, and measures taken during a military occupation do not affect the existence of the → State as a → subject of international law and therefore do not lead, in principle, to its extinction (→ States, Extinction). The great practical importance of these customary rules is demonstrated by the problems of → State succession, especially in the field of treaties (→ Vienna Convention on Succession of States in Respect of Treaties). Extinction of a State means loss of a treaty party and entails considerable legal and financial consequences. As the law of State succession is not yet completely developed and does not accept any "automatic" universal succession, international law has to ensure the legal duration of rights and obligations of existing subjects of international law. Another difficulty arises from the fact that the final extinction of a State cannot be determined before the lapse of a certain period of uncertainty about the date of succession, extinction being more often than not a process rather than a single event. Special practical questions also arise in the case of "resurrected" States which had disappeared for a number of years or which had endured a period of dependence or foreign occupation. The legally uninterrupted existence of the State personality is the key not only to State succession (Hall) but also to State continuity (or identity), even if these two notions are mutually exclusive. In quite another context the notion of continuity does not refer to the identity of a State as a whole, but only to the existence of certain rights and obligations which may survive in spite of serious State crises such as → armed conflicts. In those cases continuity may be assured pursuant to the rules of State succession by devolution agreement or by unilateral confirmation. The principle of continuity in this sense is part of the State succession debate and can be regarded as being contrary to the clean-slate doctrine. Particular questions arise concerning the continuity of international organizations (→ International Organizations, Succession).

2. Historical Background and State Practice

Continuity as a concept of international law arose during the 19th century in connection with

belligerent actions and the birth of nation-States in Europe (→ History of the Law of Nations). The formation of Italy (1860–1870) and of other European States like the German Reich (1871) can be noted as examples which gave rise to an intensified discussion of the continuity concept in constitutional and international law. Frequent territorial changes and internal revolutions posed different continuity problems. After World War I new questions of continuity resulted from the dissolution of the Austrian and Ottoman Empires. The great practical importance of the distinction between "old" and "new" States became evident when → Austria objected to being regarded as identical with the former Austrian Empire, thereby intending to avoid → reparations. The Soviet Union refused to accept the international financial obligations of Tsarist Russia on the grounds of being a new State after the socialist revolution. Following World War II the number of unresolved continuity problems (e.g. Albania, Ethiopia) increased in view of the re-establishment of States such as Czechoslovakia and Austria, and the division of others such as Germany, → Vietnam and → Korea (→ Divided States). The process of → decolonization added a new dimension to succession and continuity cases (→ Colonies and Colonial Régime), especially with respect to the → British Commonwealth of Nations (e.g. Burma, India and Ceylon). In most of these cases State practice, through → diplomacy and a case-by-case method, achieved pragmatic solutions.

Notwithstanding the historical differences between the various cases, one of the basic rules of State continuity was postulated already in the 19th century in the London Protocol of February 19, 1831. It stated "D'après ce principe . . . les Traités ne perdent pas leur puissance, quels que soient les changemens qui interviennent dans l'organisation intérieure des peuples" (Martens NR, Vol. 10, 197). This formula correctly described and laid down the trend in State practice, although the arguments in support of the rule varied from case to case. The principle under international law of the continued existence of a State regardless of internal crises increasingly gained ground, leading to the assumption of State continuity even in times of a mere *de facto* régime. The award made by Taft in the → Tinoco Concessions Arbitration of October 10, 1923 (AJIL, Vol. 18 (1923) p. 247) therefore was based on established State practice.

3. *Particular Rules of State Continuity*

(*a*) Coup d'état *and revolution*

The State as a subject of international law generally remains unimpaired by amendments of the constitutional order, even in extreme cases of national upheavals. This independence of the State from internal social and political changes renders international intercourse more reliable and predictable. However, after World War I → socialist conceptions of international law favoured discontinuity, ascribing a special character to the socialist revolution. Considering the structure of international law and its need for formal criteria, these efforts towards a political and ideological understanding of continuity could not succeed.

(*b*) *Changes of territory*

Similarly uncontested in principle is the rule that alterations of territory as such do not affect the identity of a State. Early attempts to codify the law of treaties therefore could proceed from the assumption of general consensus on this point, as is demonstrated by Art. 26 of the Harvard Research Draft Convention on the Law of Treaties of 1935 (AJIL, Vol. 29 (1935) Suppl., p. 655; → Codification of International Law). However, there is considerable debate about the minimum amount of territory that should remain. The history of international law contains numerous examples of major losses of territory which in no way deprived the State of its identity. In a specific case additional factors would have to be taken into account, such as international → recognition as a new State under international law.

(*c*) Occupatio bellica

The third continuity rule which developed through long-standing State practice implies that neither an *occupatio bellica* as such nor measures taken by the occupying power lead to the extinction of the occupied State (→ Occupation, Belligerent; → War, Laws of). By an *occupatio bellica* State → sovereignty is temporarily superimposed, but does not pass to the occupant. This rule

of international law has gained further significance by the prohibition of → annexation. A necessary conclusion is that agreements between the occupying power and a puppet government installed by the occupant, or a cession of territory during occupation, are not effective. Attempts also failed to extend, as in the case of Austria, the notion of *occupatio bellica* to include forceful, yet non-belligerent occupations with a view to annexation (*occupatio quasi-bellica*, see Verdross) Similarly, certain controversial questions of occupation concerning Japan and Germany did not suspend the general rule (→ Germany, Occupation after World War II).

(*d*) *Criteria of State continuity*

The application of the rules of continuity in an individual case depends on several additional elements. The uncontested general rules do not supply a definite solution where the extinction of a State is due to a combination of different factors. As a rule it may only be said that a State can survive long periods of uncertainty about its juridical status, for example during a → civil war of several years duration. However, international law does not provide an exact time-limit for such a period, and the continuity rules do not assure a certain size of State territory. The question rather is whether a cession of the respective territory is based on a valid legal ground (→ Territory, Acquisition). In the absence of a valid title, reference must be made to the extent of State territory at the beginning of the State crisis. The final and definite cessation of one of the constituting attributes of State personality results in the extinction of the State. Substantial difficulties derive from attempts to define the State in international law. Different conclusions may be arrived at depending upon whether the State organization, sovereignty or the population are emphasized as key elements. In this field, recognition of a State under international law has an important function because it is able to overcome uncertainties as to whether or not in the eyes of the international community one or several new States have been created.

Decisive significance is attributed to the principle of → effectiveness which, considering the mere *de facto* situation, steps in if the major characteristics of a State's existence have been eliminated. Application of the effectiveness principles is precluded by repeated actions of → protest which impede the assumption that a given *de facto* situation has become definite (→ Acquiescence). Yet, it remains open to doubt whether the rule *ex injuria jus non oritur* can compensate a final lapse of a State's organizations (Marek). In spite of its great importance, this rule alone is not capable of precluding the application of the principle of effectiveness if a State lacks any other discernible evidence of outward existence.

Any assessment of an individual case is further complicated by the intrusion of domestic elements. Although international law is principally independent of municipal law, the way a State concerned sees itself is not to be ignored, because it may determine the scope of the principle of effectiveness (→ International Law and Municipal Law). Under a more formal understanding of State continuity these domestic elements could be disregarded as long as the organizations of a State constituted the decisive factor. Yet more recent developments in international law tend to accentuate material elements. While already in the 19th century international law often recognized the existence of nations or peoples in spite of foreign occupation, this aspect gained further significance with the development of the right of → self-determination in the 20th century. The turning away from formal criteria was strengthened by the prohibition of the → use of force and annexation. This general trend in international law, which has also become evident in the work of the → United Nations, justifies giving priority to the right of self-determination in the solution of problems of continuity, provided that this right is actually exercised in an internationally perceptible manner.

4. *Future Development*

This new trend in international law raises the question of whether the traditional understanding of continuity should be supplemented by a material conception which incorporates elements which preserve continuity, including the right of self-determination. Yet it remains controversial to what extent mere political or social manifestations of a State whose existence is not otherwise discernible should be taken into account. Particular problems arise if recourse is had to supplemen-

tary notions such as legal fictions of continuity (Cansacchi). Attempts to cope with the extinction of a subsequently resurrected State by simulating its uninterrupted legal existence (e.g. in the case of Austria) are inconsistent with the still valid principle of effectiveness and can explain the continuity of a State as a subject of international law in an *ex post* assessment at best. The need to combine the recently developed material elements of continuity with the necessarily formal and indispensable characteristics of international law will pose major difficulties in any future development.

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WILFRIED FIEDLER

DAMAGES

1. *Notion*

The question of damages arises when a → subject of international law is in breach of an international obligation, thereby incurring responsibility and, as a legal consequence, must render reparation for → internationally wrongful acts or omissions, or for acts and omissions not prohibited by international law. Although the terminology used in the literature and case-law concerning → reparations is far from uniform (sometimes "reparation", "restitution" or "indemnity" are used synonymously as generic terms covering all types of reparations, while "damages" or "compensation" specifically denote payment for actual loss sustained or injury inflicted upon persons or property), the basic idea behind all types of legal consequences for breaches of international obligations is to make good the injury caused to persons or property by a State or other subject of international law. To this end, three main types of reparation may be distinguished: → restitution, → satisfaction, and damages. The award of damages thus presupposes that restitution (*restitutio in integrum*) or satisfaction are not possible or not sufficient means of reparation. Frequently, however, damages are awarded in conjunction with satisfaction. The principle was well summarized by the → Permanent Court of International Justice (PCIJ) in the Chorzów Factory Case (Series A, No. 17 (1928), at p. 47):

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law" (→ German Interests in Polish Upper Silesia Cases).

The Court's dictum is generally accepted as stating a rule of international law, or even a → general principle of law in the sense of Art. 38(1)(c) of the Statute of the → International Court of Justice (ICJ). Whilst there is general agreement in principle, controversy exists as regards details.

2. *Types and Extent of Damages*

While in municipal law clear distinctions are

drawn between private and public law remedies, this is not maintained as neatly in international law, where compensation covers both compensation as recompense for deprivation of property or payment for losses sustained and damages in lieu of full restitution, should this prove impossible. Thus defined, damages can arise in two types of situations, either (a) as reparation for direct State wrongs, or (b) as State claims on behalf of its nationals (→ Diplomatic Protection). In both situations, however, damages are awarded not for the loss suffered by individuals but for the breach of an international obligation that rests on the defendant State, i.e. its own actual or imputed wrongful act. The Permanent Court affirmed this notion in the Chorzów Factory Case (ibid., at p. 28) by saying: "The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage".

(a) Measure of damages for direct State wrongs

In cases of direct State wrongs the measure of damages must relate to the actual loss suffered by the claimant State itself. In the → Corfu Channel Case the ICJ affirmed this rule upon establishing Albania's responsibility. Both the damage to two British → warships and the cost of pensions and medical treatment as a result of the killing and injuring of crew members were recognized under this heading. Moreover, the defendant State is fully liable for wrongful acts of its own officials. In such cases, the damages to be awarded are calculated in direct relation to the injury to persons or property concerned. However, the situation is different should the claimant State demand damages for damage done to a vessel flying its flag (→ Flags of Vessels), but which in fact is owned, controlled and managed by nationals of the defendant State, having contravened coastal laws of the defendant State, as happened in the → *I'm Alone* Case (RIAA, Vol. 3, p. 1609). In this case the loss or injury must be clearly connected with the claimant State seeking damages. Damages may also be awarded in addition to satisfaction, when redress for insulting the national honour of the claimant State is in question. Thus, in the *I'm Alone* Case, the commissioners decided that the United States should not only apologize formally for the illegal acts of its coast guard, but should also pay $25 000 in damages.

(b) Claims on behalf of nationals

In cases of claims by a State on behalf of its nationals, the theory is that the State can only claim damages for wrongs it itself has suffered, and individuals are left to seek damages according to the defendant State's legal system. In practice, however, claims of individuals are presented by the home State, acting as a mouthpiece for its nationals: "By taking up the case of one of its subjects . . . , 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" (→ Mavrommatis Concessions Cases, PCIJ, Series A, No. 2 (1924) at p. 12). If the victim of an international wrong is a legal person, the relevant connecting factor for applying these principles is the place of the company's incorporation, not the → nationality of its shareholders (→ Barcelona Traction Case). In any event, the award of damages presupposes exhaustion of → local remedies. Sometimes that State in which the company is incorporated adds a claim for damages as compensation for material or immaterial losses incurred by the claimant State itself. Such double-based claims in the practice of courts, → arbitration and → conciliation proceedings invariably increase the credibility of a claimant State's demand for damages. Out of a multitude of cases decided, the following main principles can be distilled: In the case of property interference, the value and degree of interference are considered to be relevant criteria, and it matters not whether property is lost through destruction or expropriation. If the defendant State refuses to make restitution, it may opt instead to pay the value of the property as damages.

As a rule, only the reasonable market value of property at the time of taking and, if that proves impossible to assess, its intrinsic value forms the basis of valuation (*damnum emergens*). Thereby, abnormal circumstances or speculative prices are ruled out. If, however, expropriation takes place in breach of international law treaties or → concessions, then the loss of expected profits, the *lucrum cessans*, is also awarded as damages (→ Expropriation and Nationalization). Furthermore, interest is taken into account for the entire period during which property usage is deprived.

The rate of interest may vary according to the actual circumstances of the case and, unless otherwise agreed, it is usually calculated from the date of the wrong (*dies a quo*) and not from the date of the judgment, or of a possible → *compromis*.

When it comes to assessing damages for injuries to a State's nationals, the bases of calculation are less well settled in the jurisprudence of international tribunals. This is so because in reality the State's responsibility under international law does not relate to the actual personal injuries suffered but rather to the → denial of justice involved in failing to take all precautions necessary to prevent harm from being done, or in condoning illegal acts. The leading case on this question is the Janes Case of 1924 (RIAA, Vol. 4, p. 82). Janes had been murdered in Mexico in broad daylight in front of witnesses. Although the identity of the assassin was known, the Mexican authorities failed to apprehend him. The damage caused to the relatives by the killing of Janes was a matter for internal Mexican laws; the damage caused by that State – acting through negligent officials – related only to the non-punishment of the murderer, the omission of a duty resting on Mexico required by international law (→ Aliens; → Minimum Standard). Yet in assessing the measure of damages, tribunals frequently look to standards that in theory are ruled out in State claims on behalf of individuals, such as the diminished earning capacity of the injured persons, particularly of breadwinners, or the age, family situation, economic position and potential earning capacity of the injured or killed individuals. But the tribunals invariably apply these standards purely as yardsticks, merely in order to facilitate the quantification of damages to be awarded for the wrongful act of the defendant State, and much depends on the individual facts and the actual *compromis* of the case in point.

(c) Remoteness of damage

In general, damages will only be awarded if the wrongful act or omission attributable to the defendant State actually did cause the damage complained of. No compensation needs to be paid for damage which is too remote from the wrongful conduct. While this principle is undisputed, controversy exists regarding the exact standards governing remoteness of damage, much as in municipal law. Whereas civil law jurisdictions tend to treat this problem in terms of equivalent or adequate causal connections between the internationally wrongful act and the actual damage caused, in common law jurisdictions remoteness of damage may vary according to the type of tort, the general rule being that only proximate and natural consequences of acts are considered relevant, while a "reasonable foreseeability" test applies to torts involving negligence (cf. Overseas Tankship (U.K.) v. Morts Dock & Engineering Co. Ltd. (No. 2) (1961) A.C. 388, at p. 426). At international law, tribunals apply a similar test to questions of remoteness, as was illustrated in the → Naulilaa Arbitration of 1928 (RIAA, Vol. 2, p. 1013). There the tribunal rejected a claim for damages as too remote, where a native uprising had followed upon wrongful German → reprisal attacks on Portuguese colonial territory. Furthermore, when facing issues of remoteness, tribunals will carefully examine allegations of parallel or subsequent causes negating responsibility (*novus actus interveniens*).

In calculating the measure of damages the victim's contributory negligence (*compensatio culpae*) or any advantages accruing through the wrongful act or omission, such as taxation or maintenance cost savings (*compensatio lucri cum damno*), is set against the claim for damages.

(d) Punitive damages

Occasionally the award of "penal", "punitive", "vindictive" or "exemplary" damages has been discussed, particularly in cases of personal injury, with a view to emphasizing the wrongfulness of the act in question. In cases where there has been a denial of justice, or where an individual of the claimant State's nationality has been subjected to inhuman or degrading treatment, without this being committed by State officials, the award of damages depends largely on the degree of misconduct by the defendant State. The line to be drawn between punitive damages as an expression of outrage and using the same facts in assessing the actual measure of damages is a very fine one in practice. Furthermore, relatively few cases, such as the Roberts and Maal Claims (RIAA, Vol. 4, p. 77 and Vol. 10, p. 730), are cited in support of punitive damages. In the Maal Claim, the Nether-

lands was awarded $500 for the indignity suffered by one of its nationals stripped in public by Venezuelan police officials, while in the Roberts Case, Mexico had to pay US $8000 to the United States for seven months of illegal imprisonment of Roberts. A substantial portion of the damages awarded related to Robert's subjection to cruel and degrading treatment during the period of imprisonment. In the Imbrie Case of 1924 (Whiteman, Vol. 1, p. 732), an American diplomat was attacked and later killed in Tehran. Neither the Persian police nor the armed forces had made efforts to protect him. The United States expressly renounced the claim of punitive damages but demanded full reparation (US $110 000 for costs of escort and shipment of the body, and $60 000 for the benefit of the widow). In the → *Lusitania* Claims of 1923 (RIAA, Vol. 7, p. 32), United States nationals were killed aboard a British ship torpedoed by a German → submarine, and punitive damages were strongly advocated by the United States Government. However, the → Mixed Claims Commission rejected this contention saying:

> "That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt . . . . Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages, but not as a penalty" (RIAA, Vol. 7, p. 32, at p. 40).

Thus, although in all these cases damages outwardly reflected the defendant State's degree of misconduct, the effect of inhuman or other outraging treatment on the individuals concerned were obviously relevant considerations in justifying the quantum of damages awarded. Closer analysis of the cases cited in favour of punitive damages thus reveals that this category of damages, if ever recognized, today no longer musters support in international law.

3. Recent Developments

The main ideas as outlined have been incorporated in the International Law Commission's Draft Articles on State Responsibility. Accordingly, damages merely serve as a substitute where restitution fails (Draft Art. 6(2)): "The injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach, would bear" (→ Responsibility of States: General Principles). Less progress has been made to date as regards the ILC project entitled International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (YILC (1982 II Part 1) p. 51; → Responsibility of States: Fault and Strict Liability). Although there is general agreement that the rules governing ultrahazardous activities are equally in need of codification, much dissent remains about details of strict liability (→ Environment, International Protection; → Space Law). Consequently, the International Law Commission's Special Rapporteur in his schematic outline concentrates on joint fact-finding machinery, duties to negotiate and to provide information and the sharing of responsibility (Draft sections 2, 3 and 5). If reparation by way of compensation is to be made at all, then it shall only be made if the loss or injury complained of falls within the "shared expectations" of the States involved, as expressed in prior correspondence or other exchanges, or failing that, as implied by common legislation or other standards or patterns of conduct (Draft sections 4 and 7). Even if agreement is eventually reached concerning the Draft as a whole, it is unlikely that many States will submit readily to such far-reaching rules of strict liability. This is well illustrated by the meagre results achieved at the Vienna conference of the → International Atomic Energy Agency concerning liability for transborder damage caused by atomic fallout following the Chernobyl disaster at the end of April 1986. All that can be expected in the foreseeable future are increased duties of information and claims of damages for the breach of such duties. Agreed new standards of strict liability needed for such cases, apart from those existing under the Paris Convention of July 29, 1960 concerning Third Party Liability in the Field of Nuclear Energy, including its protocols and Additional Protocol, which the Soviet Union has not ratified, are not within sight.

4. *Evaluation*

Although details concerning the award of damages are disputed, the principle as such is generally accepted. Moreover, there has been a marked tendency to enhance the status accorded to individuals under international treaty law. Thus under Art. 50 of the → European Convention on Human Rights a breach of a Convention duty may result in just satisfaction (*satisfaction équitable, gerechte Entschädigung*) if the internal law of the contracting State affords only partial reparation. In a whole series of cases the → European Court of Human Rights has practically equated "just satisfaction" with pecuniary compensation, awarding damages for a contracting State's breach of a Convention duty (see the cases De Wilde, Ooms and Versyp, June 18, 1971, A 14; Ringeisen, June 22, 1972, A 15; Neumeister, A 17; Golder, February 21, 1975, A 18; Engel and Others, June 8, 1976, A 22; Luedicke, Belkacem and Koç, November 28, 1978, A 29; König, June 28, 1978, A 36; Artico, May 13, 1980, A 37).

Whilst States in general remain reluctant to submit to claims for damages, as was shown in the → United States Diplomatic and Consular Staff in Tehran Case (→ Hostages; → United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)), they sometimes conclude → lump sum agreements to cover all claims for compensation, or make *ex gratia* payments of damages without admitting responsibility at international law, as did the Soviet Union in relation to damage caused to Canada by the remains of the nuclear-powered satellite Cosmos 954 in 1978.

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EIBE RIEDEL

DE FACTO RÉGIME

1. *Notion*

It has been a not infrequent occurrence in international law that for long periods entities have existed, frequently claiming to be States or governments, which controlled more or less clearly defined territories without being recognized – at least by many States – as States or governments (→ Recognition; → Non-Recognition). Some examples are the Confederation in the → American civil war, the national government in the → Spanish civil war, the German Democratic Republic before 1972, North Vietnam before the reunification of → Vietnam, North Korea (→ Korea) and → Taiwan.

Because of the imperfect nature of international law no possibility exists of clarifying whether entities have the quality of States although they are not recognized as such. Therefore, it is of great importance to analyze State practice as to the position of those régimes in international law. The situation is different where a non-recognized government fully controls the territory of a recognized State. Here, it cannot be doubted that a → subject of international law exists and the government has the right to represent the State. To avoid misunderstandings the term "*de facto* régime" seems preferable to describe the entity in question irrespective of whether it claims to be a new secessionist State (→ Secession) or whether it aims to take over the government in a recognized State. The term "*de facto* government" is sometimes used for the non-recognized government which raises quite different issues. Therefore the term *de facto* régime will be used throughout this article.

2. De facto *Régime as Subject of International Law*

State practice shows that entities which in fact govern a specific territory will be treated as partial subjects of international law. They will be held responsible, treaties may be concluded with them and some sort of intercourse is likely to take place with States. This will not be of the same nature as the normal contact between States but it is of great importance that non-recognition is not identical to denying any status under international law.

3. *Prohibition of the Use of Force*

State practice, especially within the → United Nations, clearly proves that the prohibition of the → use of force applies irrespective of recognition to all *de facto* independent régimes. The → Friendly Relations Resolution of October 25, 1970 (UN GA Res. 2625 (XXV)) expressly states:

> "Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect."

This includes the borders of what are here called *de facto* régimes. Art. 1 of the definition of → aggression adopted by the → United Nations General Assembly in Res. 3314(XXIX) of December 14, 1974 contains an explanatory note according to which the term "State" is used "without prejudice to questions of recognition or to whether a State is a member of the United Nations". During the Vietnam war it was frequently stated by many governments that the non-recognition of one or other of the parts of the divided country could not affect the applicability

of Art. 2 (4) of the United Nations Charter in that respect.

4. *Responsibility of the* de facto *Régime*

During the American civil war Lord Russell, the British Foreign Secretary, explained to the United States Ambassador in London:

> "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a de facto government, the state so aggrieved has a right to claim from the de facto government redress and reparation" (Moore, Digest, Vol. 1, p. 209).

This practice has been followed in many instances and should not be open to doubt. When the International Court of Justice (ICJ) explained in its advisory opinion on Namibia in 1971: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States" (ICJ Reports 1971, p. 3, at p. 54), it did of course not refer directly to *de facto* régimes but to a recognized State whose administration of a territory is not recognized (→ South West Africa/ Namibia (Advisory Opinions and Judgments)). It would seem, however, that the principle underlying the Court's statement also applies here. In several cases reparations have been claimed from and paid by *de facto* régimes (Frowein, p. 77 et seq.).

5. *Treaty Relations*

It is quite common for States to enter into relations with *de facto* régimes although such relations will frequently be kept on a level below that of normal → treaties. Especially in cases where non-recognition is maintained because of political pressure from other States, all kinds of agreements will frequently be concluded. Sometimes the parties to such agreements are institutions of public law distinct from the State and the *de facto* régime, as for instance chambers of commerce. Sometimes *de facto* régimes become members of multilateral treaties. State practice shows that their accession will frequently not be accepted as valid by non-recognizing States. However, there are also examples to the contrary. Sometimes sophisticated devices are used to make sure that the *de facto* régime becomes a party to the treaty without having direct relations with non-recognizing States. For example, in the Nuclear Test Ban Treaty of 1963 the solution was found to have the Soviet Union, the United Kingdom and the United States named as → depository governments, to enable the German Democratic Republic and the National Chinese Government to deposit their instruments of ratification, the first in Moscow, the second in Washington.

6. *Representation*

It is clear that the establishment of → diplomatic relations implies recognition in the full sense. The exchange of other missions may also be agreed upon with *de facto* régimes. This is true for trade missions, *ad hoc* delegations, etc. Normally, the State claiming title to the territory of the *de facto* régime may not claim any right to prohibit such contacts, especially where they take place to protect the nationals of the non-recognizing State. Where a duty of non-recognition exists, the sending of formal missions must be avoided.

7. *Recognition of the Acts of* de facto *Régimes in Municipal Law*

In some countries the application of foreign laws and other acts is or has been dependent on recognition (→ Recognition of Foreign Legislative and Administrative Acts; → Non-Recognition). This means that even where a *de facto* régime has been in existence for a long time problems might arise in the courts of these countries as to the applicability of its laws. However, a modern tendency shows that the factual control of a territory should be decisive in the context of conflicts of law (→ Private International Law). As the ICJ pointed out in the Namibia advisory opinion, the non-recognition of laws and administrative acts should not be to the detriment of the inhabitants of the territory (ICJ Reports 1971, p. 3, at p. 56). Therefore, the rule, long applied in Germany or Switzerland, according to which the mere factual implementation of a legal order is taken into account in the framework of the rules of conflicts of laws, is preferable.

8. *Termination of* de facto *Régimes*

The *de facto* régime may come to an end either by being finally recognized as a new State or as the government of a State, or by the victory of the old State or government. According to a rule fre-

quently confirmed in the practice of claims commissions, a successful *de facto* régime's treaties and other acts will bind the finally recognized State or the State as whose government the former *de facto* régime is now recognized. Acts of an unsuccessful *de facto* régime, on the other hand, will become invalid with the disappearance of the régime. There are, however, many decisions of claims commissions according to which the State may be liable for those acts of unsuccessful *de facto* régimes which formed part of the normal administration of the territory concerned. The principle applied in these cases would seem to be based on the idea that such normal acts of administration are of a neutral character and would have been performed by any government. This principle should be accepted as a general rule after the termination of the *de facto* régime.

9. Evaluation

The lack of a procedure by which disputes as to the nature of non-recognized entities can be settled has made it necessary to concentrate on the legal position States grant to such entities even without recognizing them. The importance of the notion of *de facto* régime lies in its clarification that non-recognition is not identical to the refusal to accept any position of the entity in question as a partial subject of international law. The notion makes it possible to draw the necessary consequences from a prolonged period in which a territory is governed by a non-recognized entity.

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DECOLONIZATION

1. Notion and Process

The notion of decolonization requires a clear understanding of the notion of a colony. In the 19th century the latter was narrowly understood to denote areas which had been incorporated into the State territory of the mother country whose native inhabitants were of the same nationality as those of the mother country, but not of the same race. In a wider sense, the term was used to describe areas such as → protectorates and trust territories, which, not being annexed, lay outside the State territory of the mother country but which in external relations and usually also in internal matters were subject to the sovereign power of the mother country (→ Mandates; → United Nations Trusteeship System).

The legal relations between mother countries and their colonies in both of the above senses were highly variable as matters of international and domestic law. Invariably, foreign relations and defence powers were exercised by the mother country. Usually internal powers and in particular the power to maintain public peace and security were exercised by officials from the mother country, in their own right or in the name of the territory concerned. At the end of the colonial epoch the tendency was increasingly towards the complete integration of colonies into the mother country. Because of this, the inhabitants of colonies were usually awarded, in addition to → nationality, the same basic rights as those of the inhabitants of the mother country. Furthermore, the status of colonies approached that of subordinate governmental bodies under the public laws of the respective mother countries. It was hoped that this was the way to avoid the accusation of foreign domination which rested upon the violation of the principles of equality and democracy.

It was the process of democratization itself based on the principle of equality which provided the main reason for the colonies gradually developing into autonomous and then independent → States. Given the population densities in the colonies, the mother countries were unable to provide complete representation within the governmental organs of the mother countries which would have taken proper account of the colonial population. Beyond a certain point, the process of democratization could only take place through equal representation in the parliaments of the colonies themselves. However, since democratic principles require democratic legitimation for any exercise of sovereign power, the mother States had to transfer sovereign powers to the colonies,

which, in gaining greater weight, had to become genuine States.

In the final period, generally directly before the acquisition of independence, the colonies were granted a degree of autonomy which exceeded the rights of self-administration granted to other governmental bodies within the mother country. The colonies attained the status of States, but only in a domestic sense, since the mother country continued to exercise external powers. The constitutions of these States were partly laid down by the mother country and partly by the new States themselves. The relations between the new States and the mother countries were first regulated by a unilateral act of the mother country concerned (→ Unilateral Acts in International Law), and secondly by bilateral treaties between both States. In the first instance, the mother country tended to retain a number of powers which at first rested on its constitutional law and later on the treaties it concluded. In the final stage, this relationship of subordination was replaced by mutual and equal coordinate relationships.

Colonialization reached its zenith around the end of the 19th century when many territories in Africa and Asia were divided among the European States (→ History of the Law of Nations). As a result of pressure in particular by the → United Nations, a wave of decolonization commenced which attained its climax in 1960 and which led to the independence of nearly 100 new States. The principles of democracy and government under law, which initially served to legitimate the domestic legal orders only of the mother countries, could not be restricted to them and were turned against foreign domination. These principles found expression at the level of international law in the right of → self-determination of peoples which was able to graduate from a mere political goal into a genuine legal principle because the subject of this principle appeared to be fixed with regard to colonial areas. Even if the original understanding of the right of self-determination tended to be in terms of the population of a colony being able to decide between the various forms of municipal and international links with the mother country – in particular by means of referenda – the development, especially within the United Nations, was towards the notion that self-determination could necessarily only be realized by the development of colonies into completely independent sovereign States.

Even if some colonies were able to transform themselves into sovereign States in a single stroke, decolonization was generally a drawn out process, in some respects like the process of integration in the → European Communities in reverse: at each stage the mother country transferred a further layer of power. This process was so continuous that in contrast to the, in international law doctrine generally accepted clear division between the phases of purely municipal and exclusively international legal relations, it was in fact a process whereby the rules of public international law were gradually superimposed upon and finally those rules displaced the rules of municipal law. The exact point where the States become → subjects of international law and fully replace their public law links to the mother country with those of international law is as a rule difficult to determine.

It is thus fair to say that the process of development is not entirely well represented by the picture – presented by the rules of → State succession – of the sudden appearance of new States in the international legal relations. Rather individually and precisely determined competences of the mother country were transferred so that problems of legal succession arose with each such transfer. Therefore the preference here tends towards the characterization of this form of State succession as a succession of function. This succession of function was obscure in international legal terms, simply because new States only entered into international legal relations with third States in the final phase of decolonization, i.e. with the transfer of foreign power competence.

The rules of State succession were drafted afresh by the codification treaties of the United Nations (→ Vienna Convention on Succession of States in Respect of State Property, Archives and Debts; → Vienna Convention on Succession of States in Respect of Treaties; → Codification of International Law). The succession rules on nationality have also changed considerably during the course of the decolonization process. First of all, it should be mentioned that the new States have based their respective nationalities on such different criteria that it is hardly possible for rules, in respect of succession and nationality, to develop

in international law. On the other hand, it must be emphasized that, even before independence, the new States did possess the quality of States and therefore could bestow nationality. Such nationality, however, did not yet possess any quality under international law, because the new States were not competent to exercise foreign power before their ultimate independence, and thus diplomatic protection was exercised by the mother country which tended to further the practice of bestowing the old nationality of the mother country upon the individual. Moreover, developments have demonstrated that the various theories devised for nationality and succession were adopted not as alternatives but rather in a cumulative manner. On the one hand, the criteria to which the new States resorted in the determination of their nationality rules were so various that it is barely possible to adhere to the theory of automatic succession of nationality. On the other hand, the promulgation of nationality laws in some new States was so tardy that the development of a rule of automatic State succession necessarily had to be developed. In this connection, the group of individuals possessing the earlier nationality of the mother country was not entirely divided up between the mother country and the new States. The mother countries were far more inclined to assume that numerous inhabitans of the new States had not lost the nationality of the mother country. The numbers of dual nationals possessing the old and the new nationality thus increased substantially during the decolonization period.

So far as newly independent States belonged before independence to different mother countries, their common boundaries were determined by international legal acts between the mother countries, i.e. treaties, which were transferred to the new States by way of State succession. In this area, the remaining problems concerned only the borders between the colonies of the same mother countries. Such borders were usually determined by a unilateral domestic legal act of the mother country concerned. It was therefore only to be expected that in the division of areas between such States they would have resorted to the doctrine of → *uti possidetis* which had been developed for the same situation in Latin America. This legal principle transforms the nature of a domestic legal act demarcating a boundary into a legal principle of international law. Accordingly, of crucial importance is the content of this legal principle and not the actual territory over which the new States exercise dominium. The transference of this legal principle to the process of decolonization was also to be expected because the earlier colonies are identical to the States of today and because even if international law has displaced the original domestic law, necessarily there remain certain residual elements of the old relations under domestic law.

The old colonial structures have persisted the longest in Africa in the form of regional organizations which bound a number of colonies together into a single administrative or colonial union. In the development towards independence, such unions also were changed from a domestic to an international legal basis. The African States in particular were obliged to continue with these old colonial structures to prevent new unified States from dissolving into → micro-States as a consequence of resort to the traditional tribal structures.

2. *Problems of the Decolonization Process under International Law*

The succession of the new States to the rules of general international law (→ customary international law and → general principles of law) has not given rise to very great problems. In principle, the new States have regarded themselves as bound by the general international law developed over centuries by the European States. It is true that different views exist on the binding force of old law for new States (→ New States and International Law). The different views concern the question whether, with respect to this adoption, the traditional rules are automatically applicable with the entry of the new State into the international legal community or whether the new States are more or less free to accept or reject rules of "old" international law. With the exception of certain rules of international law governing → aliens (e.g. the expropriation of property owned by aliens), whose continuing validity remains a matter of controversy, both the old and the new States assume the continued validity of most parts of classical international law and the binding nature of these legal principles for all States.

This succession could have given rise to very great theoretical difficulties. Indeed, it is possible to take the view that, unlike the entry of individual

new States into the → international legal community, something new began with the great numbers of new States, where a qualitative leap had taken place. On the one hand, the practice of the old States, whose small number provided perhaps a representative picture of the view of 50 States, was no longer a representative picture of the view of over 150 new States, if only because these legal principles were developed by the European States whose values and interests were quite different from those of the new States.

On the other hand, States in a period of increasing State → interdependence could not eschew the rules of international law. As in a revolution, where the old law can also not be replaced at a stroke by new law more representative of the new ideology, old law must for the same reasons continue to be valid. Equally as in a revolution, only those old legal principles which were at variance with the new ideology lost their basis of validity. As for the remainder, the old law was interpreted against a background of the new interests and values and was gradually altered in content by new methods of creating law, in codification treaties and by means of resolutions, particularly within the United Nations.

It should, however, be mentioned that the old *jus publicum europeum* has changed greatly since the time of Grotius. In fact the original unity of values esteemed by the peoples of Europe which existed in the common classical and Christian tradition was slowly lost from the 16th century onwards. The legal principles of international law in modern times were thereby gradually robbed of their original values with the changeover from → natural law principles to those of → positivism. In the place of legal principles heavily loaded with values have emerged stronger, more technical rules which are almost entirely determined by the principle of external sovereignty as the guiding light of modern international law.

This development of international law has considerably facilitated the adoption of classical international law by the new States, which rest upon a different basis of values than that of European States. In fact, the principle of external and internal → sovereignty has been a potent weapon of power in the hands of the new élites within the new States who, in the interests of the social, cultural and economic development of their territories, have been loath to refrain from resort to such weapon.

Under the international law of → coexistence, the function of sovereignty as a right of equal participation was of no great importance. This changed with the development of the → international law of cooperation, pursuant to which the separate nature of States in close proximity was replaced by an increasing interdependence. In this situation sovereignty, expressed as a right of equal participation in international decisions, plays an important role. In one sense, the right of equal participation is developing in terms of positive demands for payment and performance. In another sense the equal participation of member States in the international process of formulating objectives should ensure a decision which will take due account of all State interests. In a third sense joint participation should facilitate an international decision in favour of the just distribution of the world's gross domestic product, for example, in line with the new → international economic order among the member States of the international legal community. Precisely this aspect and this function of the sovereignty principle receive greater emphasis by the new States than by the older States.

It must finally be said that the right of self-determination has only managed to attain status as a genuine legal principle within the context of the independence of the new States. Although the situation of many → minorities within the new States has given cause for concern, the new States refuse to recognize the right of self-determination in relation to minorities because this could lead to the collapse of unified States.

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DECOLONIZATION: BRITISH TERRITORIES

1. Historical Background and Commencement between World Wars I and II

The British Empire began to emerge three or four centuries ago. With the exception of the declaration of independence proclaimed in 1776 by 13 North American colonies, which were recognized as the United States of America through the Peace Treaty of Paris in 1783 (→ Recognition), the British Empire never suffered a serious setback before reaching its widest extension through the → Peace Treaties after World War I under which it secured control over some former German and Turkish territories (→ Colonies and Colonial Régime). Though the peace treaties after World War I thus marked the peak of the British Empire they also marked a turning point. Besides the British Empire, the four colonies of Canada, Australia, New Zealand and South Africa, then called the Dominions, as well as India, which had a special position, also signed the peace treaties and thus became separate members of the → League of Nations. These admissions were soon followed by that of the Irish Free State, which was established as another Dominion in 1922. The resolutions of the Imperial Conference held in the years 1926 and 1930, and the Statute of Westminster, 1931, were further milestones in the transformation of the British Empire into the → British Commonwealth of Nations, a development through which the Dominions ceased to be colonies and became independent sovereign States, although the words "independence" and "sovereignty" in relation to the Dominions were not generally used before the end of World War II. Newfoundland, another Dominion to which the development mentioned partly extended, virtually lost Dominion status in 1934 and finally became a Canadian Province in 1949.

Beyond these examples of independence inside the Commonwealth there were also two early examples of independence outside the Commonwealth in the cases of Egypt and Iraq, both of which had only in a marginal sense formed part of the Empire. Egypt had been placed under British protection by a British proclamation of 1914 and was declared independent by another British proclamation of 1922. Egypt's independence, thus proclaimed, was, however, subject to serious reservations. She became genuinely independent through the Anglo-Egyptian treaty of → alliance of August 12, 1936 (LNTS, Vol. 173, p. 401), after the entry into force of which she was admitted to membership in the League of Nations in 1937; some British rights in relation to the → Suez Canal even survived World War II. Anglo-Iraqi relations, on the other hand, had been defined, and confirmed by the League of Nations, by the treaties of alliance of October 10, 1922 (LNTS, Vol. 35, p. 13) and January 13, 1926 (LNTS, Vol. 47, p. 419), which were regarded as equivalent to a → mandate. Iraq then attained independence by the Anglo-Iraqi treaty of alliance of June 30, 1930 (LNTS, Vol. 132, p. 363), which came into force with the admission of Iraq to membership in the League of Nations and the termination of the mandate in 1932.

Though the → decolonization of British territories had thus already commenced during the decades between the two World Wars, decolonization in the sense of the attainment of independence was then limited to the Dominions and the cases of Egypt and Iraq. In relation to the other British territories, decolonization confined itself

throughout to preludes to the attainment of independence, i.e. the advance towards self-government short of independence. Transjordan, which was covered by the mandate for → Palestine but was later separated from the western part of the territory, reached such a form of self-government by an agreement concluded with Britain in 1928. Southern Rhodesia (→ Rhodesia/Zimbabwe) became a "virtually self-governing colony" in 1923; as in the Dominions, political power in Southern Rhodesia essentially rested with the white population. The advance to self-government in the other African territories did not really begin before the end of World War II. On the other hand, in some Asian territories where the national movements for self-government or even independence were already strong the advance thereto was able to begin much earlier than for the majority of the African territories. Examples in Asia were the constitutional reforms for Ceylon in 1931 and for India and Burma in 1919 and 1935.

The advance to self-government through constitutional reforms temporarily ended with World War II. But the → occupation of such British territories as Burma and Malaya by Japan again strengthened the Asian national movements. Burma made a declaration of independence in 1943 which was later declared invalid by the High Court of Rangoon in Krishna Chettiar v. Subbiya Chettiar ((1948) A.D. 537). After the defeat of Japan, Burma of course remained a British territory; but like India and Ceylon she could hope for the early attainment of independence, which was also expected by Transjordan. Likewise, the termination of the British Mandate over Palestine was foreseeable.

2. Major Problems after World War II

(a) General

The future of → colonies and colonial régime had formed the object of discussions between Great Britain and the other Allied Powers during the later years of World War II. The obligations which, as a result of these discussions, were laid down in Chapters XI to XIII of the → United Nations Charter suggested some measure of decolonization but did not urge general and total decolonization. However, when the → United Nations General Assembly adopted Resolution 1514(XV) on December 14, 1960 containing the declaration on the granting of independence to colonial countries and peoples, virtually general and total decolonization was already on the way to becoming British policy. Nevertheless, Great Britain abstained in the vote together with some other States, among them such traditional colonial powers as France and Portugal. The usual pattern, albeit neither general nor uniform, was the gradual advance of British territories towards self-government through constitutional reforms over several stages: at some time or other the territories attained "internal self-government" with only external affairs and defence remaining under British control, and then the decolonization process after World War II resulted in the attainment of "full self-government".

By 1986 about 50 territories had thus emerged as independent States under their old or under new names in the following chronological sequence:

Transjordan: June 17, 1946; India (India and Pakistan): August 15, 1947; Burma: January 4, 1948; Ceylon, later Sri Lanka: February 4, 1948; Palestine (Israel): May 14, 1948; Sudan: January 1, 1956; Gold Coast (Ghana): March 6, 1957; Malaya: August 31, 1957; British Somaliland (Somaliland): June 26, 1960; → Cyprus: August 16, 1960; Nigeria: October 1, 1960; Sierra Leone: April 27, 1961; Kuwait: June 19, 1961; Tanganyika: December 9, 1961; Jamaica: August 6, 1962; Trinidad and Tobago: August 31, 1962; Uganda: October 9, 1962; Zanzibar: December 10, 1963; Kenya: December 12, 1963; Malta: May 31, 1964; Nyassaland (Malawi): July 6, 1964; Northern Rhodesia (Zambia): October 24, 1964; Gambia: February 18, 1965; Maldive Islands: July 26, 1965; British Guiana (Guyana): May 26, 1966; Bechuanaland (Botswana): September 30, 1966; Basutoland (Lesotho): October 4, 1966; Barbados: November 30, 1966; South Arabia, Aden and other territories (South Yemen): November 30, 1967; Mauritius: March 12, 1968; Swaziland: September 6, 1968; Fiji: October 10, 1970; Tonga: June 4, 1970; Bahrain: August 15, 1971; Qatar: September 3, 1971; Trucial States, Abu Dhabi and other territories (→ United Arab Emirates): December 1, 1971; Bahamas: July 10, 1973; Grenada: February 7, 1974; Seychelles: June 29, 1976;

Solomon Islands: July 7, 1978; Ellice Islands (Tuvalu): October 1, 1978; Dominica: November 3, 1978; Gilbert Islands (Kiribati): June 12, 1979; Saint Lucia: February 22, 1979; Saint Vincent and the Grenadines: October 27, 1979; → New Hebrides (Vanuatu): July 30, 1980; Southern Rhodesia (Zimbabwe): April 18, 1980; British Honduras (Belize): September 21, 1981; Antigua and Barbuda: November 1, 1981; Saint Christopher and Nevis: September 19, 1983; Brunei: December 31, 1983.

Usually the newly independent States were territorially identical with the dependencies from which they emerged. However, there were some exceptions. India, the most important dependency, attained independence under partition into India and Pakistan which gave rise to some → boundary disputes in the Indian subcontinent including the dispute concerning → Kashmir. The State of Israel was established on only a part of the territory of Palestine, while two areas came under the control of Egypt and Transjordan, later renamed Jordan (→ Israel and the Arab States; → Israel: Status, Territory and Occupied Territories). When Cyprus became independent, the sovereign base areas of Akrotiri and Dhekelia remained British territories. Nigeria became independent without the British Cameroons, which had been administered with her before but were separately administered afterwards. One part of the British Cameroons, the Northern Cameroons, then again joined Nigeria on June 1, 1961; on October 1, 1961 the other part joined the Federal Republic of Cameroon which had emerged as an independent State from the French Cameroons (→ Decolonization: French Territories). The British Cameroons, whose partition gave rise to the → Northern Cameroons Case before the → International Court of Justice, thus provides an example of decolonization through incorporation into other independent States which themselves had already emerged from dependencies. Similarly, Singapore, Sarawak and North Borneo (Sabah) were decolonized by joining Malaya, which itself thereby became part of Malaysia on December 16, 1963.

The emergence of British territories as independent States or their incorporation into other independent States also gave rise to problems of → State succession, → nationality law in general and British nationality law in particular (→ British Commonwealth, Subjects and Nationality Rules).

(b) The position of the British territories before decolonization

Before decolonization British territories could be classified under various categories. Though such classification did not say very much about the stage of self-government of the territories, it at least indicated something about the basis and the nature of their relations to Great Britain and thus was relevant for the subsequent implementation of decolonization.

India, an original member of both the League of Nations and the → United Nations, had a special position defined in the Government of India Act, 1935 (26 Geo.5, c. 2) and consisted of British India and the Indian States. British India formed part of the Crown's dominions without being a "colony" in the official sense of the word and was thus under British sovereignty for the purposes of both British constitutional law and international law. The Indian States, protected States under the "suzerainty" or "paramountcy" of the Crown, did not form part of the Crown's dominions and were for the purposes of British constitutional law under the sovereignty of local rulers, though they were regarded as being under British sovereignty for the purposes of international law. Great Britain had full control over the external affairs and the defence of the Indian States and, moreover, also had jurisdiction which greatly varied from State to State. Though the relations between Great Britain and the Indian States to some extent rested on → treaties, these relations were not governed by international law.

Burma consisting of British Burma and the Karenni States, was defined by the Government of Burma Act, 1935 (26 Geo. 5, c.3) and was in a similar position to that of India. As a British territory, however, Burma was not a member of the League of Nations or of the United Nations.

A special position defined by the West Indies Act, 1967 (c. 4) was also held by the territories known as the Associated States (Grenada, Dominica, St. Lucia, St. Vincent, Antigua, St. Christopher and Nevis). Like British India and British Burma they formed part of the Crown's dominions without being "colonies" in the official

sense of the word. They had internal self-government, while external affairs and defence were under British control. Both Great Britain and the Associated States themselves had power to terminate the association with the effect of the attainment of independence by the Associated States. In spite of this stage of self-government British relations with the Associated States as with India and Burma were not governed by international law.

The other British territories were classified under various notions also used by other colonial powers. They were distinguished as colonies (e.g. Ceylon, Cyprus, Jamaica, Trinidad and Tobago, Malta, British Guyana, Bahamas, Southern Rhodesia, British Honduras), → protectorates (e.g. British Somaliland, Uganda, Nyassaland, Northern Rhodesia, Bechuanaland), protected States (e.g. Kuwait, Maldive Islands, Tonga, Bahrain, Qatar, Trucial States, Brunei), trust territories (e.g. Tanganyika, British Togoland, British Cameroons), mandated territories (Palestine, Transjordan), and territories under → condominium (Sudan and New Hebrides) where Great Britain shared control with other powers such as Egypt or France. Some territories were partly colonies and partly protectorates (e.g. Sierra Leone, Gambia), while some were partly colonies, protectorates and trust territories (e.g. the Gold Coast and Nigeria). Malaya comprised colonies and protected States.

The fundamental difference between the various notions was that only colonies were part of the Crown's dominions and thus under British sovereignty for the purposes of both British constitutional law and international law; while the other territories were not part of the Crown's dominions, some of them were certainly under British sovereignty for the purposes of international law. But at least the government of the colonies and that of the protectorates which all were more or less colonial protectorates were virtually equal. Beyond the control of the external affairs and the defence of the colonies, the crown had full jurisdiction. Though the protectorates had to some extent been established by treaties, these treaties hardly had legal relevance (→ Indigenous Populations, Treaties with). British relations with the protectorates were therefore not governed by international law.

The position of protected States was different, since British jurisdiction beyond the control of external affairs and defence varied greatly. British relations with protected States throughout their existence rested on treaties with a local ruler and were at least in some cases governed by international law.

The three trust territories were administered under trusteeship agreements (UNTS, Vol. 8, pp. 91, 119, 151). The mandated territories were administered under the mandate for Palestine of July 24, 1922 (BFSP, Vol. 116, p. 842) and an agreement between Great Britain and Transjordan of February 20, 1928 (BFSP, Vol. 128, p. 273). The position of the two territories under condominium was set out in an agreement between Great Britain and Egypt of January 19, 1899 (CTS, Vol. 187, p. 155) and a protocol between Great Britain and France of August 6, 1914 (CTS, Vol. 220, p. 219).

3. The Implementation of Decolonization

Though the decolonization of British territories, regarded as a political phenomenon, was above all an outcome of the demands of the national movements in the dependencies, in law it was implemented almost everywhere by British measures or by measures taken with British participation (as listed in the bibliography below). The unilateral declaration of independence proclaimed in 1965 by Southern Rhodesia was at most a temporary exception since it later had to be revoked by Southern Rhodesia herself. Usually the attainment of independence by British territories was the result of British Acts of Parliament, of which the Indian Independence Act – "setting up in India two independent Dominions . . . to be known respectively as India and Pakistan" – was the first and at the same time the most important. It was followed by more than 30 other British Acts of Parliament of which the Belize Act was the last. The Associated States attained independence through British orders made under the West Indies Act, the colonial protectorates through British Acts of Parliament or British proclamations made under the royal prerogative. Where the attainment of independence or the incorporation into another independent State concerned trust territories, as in the cases of Tanganyika, British Togoland and the

British Cameroons, there were besides the respective British measures also resolutions of the UN General Assembly terminating the trusteeship agreements (Res. 1642 (XVI), Res. 1044 (XI), Res. 1608 (XV)). Though the incorporation of British Togoland into Ghana and the incorporation of the British Cameroons into Nigeria or the Republic of Cameroon followed the results of → plebiscites held before, the trust territories like other British territories usually did not participate formally in the measures through which decolonization was realized but were formally the objects thereof.

The measures realizing decolonization also included several treaties, which were sometimes designated as agreements, exchanges of → notes or otherwise. Among them were the Anglo-Egyptian agreement concerning self-government and self-determination for the Sudan and the Anglo-French exchange of notes concerning the granting of independence to the New Hebrides. Both treaties were concluded between Great Britain and another independent State with which the control over a territory under condominium was shared; the territories themselves again did not formally participate in the measure. But while the New Hebrides attained independence under the name of Vanuatu solely through the Anglo-French exchange of notes, the Sudan declared her independence unilaterally, whereby it went beyond the Anglo-Egyptian agreement. Both Great Britain and France, however, recognized the Sudan as an independent State some days after her unilateral declaration of independence.

Several other British territories attained independence through treaties in which they formally participated. Such treaties were for example the Treaty of Alliance between Great Britain and Transjordan; the Federation of Malaya Agreement and the Agreement relating to Malaysia, concluded under powers given through the Federation of Malaya Independence Act and the Malaysia Act; the exchanges of notes or letters between Great Britain and Kuwait, Bahrain, Qatar, Tonga and Brunei; and various other measures. The territories in question had nearly throughout been protected States before the attainment of independence and their status had already then rested on treaties which Great Britain had concluded with them.

The decolonization of British territories meant both the relinquishment of British control, especially sovereignty or jurisdiction, over the various territories and their emergence as independent States or their incorporation into other independent States having previously emerged from dependencies. While there were cases where both elements were clearly separate from each other, there were also cases where both elements were closely connected. On the one hand, Transjordan, Burma, Palestine (Israel) and South Arabia (South Yemen) were cases where Great Britain confined her role to the relinquishment of control over the territories concerned. On the other hand, India (India and Pakistan), Ceylon, Gold Coast (Ghana), Nigeria, Sierra Leone, Tanganyika, Jamaica, Trinidad and Tobago, Uganda, Kenya and nearly all other cases of colonies and colonial protectorates were examples where Great Britain extended her role to the setting up of independent States in place of the British territories. While the Indian Independence Act provided that India and Pakistan as independent States were provisionally to be governed under the Government of India Act, 1935, the other independent States were granted constitutions by British orders at their emergence. Thus, such States were in law British creations though the constitutions had usually been agreed before at conferences known as constitutional conferences or independence conferences. The deficient legal "autochthony" of the constitutions was sometimes regarded as a shadow on the independence of the States thus set up and therefore, in addition to posing questions as to the contents of the constitutions, was a stimulus to replace the constitutions having a "British root" by constitutions having a "local root".

In the context of decolonization of British territories numerous treaties and agreements were concluded between Great Britain and the emerging independent States. Among them were several public officers' agreements and exchanges of letters relating to the devolution of international rights and obligations. More comprehensive treaties or agreements were concluded with Burma and Ceylon and, above all, in connection with the attainment of independence by Cyprus. Some agreements relating to defence had considerable political importance.

4. *The Position of the Independent States after Decolonization and Later Changes*

The independent States emerging from British territories usually became members of the British Commonwealth at their emergence or at some time thereafter with the consent of the other members. Only Transjordan, Burma, Israel, Sudan, Somaliland, Kuwait, South Yemen, Bahrain, Qatar, and the United Arab Emirates for various reasons never sought membership, though it was, at least after World War II, no longer a restriction on independence. India was already an original member of the United Nations before the attainment of independence and remained so thereafter. Pakistan, regarded as a new State, along with all other States had to seek admission to UN membership. The new States usually were admitted, although the admission of Transjordan and Ceylon was vetoed until 1955 by the Soviet Union, which did not recognize them as genuinely independent States.

Usually the new States have kept their territorial identity up to the present time. There have, however, been some exceptions. India extended herself after the attainment of independence by incorporating some French and Portuguese dependencies (→ Decolonization: French Territories; → Decolonization: Portuguese Territories) as well as → Sikkim. (British) Somaliland united with (formerly Italian) Somalia through the Law of Union of 1960. Tanganyika and Zanzibar united in Tanzania through the Articles of Union of 1964. Through the Independence of Singapore Agreement of August 7, 1965 between Malaysia and Singapore and an annexed proclamation (UNTS, Vol. 563, p. 90), Singapore became an independent State separate from Malaysia, of which it had become part in 1963. The most important exception concerned the Eastern Province of Pakistan: It seceded from Pakistan as the result of a civil war and proclaimed itself an independent State under the name of Bangladesh in 1971. After the recognition of Bangladesh and her admission to membership of the Commonwealth, Pakistan left the Commonwealth in 1972; apart from the earlier cases of Ireland and South Africa, Pakistan has remained the only member which has ever left the Commonwealth. The Commonwealth thus has shown a remarkable will to survive, particularly with regard to its younger members. The "British Empire", on the other hand, is gone. In particular, British dependent territories have been reduced to ten, among them → Hong Kong, → Gibraltar and the → Falkland Islands (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories).

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WERNER MORVAY

DECOLONIZATION: DUTCH TERRITORIES

1. The Netherlands East Indies

(a) Historical background

When Japan occupied the Netherlands East Indies in March 1942, the territory had been a Dutch colony for more than three centuries (→ Colonies and Colonial Régime). In the spirit of the → Atlantic Charter (1941), Queen Wilhelmina, then in exile in London, launched a plan for a post-war commonwealth of the Netherlands, Indonesia, Suriname and the Netherlands Antilles. At the Potsdam Conference in July 1945 (→ Potsdam Agreements on Germany (1945)) the Anglo-American Chiefs of Staff agreed to transfer jurisdiction over the Netherlands East Indies to the South-East Asia Command under Lord Mountbatten. The task of the Command was, *inter alia*, to organize the → repatriation of enemy forces (→ Enemies and Enemy Subjects) after the Japanese → surrender, to liberate Allied → prisoners of war and to maintain order until the territories had been returned to the respective authorities. While the Indonesian nationalists took advantage of the political vacuum after the Japanese capitulation by proclaiming the Republic of Indonesia on August 17, 1945, the Dutch Government made every effort to implement the basic ideas of 1942 and entice the population to accept the concept of → federal States. This resulted in the signing of the Linggadjati Agreement on March 25, 1947 (DeptStateBull, Vol. 18 (1948) p. 325), Art. 2 of which provided that "the Netherlands Government and the Government of the Republic shall cooperate in the rapid formation of a sovereign democratic state on a federal basis". A fundamental difference in interpretation, however, brought subsequent negotiations to naught. In order to achieve what they had not gained at the negotiating table, the Dutch launched a police action on July 20, 1947.

Through the → good offices of the → United Nations Security Council, the parties were able to conclude the Renville Agreement on January 17, 1948 (DeptStateBull, Vol. 18 (1948) p. 334). By a second police action on December 19, 1948, the Dutch Government tried to force the creation of a federation. On January 28, 1949, the Security Council called for the restoration of the Republican government and for the transfer of → sovereignty to a United States of Indonesia, reconstituting the Security Council's Committee of Good Offices as the United Nations Commission for Indonesia. By a preliminary agreement (the Van Royen-Roem Accords of May 7, 1949) and a Round Table Conference in The Hague, transfer

of sovereignty to an independent State of Indonesia took place on December 27, 1949 (UNTS, Vol. 69, p. 206). The UN Commission for Indonesia was entrusted with the task of observing the implementation of the Round Table Conference Agreements which, after the unilateral proclamation of the Unitary Republic of Indonesia on August 17, 1950, adjourned *sine die* in April 1951.

(*b*) *Basic issues*

In the → decolonization process the crucial issues at stake were:

(i) the question of sovereignty: the respective juridical claims of the Netherlands and the Republic of Indonesia; the Republic's constitutional and international status prior to the United States of Indonesia;

(ii) the Republic's foreign relations;

(iii) internal security: the status of the Republican armed forces; justification for retention of Dutch forces in the territories;

(iv) economic reconstruction: the restitution of foreign properties in Republican territory and the application of the → most-favoured-nation clause to Indonesia (Draft Financial and Economic Agreement, Art. 11); and

(v) the status of Western New Guinea.

(*c*) *Evaluation*

The fact that the Dutch embraced the federalist concept must be ascribed to the existence of the Republic and the attempt of Dutch policy-makers to devise a counterbalance to its power and prestige. In fact the Republic exercised effective jurisdiction only over Java and Sumatra, and the Dutch intention was to thwart any attempt of Republican domination over other parts of Indonesia. The purpose of the first police action was not so much the elimination of the Republic, but rather the creation of conditions favourable to the implementation of the federal policy. The Dutch maintained until the very end that → United Nations involvement was *ultra vires* and that the dispute was a matter of → domestic jurisdiction. The Dutch reluctance to transfer sovereignty was due to the failure to recognize the roots of rising Indonesian nationalism rather than to concrete or abstract legalisms. The independence of Indonesia, however, can also be viewed as an American attempt to ward off communism in the region through → power politics. The threat to withhold assistance under the Marshall Plan (→ European Recovery Program) to the Netherlands only accelerated the decolonization process. Therefore, if jurisdiction over the Netherlands East Indies had not been transferred at the Potsdam Conference, this process would have occurred even faster.

2. *Western New Guinea*

(*a*) *Origin of the conflict*

Due to the lack of agreement at the Round Table Conference in 1949, Art. 2 of the Charter of Transfer of Sovereignty provided, *inter alia*, that the → *status quo* of the territory of Western New Guinea should be maintained for a period of one year, followed by → negotiations between the Netherlands and Indonesia to determine its final political status. A stalemate in the negotiations led to the collapse of the Dutch-Indonesian Union (1954), a renunciation on the part of Indonesia of its obligations under the Round Table Conference Agreements of 1956 and a rupture of diplomatic relations in 1960 (→ Diplomatic Relations, Establishment and Severance).

(*b*) *Resolution*

The → United Nations General Assembly, seised with the question beginning in 1954, failed to produce results acceptable to both parties. In order to break the deadlock, the → United Nations Secretary-General called on the United States to mediate (→ Conciliation and Mediation). At the initiative of President John F. Kennedy, Ambassador Ellsworth Bunker worked out a plan based on some of the elements of a proposal launched by the Dutch Minister of Foreign Affairs at the General Assembly in October 1961. It contained the Dutch readiness to transfer sovereignty to a United Nations organ which should prepare the population for → self-determination. This "Bunker plan" provided subsequently the basis for the agreement signed on August 15, 1962 (UNTS, Vol. 437, p. 273), which entered into force on September 21, 1962 after the General Assembly had endorsed its implementation.

The Agreement stipulated, *inter alia*:

(i) transfer of Dutch administration to a United Nations Temporary Authority (Art. 2);

(ii) transfer of the administration to the Republic of Indonesia by May 1, 1963 (Art. 12); and

(iii) the appointment of a UN representative to supervise the "act of free choice" (Art. 16). The "act" was carried out through collective consultations from July 14, 1969 to August 2, 1969, by which process the Papuan population opted to become an integral part (Irian Barat) of the Republic of Indonesia.

(c) *Special legal problems*

In the subsequent debates of the General Assembly on the conduct of the act of self-determination and the results thereof under Art. 21 of the Agreement, several delegations expressed reservations as to the method followed and stated that it could not be considered an act of self-determination. This method of consultations had been followed, however, due to the special situation prevailing in the territory with regard to its population and geographical conditions. The Dutch argued in the decolonization process that a transfer of sovereignty ran counter to their obligations under Art. 73(e) of the → United Nations Charter (→ Non-Self-Governing Territories).

3. *The Netherlands West Indies*

(a) *Common features*

Unlike the cases of Indonesia and Western New Guinea, the process of decolonization of Suriname and the Netherlands Antilles developed primarily through constitutional law. After having reached an agreement with representatives of the two colonies, giving them an autonomous status within the kingdom, the Dutch Government ceased to report to the United Nations under Art. 73(e) of the UN Charter after 1950. It consolidated the status of the territories in the 1954 Charter of the Kingdom of the Netherlands, based on equal partnership and autonomy, except regarding "Kingdom affairs" (Art. 3).

(b) *Suriname*

A colony since 1667, Suriname was administered by the Dutch West India Company. It was given full self-government in domestic affairs in December 1949. A Royal Commission constituted in January 1972 was to prepare alternatives to the constitutional relationship between the Netherlands, Suriname and the Netherlands Antilles. After the Kingdom Charter had been amended by a special Act of Parliament, both in the Netherlands and in Suriname, the latter became independent on November 25, 1975 and was admitted to the United Nations on December 1975.

The recognition of Suriname's sovereignty over its territory was governed by a Royal Declaration dated November 25, 1975. Being a "Kingdom affair", the question of → nationality was settled by the parties concerned through allocation of nationality by treaty. This procedure ran counter to the principle of a "genuine link" as defined in the → Nottebohm case. Taking advantage of their newly acquired nationality, many Surinamese subsequently moved to the Netherlands. Unlike succession to "territorial" treaties, which is a matter of course (→ Treaties, Effect of Territorial Changes), succession to other treaties is not. From the available *modi operandi* under international law, treaty rights and obligations developed upon Suriname by virtue of → customary international law.

(c) *The Netherlands Antilles*

A colony since 1634, administered separately as part of the Dutch West Indies since 1845, the Netherlands Antilles was so named in 1948 as a result of a change of the Constitution. A Royal Commission was constituted in 1978, and a → Mixed Commission in 1982 looked into alternatives to the constitutional ties under the "Kingdom Charter".

The establishment of six independent new States is at present not feasible, although the Royal Commission defined the right to self-determination as "the right of the population of each island to determine its own political future". Some islands prefer to retain a common bond with the Kingdom of the Netherlands. In July 1985, the Kingdom Charter was amended again by a Special Act of Parliament in order to bestow a separate status for a period of ten years on the island of Aruba. Its purpose is to pave the way, in accordance with the wishes of Aruba, for ultimate independence by January 1, 1996.

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J.G.C. VAN AGGELEN

DECOLONIZATION: FRENCH TERRITORIES

1. Introduction

Aside from several areas in Latin America and in the Pacific Ocean, the French colonial realm continued after the Second World War to comprise the three Indochinese possessions, Vietnam, Cambodia and Laos, the three North African protectorates and colonies, Algeria, Morocco and Tunesia, numerous amalgamated colonies in the two colonial unions of French West Africa and French Equatorial Africa, Madagascar, Réunion and the Comoro Islands as well as the two C-mandates and later trust territories, Togo and Cameroon, and the two A-mandates, Syria and Lebanon. The international law and constitutional law situation of these territories varied greatly. Towards the end of the 19th century, Tunesia, Morocco and Vietnam (Annam) and Cambodia were independent States which became → protectorates on the basis of treaties with France. In this regard, France thus exercised foreign affairs power partially in its own name and partially in the name of these States. However, very extensive and important domestic powers such as the maintenance of public safety and order were also formally exercised by the French Republic. Moreover, purely domestic powers lay in the hands of French officials who were only formally appointed by the particular "government", but substantively subject to the supervisory power of the French deputy or commissioner.

In light of these far-reaching French powers it may be asked whether the governmental power, which was maintained by these entities only on a purely formal basis, could still justify the designation of these entities as → States in the context of international law, or whether it was not far more a question of fully integrated so-called "colonial protectorates" (→ Colonies and Colonial Régime).

The A-mandate territories in the Near East and the C-mandate territories, later trust territories, in Black Africa were based on corresponding mandate treaties with the → League of Nations and were subject to the international control initially of the League and later of the → United Nations (→ Mandates; → United Nations Trusteeship System). These territories were administered by France as if they were French colonies and were fully integrated in the French State.

In contrast, the other Black African regions were integrated components of the French Republic also according to the "basic relationship"; however, they possessed a legally subordinated status in their relationship to the *départements* of metropolitan France. In fact, their inhabitants possessed French citizenship but not the fundamental rights provided for in the constitution and, therefore, not the right to vote and to be elected. Consequently, they were, on the one hand, not represented in the National Assembly and in the Senate of the French Republic and, on the other hand, self-government in the colonies themselves was still largely unknown.

2. Near East

In the A-mandate territories of the Near East, France founded the two autonomous States, Syria and Lebanon, as early as the 1920s. These States, however, similar to the protectorate States in Africa and Indochina, exercised few powers of their own. Real authority lay rather in the hands of the French High Commissioner. Both States were

supervised by a unified French administration which was for the most part formally separated from the organs of the French Republic. During the Second World War this French administration in the Near East remained loyal to Vichy.

Upon the reconquest of the mandate territories by the troops of Great Britain and free France, the French General-Deputy Catroux proclaimed the independence of both States. As later would become apparent, this did not amount to a legal act, changing the status of these territories, but rather to a promise of later independence. Hence, France again assumed almost full → territorial sovereignty; thus, little change occurred initially in the colonial structures of the territories. Nevertheless, in the period from 1941 to 1945 numerous third States had recognized the independence of the Levantine States which, moreover, became original members of the United Nations in 1945. Under the pressure of these third States, later also of the United Nations and finally of insurgent movements in the States themselves, France transferred increasing levels of sovereign authority to the States and eventually withdrew its last troops from these territories in April 1946. The independence of both States was thereupon, as the ensuing immediate assumption of diplomatic relations showed, reached through the factual circumstances (→ Decolonization).

3. *Indochina*

The French constitution of the Fourth Republic of 1946 established the French Union. It was intended by this means first and foremost to assimilate the protectorate States and the *États associés* which were to be founded in the French Union. In practice, the French Union was to have comprised only the three Indochinese States, Vietnam, Cambodia and Laos, discounting the fact that representatives of other colonies sat in its organs.

Initially, the French administration in Indochina also remained loyal to Vichy, primarily as a result of the occupation by Japanese troops. In 1945 this administration was replaced by representatives of the new government. The administrative structures changed, however, only with the conclusion of the conventions entered into with the three Indochinese States in 1946. These treaties envisaged "independence in the framework of the French Union", thus on the one hand, independence and, on the other hand, certain limitations on such independence through membership in the French Union. Naturally both the Indochinese States and France afterwards drew support from one side or the other of this combined formula. The resulting problems could not be surmounted through the conventions concluded in 1948 and 1949, above all since the French troops in all three States were meanwhile under fierce attack by guerilla units, in Vietnam by units of the Democratic Republic of Vietnam (→ Vietnam).

Through the treaties of 1946 and 1948 to 1949 individual levels of domestic sovereign authority were transferred to the three States. The most important competences, particularly with regard to foreign affairs, defence and economy and currency, remained with the French Union. This Union had its own organs in the form of the Union-President, the Union-Assembly and the High Council, in which representatives of the Indochinese governments or population were also seated in addition to those of the French government. However, these organs possessed only participatory, particularly advisory rights *vis-à-vis* the organs of the French State, which continued to exercise their powers largely unilaterally. Thus, the French Union did not involve a union of States under international law with international legal personality, but rather a juridical person under French colonial law which was fully integrated in the French State (→ Confederations and Other Unions of States).

In the wake of the increasing pressure of guerilla units, especially in the Democratic Republic of Vietnam, new treaties were negotiated with the three States in 1953 to 1954 which transferred further extensive sovereign powers to these States, released the French Union from unilateral adherence to the French constitution and placed it on a treaty footing, which thereby largely also led substantively to the approximation of the Union with an → international organization of equal partners. These last remains of the French colonial structures were abandoned with the French withdrawal from Vietnam in 1954; the fight against the guerilla units of North Vietnam was thereupon further pursued by the United States alone.

4. *Africa*

The French defeat in Indochina in 1954 and the Algerian war weakened the international and

internal situation of the French government so greatly that it finally was prepared to grant almost complete independence to Tunesia within the framework of certain reservations involving cooperation through a treaty concluded on July 31, 1954. In this manner the government sought to end the open guerilla war which had erupted following the return of Bourgiba to Tunesia. Likewise, owing to the recent open outbreak of a revolution which had been smouldering since the 1930s, the French government granted Morocco independence in the declaration of de La Celle-Saint Clurd of November 1, 1955. The almost inevitable consequence was that the treaties concluded with Tunesia in 1954 could no longer be fulfilled. Instead, the protectorate treaty of Bardo was extinguished in a protocol of March 20, 1956 and the full independence of Tunesia was declared. In contrast to the development in Indochina, Black Africa and the Near East, the independence of Morocco and Tunesia as well as Algeria did not occur through a process in which increasing layers of competence were transferred to the new States until they attained independence in the final stage.

The French constitution of 1946 held firmly to the integration of the French colonies in Black Africa into the French Republic. Initially, only the designation for these colonies changed; they were now named "overseas territories" (*territoires d'outre-mer*; → France: Overseas and Dependent Territories).

Nevertheless, the French Republic attempted from 1946 to 1955 through the gradual according of equal status to the inhabitants of the French colonies with those of the motherland also legally to integrate these colonies fully in the French State. The native inhabitants of the colonies who until 1946 possessed only the French → nationality acquired besides citizenship (*citoyenneté*) in 1946 also the basic rights grounded in the French constitution and above all the right to vote and to be elected. This extension of the principles of the State governed by law and of democracy led to a participation in the drafting of the constitution of 1946 and to a participation in French State organs, particularly in Parliament and in the Senate, later also in the government. In addition, it led to a gradual expansion of organs of self-government and to a transference of French competences to these organs.

The full legal integration in the motherland through the accordance of basic rights, however, quickly ran up against a barrier since representation in the organs of the French Republic corresponding to the proportion of the native population would have led to a severe "colonization of the motherland". After 1955 the growing demand for full equality with regard to basic democratic rights had led to a shift from the assimilation or integration policy to a policy through which the self-administration of the colonies would be gradually strengthened further and finally the colonies transformed into independent States. This development emerged clearly after 1956. French sovereign powers were increasingly transferred to the organs of self-government of the overseas territories or at least to the governors so that the participation of the populace in the exercise of sovereign powers through the governors became possible. Finally, the founding of "autonomous republics" in Togo and Cameroon as States as defined by French constitutional law (*États associés*) in 1956 and 1957 also corresponded to this development.

5. The Francophone Community

The constitution of the Fifth French Republic of 1958, in whose drafting by the constitutional assembly the population of the overseas territories had been just as involved as in the drafting of the constitution of 1946, conferred on the overseas territories and departments very wide-reaching decision-making powers with regard to their future legal status and, particularly, their relations to the French Republic. It was first of all provided that the populations of these territories could decide for or against the new constitution in referenda: A decision against the constitution resulted, as the example of Guinea demonstrated, in immediate independence. Secondly, there was a right of electing between several different types of statutes which allowed, at one end of the spectrum, the transformation of the overseas territories into overseas *départements*, and at the other end, the founding of autonomous States in the francophone community. These States possessed quite far-reaching, almost all-encompassing competences in the domestic area; only foreign affairs, defence, currency, common economic and defence policy as well as several other limited powers were reserved for the francophone community. This community

had four organs at its disposal: the president of the community, with whom the president of the French Republic was identical, the executive council, comprised of the governments of all the States concerned, and the Senate of the community, in which representatives of the national Parliaments sat, as well as the court of arbitration. The francophone community involved merely an intra-State rather than an inter-State union with the clear predominance of the organs of the French Republic. Nevertheless, the organs of the community were so structured that a decision could gradually be transferred from the French president and the French government to the State representatives, who decided in unity.

Particularly under the pressure of the Algerian war, new treaties were concluded in 1960 with all the States in Black Africa, thus launching these States into independence. Aside from close cooperation with France in many areas, especially with regard to defence, economy, currency and culture, these mostly bilaterally concluded treaties provided for the continuation of the francophone community which, however, was henceforth placed on a treaty rather than a constitutional basis and which thereby also substantively moved closer to an international organization. Thereafter, however, the francophone community ceased to function and was extinguished through subsequent factual developments. Close cooperative relations were retained between the Black African States and France, whereby the exclusive character of these relations and the strict obligations of the African States were gradually adjusted to their new status and finally extinguished.

6. *Algeria*

The, in part, surprising and unproblematic decolonization primarily in French Black Africa, but also the withdrawal from Indochina and the independence of Morocco and Tunesia were based above all on the attempt to retain at least Algeria as the domicile of numerous French settlers and businesses. Its affiliation with France had likewise been placed in question through the outbreak of guerilla fighting in 1954. These facts laid the basis for a particularly close relationship with the French Republic so that in the eyes of the succeeding French governments a development similar to that in Black Africa was precluded; in contrast, Algeria was bound more closely to France through its transformation into a *département*. Only when an attempted revolt by the French army at the peak of the "civil war" was barely avoided did General de Gaulle decide, in order to reduce the internal and external strain to France's relations, to conclude the Accords d'Evian with the Front of National Liberation (FLN) on March 19 in 1962 (UNTS, Vol. 507, p. 25), which led to the full independence of Algeria on January 1, 1963.

7. *Conclusions*

Several general conclusions may be drawn from the decolonization of the French colonial realm:

(a) Decolonization in the French as in other colonial realms was triggered by the fact that the concept of democracy and the closely related right of → self-determination became increasingly powerful in the States of both the East Block and the West Block, in the colonies, but also in the mother countries themselves. The colonial States thereby fell under the growing pressure of world public opinion, which was further reinforced by the guerilla insurrections in numerous colonies.

The mother countries at first attempted to evade the development of the new States towards independence by integrating the colonies fully in the motherland. Thus they conferred also on the inhabitants of the colonies all the basic rights flowing from the principles of democracy and of government ruled by law and brought about the equal electoral franchise required by those principles by allowing the participation of the colonial population in the organs of the motherland. On the other hand, however, they simultaneously created organs of self-government in the colonies and transferred to these organs far-reaching domestic competences. This development was limited by the fact that the principle of equality inherent in the principle of democracy could not be realized through the participation in the central organs of the motherland without leading to the colonization of the mother countries by the peoples from the colonies as a result of the larger populations of the colonies. Therefore, the principle of democracy in its further development could only fully prevail through the development of independent States. The attempt of the mother countries to evade this development by allowing

the populations of the overseas territories to decide in referenda upon a legal status in the framework of the motherland in which the principle of democracy was not fully realized, was no longer accepted by the inhabitants of the colonies, by third States or by the United Nations in the course of further development. On the contrary, world public opinion did not see the right of self-determination as adequately satisfied when peoples freely decided in favour of a reduced legal status on the basis of this right. Rather, the principle of democracy demanded in the future the full realization of the "mathematical" principle of equality and consequently the independence of the new States.

(b) Customary law and the conventions of the → International Law Commission proceed on the assumption that new States come into being "overnight" and thus seek independence simultaneously. Such a legal development, however, rarely took place during decolonization. Rather organs of self-government were established in the colonies in the first phase of the process which, however, more nearly possessed the status of local domestic territorial political authorities; these self-administration organs acquired increasing layers of competence. In the second phase, these organs developed into States as defined by domestic law, to whom again further competence was transferred in a layered fashion. These States attained independence only in the final stage. This meant, on the one hand, that a case of classical → State succession is not at issue here, but rather one of succession of functions with regard to certain layers of competence, whereby in each phase, rules with regard to succession must be developed. On the other hand, the later independent States are largely identical with the earlier domestic territorial political entities. Since the legal relations concerning these colonies were already formed to a large extent for and through such organs of self-government, problems thus do not arise in this regard as to the succession of functions in the legal relationships with the motherland.

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DECOLONIZATION: PORTUGUESE TERRITORIES

1. Preliminary Remarks

Portuguese colonization did not have in history the same importance as that of the Greek or Roman Empires. Still, it did make its marks on modern and contemporary history and left throughout the world the distinctive traces of Portuguese culture and European civilization. Portuguese colonization had its own particular characteristics, when compared with the colonization of other European countries. These characteristics varied according to the historical period in which the colonization occurred, but always permitted greater religious expression and the expansion of the Christian faith, compared to other colonizations, especially in the period from the conquest of Ceuta, in the North of Africa, in 1415, to the end of the 16th century.

The Portuguese possessions in Africa were colonies until 1951 (→ Colonies and Colonial Régime), when they were integrated into Portuguese territory as *províncias ultramarinas* (overseas provinces). The legal régime of the provinces was included in the first written Constitution of 1822, but had been followed since the beginning of the 17th century. Upon the establishment of the Republic in 1910, there was a return to the colonial system. In 1972, the Constitution bestowed upon them the status of *regiões ultramarinas* (overseas regions) and the honorific status of States, which was for centuries the case with respect to the Estado Português da India (Portuguese State of India).

2. *Decolonization*

The post-war → decolonization process came late to the Portuguese territories, compared to other European colonial countries. In August 1961, Portugal withdrew from the Fortress of Sao Joao Baptista de Ajuda, because it did not have the means to resist the → siege imposed upon the possession by the armed forces of the Daomey, now Benin. On December 18, 1961, the armed forces of India took possession of the territories of Goa, Daman and Diu (western coast of the Hindustan Peninsula) which constituted the Portuguese State of India and were the only remnants, since the 17th century, of the possessions Portugal had once had from the Persian Gulf to Borneo and the Moluccas, including the Indian coast and Ceylon, later Sri Lanka. Already on July 22, 1954, India had occupied the → enclaves of Dadra and Nagar-Aveli, over which, however, on April 12, 1960 the → International Court of Justice in the → Right of Passage over Indian Territory Case, recognized the → sovereignty of Portugal. Nevertheless, India refused to abide by this judgment. The occupation in December 1961 was not prevented by the → United Nations Security Council, which failed to approve, because of the → veto of the Soviet Union, a motion in which the immediate cease-fire and the withdrawal of the Indian Armed forces from the occupied territories were demanded. Portugal refused to accept the situation of military occupation and kept in its Constitution Goa, Daman and Diu as Portuguese territories (→ Occupation, Belligerent).

It was only after the military *coup* of April 25, 1974, which aimed to re-establish democracy in Portugal, that Portugal began the decolonization of the territories in other continents over which she exercised sovereignty.

The Programme of the Armed Forces Movement, which took power after the *coup*, included, as "a short-term measure", a political solution for the overseas territories. It was understood then that the decolonization should be based on the principle of → self-determination of the peoples involved, so that it should lead, according to their choice and following what had been established in the UN "Report from the Six", either to independence, to another form of self-government or to continuation of Portuguese sovereignty. Later, the Lei Constitucional (Constitutional Act) 7/74 of July 27, 1974, approved by the Conselho de Estado (Council of State, consultative organ of the President of the Republic), renewed the right of the peoples to self-determination, although it seemed to favour the independence of the overseas territories. This Act also determined that the agreements to be concluded with third parties had also to respect that right (Arts. 2 and 3). However, the practice which came to be adopted identified decolonization as being necessarily connected with independence.

It was in that spirit that on August 26, 1974 in Argel, the Portuguese Government and the African Party for the Independence of Guinea and Cape Verde (→ Liberation Movements) signed an agreement on the *de jure* → recognition by Portugal of the Republic of Guinea-Bissau as a sovereign State, and of the right of the people of Cape Verde to "self-determination and independence" (Diário do Governo, I S, August 30, 1974). Later, similar agreements were concluded: on September 7, 1974, in Lusaka, between the Portuguese State and the FRELIMO (Liberation Front of Mozambique), in which the former acknowledged "the right of the people of Mozambique to independence", without accepting FRELIMO's proposal of a gradual transfer of power over a six year period (Diário do Governo, I S, September 9, 1974); on November 26, 1974, in Argel, between the Portuguese Government and the Liberation Movement of Sao Tome and Principe, in which the Portuguese Government acknowledged "the right of the people of Sao Tome and Principe to self-determination and independence" (Diário do Governo, I S, December 17, 1974); and on January 15, 1975, in Alvor (Portugal), between the Portuguese State and the National Front for the Liberation of Angola (FNLA), the Popular Movement for the Liberation of Angola (MPLA) and the National Union for the Total Independence of Angola (UNITA), in which the Portuguese State accepted the "right of the people of Angola to independence" (Diário do Governo, I S, January 28, 1975).

Several incidents followed the conclusion of the agreement concerning Mozambique because of the unfavourable reaction of Portuguese citizens, both black and white, to the fact that in the Lusaka → negotiations no other Mozambiquean forces

and political tendencies were heard, apart from FRELIMO, which did not deny its dependence on the Soviet bloc. But much more eventful was the enforcement of the Alvor Agreement concerning Angola. Shortly after its coming into force a → civil war broke out among the three movements, which the MPLA, the only one of them which was supported by the Soviet Union, won. Portugal was responsible for this situation, as it did not respect the position of neutrality imposed upon it by the Alvor Agreement, permitting, even before independence, the MPLA to receive massive military help, in men and material, from the Soviet Union and Cuba (→ Intervention). Moreover, far from assuming an active position in the settlement of the conflict, Portugal unilaterally suspended the Alvor Agreement by the Decreto-lei (Decree-law) 458-A/75 of August 22, 1975. Consequently, on November 11, 1975, power was handed over by Portugal to the MPLA alone, contrary to what had been provided for in the Alvor Agreement. Thus, the civil war has continued to the present day, especially between the MPLA and the UNITA.

Meanwhile, in the Treaty concluded with India on December 31, 1974 (UNTS, Vol. 982, p. 153), Portugal acknowledged the sovereignty of India over the territories of Goa, Daman, Diu, Dadra and Nagar-Aveli.

Macao, which in the Portuguese Constitution of 1933 was considered territory under Portuguese sovereignty, was exluded in 1972 from the list of non-autonomous territories prepared by the United Nations Special Committee on the situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (UN GA Official Records, 27th session 1972, Supplement No. 23, p. 27). This exclusion was demanded by → China, which already then considered → Macao part of Chinese territory. After the *coup* of 1974, the Portuguese Government clearly stated that Macao was not included in its territories to be decolonized. Because of a secret agreement signed with China, Portugal did not include Macao in the 1976 Constitution among the territories under Portuguese sovereignty, considering it only as "territory under Portuguese administration" (Art. 5.4 of the Constitution; → Treaties, Secret). The same is stipulated in the Statute of Macao, approved by the Lei (Act of Parliament) 1/76, of February 17, 1976.

In → East Timor, shortly after the 1974 *coup* in Portugal, three movements arose claiming to represent the Timorean people: the Democratic Union of Timor (UDT), pro-West, favourable to independence but with preservation of some links with Portugal; Timorean Popular Democratic Association (APODETI), which advocated the integration of Timor in Indonesia; and Revolutionary Front of Independent East Timor (FRETILIN), which possessed a programme close to that of some liberation movements of the Portuguese territories in Africa, and favoured the independence of Timor. In January 1975, Portugal accepted the formation of a coalition between the UDT and FRETILIN, aiming at gradual autonomy, through which independence would be achieved, but not before 1982. However, the withdrawal of APODETI from the government worried Indonesia, already uneasy with the Marxist wing of FRETILIN. With the radicalization of the political situation in Portugal after the communist *coup* of March 11, 1975, Portugal paid less attention to Timor. Consequently, the situation in Timor began to deteriorate: on May 27, 1975, the UDT abandoned the coalition and FRETILIN radicalized its position, leading Indonesia for the first time to threaten Timor with an invasion. At the Macao Summit of July 26, 1975, between Portugal, the UDT and APODETI in the absence of FRETILIN, the UDT proposed independence in 1980. Portugal rejected this idea and advocated immediate independence for the territory. The difficulty in reaching a consensus increased and on August 10, the UDT alleged the preparation of a *coup* by the FRETILIN for August 15 and took the capital, Dili. The Portuguese Government of Timor withdrew to the island of Atauro, claiming to be unable to rule the territory. Basing its action on the abandonment of Timor by Portugal (→ Territory, Abandonment), the Armed Forces of Indonesia invaded the territory which was later annexed (→ Annexation; → Territory, Acquisition). The UN General Assembly Resolutions 3485(XXX) of December 12, 1975, 31/53 of December 1, 1976, 32/34 of November 28, 1977, 33/39 of December 12, 1978, 34/40 of November 21, 1979, 35/27 of November 11, 1980, 36/50 of November 24, 1981, and 37/30 of December 9,

1982; and Security Council Resolutions 384 (1975) of December 22, 1975 and 389 (1976) of April 22, 1976, demanded in vain that Indonesia recognize the right of the Timorean people to self-determination.

3. *Evaluation*

The decolonization of Portuguese territories suffered from two serious juridical defects. Firstly, it did not respect the right to self-determination, since in no case were the decolonized peoples consulted concerning their future. Instead, a necessary link between decolonization and independence was established, although the peoples in question could have determined their own future in a direction other than independence, as confirmed by General Assembly Resolution 1.514(XV) of December 14, 1960, by the Constitutional Act 7/74 and by spokesmen for the Portuguese Armed Forces Movement. Secondly, the error was made of mistaking territories under colonial domination with overseas territories discovered and peopled by Portugal, such as the → archipelagos of Cap Verde and Sao Tome and Principe, which should have been given the same status as the archipelagos of Madeira and the Azores, concerning which the question of decolonization never arose.

Apart from this, the criteria used in the choice of the liberation movements with which to negotiate the independence of the African territories were very subjective. In fact, except for Guinea-Bissau, in all the other territories there was no situation of internal war; the movements were not represented in their own countries but rather kept their headquarters abroad and subsisted only with the support of foreign powers. An intention of transferring political power to those movements which at the time claimed to be followers of Marxism-Leninism and were dependent on the Soviet bloc, is clearly evident here.

In the case of the Treaty which acknowledges the sovereignty of India over the territories of the once Portuguese State of India, it must be pointed out that this Treaty was not preceded by → consultation, either with the people of that territory or with the Portuguese people, and also that it legitimized an act of occupation condemned at the time by the international community. Furthermore, this Treaty did not protect the cultural interests of Portugal or of the peoples of these territories, where both Portuguese and the millenary local culture had merged together in a remarkable way.

In the light of the responsibility which Portugal had towards her colonies throughout five centuries and noting the colonizing work she left there, expressed in racial sociability and cultural promotion, of which Brazil is a case in point, Portugal should have ensured a more just decolonization, as the decolonized peoples themselves wanted and deserved.

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DELTAS *see* River Deltas

DENIAL OF JUSTICE

A denial of justice (*justitia denegata*, *déni de justice*, *refus de justice*, *Rechts- und Justizverweigerung*) should be understood as any defect in the organization of courts or in the exercise of

justice which entails a violation of the international legal duties of States with respect to the judicial protection of → aliens. This applies not only to the ordinary court system but also to all other branches of justice, including the prize courts (→ Prize Law) as well as administrative procedures.

A denial of justice is an → internationally wrongful act. According to Art. 3 of the → International Law Commission's Draft Articles on State Responsibility which were adopted on their first reading in July 1980, an internationally wrongful act of a State arises when:

"(a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State" (YILC (1980 II, Part 2) p. 30).

Denial of justice in its various forms plays a major role with regard to the enforcement of aliens' rights within host countries; such rights can be based on → customary international law or on bilateral establishment conventions (→ Commercial Treaties). A State is liable for the practice and jurisprudence of its courts even if under the State's own domestic law the courts are not subject to executive power and the decisions cannot be altered once they have entered into force (→ International Law and Municipal Law; → Responsibility of States: General Principles).

The notion of denial of justice developed within Europe from the 13th century onwards. Where a State was unable or on grounds of ill will unwilling to make restitution for some unlawful act committed against an alien within the territory under the State's sovereign jurisdiction (→ Territorial Sovereignty), the alien was able to obtain from his own State a letter of Marque (*Lettre de marque, Mark- oder Kaperbrief*). By the 18th century this practice of private restitution had fallen into disuse. The → diplomatic protection of a State's own nationals and their rights abroad came to be included within the growing authority vested in the modern State.

The rules as to the notion, extent, prerequisites and legal consequences of denial of justice have evolved in customary international law as developed largely by the decisions of → international courts and tribunals: → Ambatielos Case; → Barcelona Traction Case; → Costa Rica Packet Arbitration; → Lac Lanoux Arbitration; → Lotus, The; → Martini Case; → North American Dredging Co. of Texas Arbitration; → Palmas Island Arbitration; → Salem Case.

In 1758 Vattel wrote:

"Now, justice may be refused in several ways: (1) By an outright denial of justice or by a refusal to hear the complaints of a State or of its subjects or to allow the subjects to assert their rights before the ordinary tribunals. (2) By pretended delays, for which no good reason can be given; delays equivalent to a refusal or even more injurious than one. (3) By a decision manifestly unjust and one-sided" (Le Droit des Gens (1758) Book II, Chapter 18, para. 350, in: J.B. Scott (ed.), Classics of International Law (1916) (translation by C.J. Fenwick)).

In 1927 on the basis of the report by L. Strisower (AnnIDI, Vol. 33 I (1927), p. 455) the → Institut de Droit International formulated the existing norms of customary international law as follows: the State would be responsible for the denial of justice if (a) the courts necessary for the protection of aliens either did not exist or did not function; (b) if the courts were not accessible to aliens when compared to the access enjoyed by resident nationals and there were no grounds for such discrimination which arose and were justified by the nature of the procedure; and (c) if the courts manifestly failed to offer the indispensable guarantees designed to vouchsafe the proper administration of justice. The State would be equally liable if the procedure and judgment represented an aberration of law. This would apply equally if a judicial decision were manifestly influenced by hostility against aliens as such or as nationals of a particular State (see AnnIDI, Vol. 33 III (1927) p. 330).

The Hague codification conference of 1930 dealt with both the responsibility of States as well as the law relating to aliens (→ Codification of International Law). The basis for discussion No. 5 on State responsibility divided the facts relevant under international law in respect of the denial of justice in the following way: the liability of a State arose when an alien suffered damage to the extent that (a) the alien is entirely denied the resort to courts in the protection of his rights; (b) a legally binding judicial decision is made which is irreconcilable with the duties of the State under a treaty

or some other international obligation; (c) a court has misused its procedures to cause delay; (d) the content of a judicial decision is manifestly influenced by malice (*malveillance*) against aliens as such or as nationals of a particular State (LON Doc. C.75.M.69.1929.V., p. 48).

In 1929 the Harvard Law School's draft convention and comments on responsibility of States for injuries to aliens was published (AJIL, Vol. 23 (1929) Supp., p. 713). This was followed in 1961 by an investigation into the same area (AJIL, Vol. 54, p. 548). The latter contained a lengthy discussion of denial of justice with reference to a great many arbitral and court decisions.

The forms that the denial of justice may take are highly various. A denial of justice may be present in any abuse of the practice of a court in each phase of a legal procedure, e.g. the misuse of a declaration of the inadmissibility of some legal avenue, the determination that a tribunal is not competent to hear the issue, the transfer of an issue to another court, the irregular establishment of a court, or the unusual and inexcusable protraction of proceedings (*justicia protracta*). On the other hand, the requirement of security from the alien to protect his domestic opponent is always admissible.

In material terms the simple miscarriage of justice (*mal jugé simple, défaut de justesse*) will rarely be seen as an internationally wrongful act in terms of the denial of justice, but this cannot be said of a serious and intentional perversion of justice as a result of malicious and false evaluation of the evidence or determination of the law. This view applies particularly when the court's bad faith is manifestly directed against the alien, for instance when legal forms are used purely as a cloak for arbitrary acts (exorbitant injustice, *absence totale de justice*).

In the enforcement of judgments the denial or delay in bad faith of compulsory enforcement or one of its variants can constitute a denial of justice.

In criminal proceedings, both judicial and administrative, any discrimination against individual aliens or groups in favour of resident nationals where the prosecution or criminal offences or the enforcement of criminal penalties are concerned may disclose a denial of justice, and this applies in particular to arbitrary arrest, the protraction of investigations and increased penalties against aliens (→ Discrimination against Individuals and Groups). On the other hand, the insufficient prosecution of criminal acts carried out by the State's own nationals against aliens may itself constitute a denial of justice, for example the protraction of investigations, mild penalties, the non-enforcement of penalties ordered against guilty resident nationals or abetting the escape of nationals from pre-trial detention, remand or ordinary imprisonment.

In the enforcement of claims for restitution for a denial of justice there are a number of peculiarities which are present in the procedures under international law (→ Reparation for Internationally Wrongful Acts). In the first instance, the innocence of the State accused of a denial of justice is advanced by the general assumption that its legislation and jurisprudence represent the requirements of international law, i.e. the international standard of a well ordered State. This broad assumption arises out of the → recognition of the State in question or the assumption of relations under international law between the States in question. Out of this legal presumption arises the norm that all domestic remedies must be exhausted before the State which has been injured in the person of its national may grant the latter its diplomatic protection.

The view advanced under the objective theory of international responsibility advanced by Anzilotti, Basdevant and Guggenheim is that the damage suffered by the alien by means of the denial of justice determines the responsibility. This considerably facilitates the evidential requirements. Even if the requirement is for blameworthy conduct by the State organs in question (the legislature, courts, police and so forth), such a requirement when measured against an international standard can usually be assumed (→ Responsibility of States: Fault and Strict Liability). Only in rare cases is it possible that a territorial State will be absolved of responsibility (*exculpatio*).

Larger States have often misused the right to exercise diplomatic protection against weaker States on behalf of their nationals because of a denial of justice (→ Abuse of Rights). South American States have therefore often made agreements with aliens wishing to establish themselves

within the host State in which the aliens waive the diplomatic protection of their home countries (→ Calvo Doctrine, Calvo Clause). To the extent that these clauses require the exhaustion of local remedies, they are representative of international law. In all other respects such agreements have no effect under international law, because the alien is not in a position to refrain from exercising claims for restitution to which, under international law, the alien's home State rather than the alien is entitled.

In the event of the failure of negotiations to eliminate the consequences of a denial of justice, the State suffering damage may resort to → reprisals. However, the principle of → proportionality must be respected. It was for this reason that the Hague Convention IV of 1907 limited the application of force in the enforcement of contractual debts (→ Drago-Porter Convention (1907)).

Restitution on the grounds of the denial of justice either in diplomatic proceedings or on the grounds of an arbitral decision (→ Arbitration) may prove difficult if the constitution of the State which is obliged to make restitution provides for a statute or referendum to overturn a defective decision which amounts to a denial of justice under international law. For such instances some equitable form of satisfaction may be agreed in → arbitration and conciliation treaties or negotiated in each particular instance. The restitution should be designed to cover not only the material damages in fact suffered by the individual alien, but should also include moral damages whose removal may be demanded by the State injured in the person of its national.

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DIPLOMATIC PROTECTION

A. Introduction: 1. Definition. 2. Diplomatic Protection as an Institution of International Law and a Compromise between Diverging Interests. – B. The Prerequisites for Diplomatic Protection: 1. An International Delict as Prerequisite for Diplomatic Protection. 2. Nationality as Prerequisite for Diplomatic Protection: (a) The general principle. (b) Natural persons: (i) The principle. (ii) Dual nationality. (iii) The special situation of German nationality. (iv) The right of individuals to protection. (c) Legal persons and shareholders: (i) Legal persons. (ii) Shareholders. (d) Ships and aircraft. 3. Continuous Nationality of the Claim as Prerequisite for Diplomatic Protection. 4. Exhaustion of Local Remedies as Prerequisite for Diplomatic Protection. – C. The Holder of the Claim: 1. Traditional Treaties and Customary International Law. 2. New Types of Treaties. – D. The Means of Diplomatic Protection. – E. Evaluation of Diplomatic Protection. – F. Diplomatic Protection and International Organizations.

A. Introduction

1. Definition

In accordance with prevalent practice and opinion, diplomatic protection is to be understood here as the protection given by a → subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law. Such a violation causing damage to the individual has usually already occurred, or is, in exceptional cases, about to occur. The individual receiving diplomatic protection is a private individual. The head of State, ministers, diplomats or consuls in their official capacity are an embodiment of the State itself. Thus an international delict injuring these persons in their official capacity is a direct injury to the State. Protection against such an injury is direct self-protection of the State and not diplomatic protection, although both can merge (→ United States Diplomatic and Consular Staff in Tehran Case). The difference is relevant chiefly in regard to the local remedies rule.

Diplomatic protection is practised, as a rule, by one → State against another. Occasionally, however, other international law subjects may also practise diplomatic protection, or are faced with it, especially international organizations (cf. section F. *infra*). In all these cases, diplomatic protection presupposes a certain link between the international law subject giving protection and the protected individual.

The term diplomatic protection is not altogether precise. First, not only → diplomatic agents and missions and their foreign offices may and do exercise diplomatic protection, but also, at a different level, → consuls, and, although very rarely, military forces. Secondly, the term diplomatic protection does not clearly denote the boundary line to other diplomatic activities for the benefit of individuals, such as the mere promotion of interests of one's own nationals in a foreign State, or friendly intercessions with foreign authorities. Thus, diplomatic or consular actions to obtain → concessions or other government contracts for nationals from the receiving State, or the arrangement of legal defense for a justly imprisoned national are not diplomatic protection in our sense; they are usually neither directed against the other State nor based on a real or alleged violation of international law. All these last-mentioned activities may be called diplomatic protection only if the term is taken in a very broad sense.

The following remarks deal as a rule with diplomatic protection under → customary international law, not with special treaty conditions.

2. Diplomatic Protection as an Institution of International Law and a Compromise between Diverging Interests

As the most important means of obtaining reparation for a treatment of → aliens counter to international law (→ Reparation for Internationally Wrongful Acts), diplomatic protection is a procedural corollary to the legal responsibility of international law subjects. As a rule, diplomatic protection is concerned with claims arising from an act, or failure to act, of a State on its own territory. But responsibility (→ Responsibility of States: General Principles) can also ensue from unlawful acts of → military forces abroad (→ Military Bases on Foreign Territory), of → warships or other → State ships, or of → State aircraft on or over the → high seas, e.g. in excess of → hot pursuit (→ I'm Alone, The). An act giving rise to diplomatic protection can even be committed on the territory of the protecting State itself. Unlawful acts of international organizations leading to diplomatic protection also take place either on the territory of some State or on territory or in space not under any → territorial sovereignty. In most cases, however, diplomatic protection appears in connection with a confrontation between one State's territorial jurisdiction (*Gebietshoheit*) and another State's jurisdiction over its nationals (personal → jurisdiction of States or *Personalhoheit*).

The legal institution of diplomatic protection as a procedural device has been influenced by some important changes in the → international legal community, e.g. by the constantly growing → interdependence, by the development of → human rights, and by attempts to raise individuals more and more to the status of subjects of international law (→ Individuals in International Law). Yet some basic principles of diplomatic protection which go back to Emeric Vattel and were developed during the 19th century have remained. Diplomatic protection is still mainly based on customary international law. As early as

1924, in the first judgment on the → Mavrommatis Concessions Cases, the → Permanent Court of International Justice (PCIJ) called the right of a State to protect its subjects injured by acts of another State in disregard of international law "an elementary principle of international law" (PCIJ, Series A, No. 2 (1924) p. 6, at p. 12). In addition, the right to grant diplomatic protection has, for instance, been included in two treaties aiming at world-wide participation, namely the → Vienna Convention on Diplomatic Relations (1961, Art. 3(1)(b)) and the → Vienna Convention on Consular Relations (1963; Art. 5(a) and (e)). In many cases customary international law is partially superseded by → treaties functioning as *lex specialis* in certain questions, e.g. in regard to the exhaustion of local remedies or to limitations on the lawful means of diplomatic protection (→ Local Remedies, Exhaustion of).

If the institution of diplomatic protection has shown a remarkable stability in a greatly changing international setting, this is probably due to the fact that the interests underlying diplomatic protection have not undergone parallel alterations. There is still the traditional triangle of actors with somewhat diverging political, economic and personal interests:

(a) The individual (natural or legal person) engaged in business or residing or only travelling abroad expects the foreign State to observe and carry out all its internationally binding obligations beneficial to himself. Individuals believing that the foreign State is not fulfilling these obligations are likely to ask their home State for help. Thus, individuals obtaining important concessions or investing on a large scale abroad (→ Foreign Investments) may hope that their expected maximum profit will not be accompanied by risks such as confiscation or → expropriation and nationalization without adequate compensation. In such an event they may want their home State's protection. Typically, an individual in need is mainly concerned with receiving diplomatic protection and with good results. As long as the protection is successful, he will usually be less interested in its ways and means and in possible, or even likely, repercussions for his home State and his countrymen.

(b) The home State, on the other hand, cannot neglect these factors. It will usually consider a violation of legal obligations which are beneficial to its nationals (natural and legal persons) as a violation of its own rights, especially if economic interests are involved. In the eyes of the home State, the prevention of – or more frequently the reparation for – such unlawful acts may be a matter of legal principle, political prestige or economic importance. The home State might also fear adverse political or economic consequences on the domestic scene from negligence in the protection of its nationals abroad.

These considerations can give individual demands for diplomatic protection some weight. But there are detrimental factors as well. The home State of the individual asking for diplomatic protection can hardly overlook the possibility of a future switch in roles; the protecting State, the claimant of today, may be the defendant of tomorrow. Besides, the question whether the present defendant has violated its international legal obligations to the detriment of the plaintiff's nationals may be very difficult to answer. The way to a peaceful and binding clarification may be long and stony. Even if a rule of international law advantageous to one's own nationals has obviously been violated, and even if all other prerequisites for diplomatic protection have unquestionably been met, it may be very hard or even impossible to obtain → reparation. The defendant State may refuse any settlement, and the protecting State may be too weak politically and economically to attempt peaceful coercion by → retorsion or → reprisals. Even if the success of diplomatic protection appears likely in the individual case, the price required of the home State and its people may be too high. For instance the defendant State may pay the demanded damages, but walk out on an → alliance, prohibit business transactions or refuse a loan, all vital to the protecting State. Or the defendant State might muster a majority in an international organization against the protecting State in a decision of paramount importance to the latter.

(c) The third actor in the triangle of interests, the defendant State, may accept diplomatic protection in principle, but believe that some prerequisite is missing in the concrete case. Worse, the defendant State may view the exercise of diplomatic protection as an expression of political

antagonism or of wholesale distrust of its legal system. Some States fear that a special protection of aliens based on customary international law or on treaties may lead to dissatisfaction of their own citizens who do not enjoy such rights. A number of States suspect diplomatic protection as a possible pretext by stronger States for → economic coercion, → intervention, intrusion into their → domestic jurisdiction, imperialism and neocolonialism. Such attitudes exist especially in Latin-American States (→ Drago-Porter Convention (1907); → Calvo Doctrine, Calvo Clause), in recently independent States, and in States following → socialist conceptions of international law.

The economic activities, the economic system and the attitude of a State towards individual rights in general may also influence its basic attitude towards diplomatic protection. A State which exports few goods or services and little capital will probably be more reserved towards the institution of diplomatic protection than a State which exports on a large scale. A State which reserves economic activities abroad mainly or even exclusively for itself depends less on the right of diplomatic protection than a State which leaves these activities to private individuals. A State which restricts the individual rights of its nationals on the domestic plane, including the right to travel abroad freely, may find it undesirable to have such rights granted to foreigners through international treaties and have these rights secured through diplomatic protection. A State adhering to a philosophy of collective thinking will be less inclined to grant diplomatic protection to its own nationals than a State which considers the promotion of individual welfare its foremost goal. Last, but not least, in contrast to a powerful State, a State with little protecting capacity might consider its own role in the conflicting interests of diplomatic protection in terms of the defendant rather than of the plaintiff.

B. The Prerequisites for Diplomatic Protection

1. An International Delict as Prerequisite for Diplomatic Protection

As diplomatic protection usually aims at reparation for → damages caused by an international delict, or, occasionally, at preventing such delicts, its practical importance depends first on the law of → internationally wrongful acts and of reparation for internationally wrongful acts (cf. also → Denial of Justice). In the last decades there has been a tremendous expansion of contacts between individuals and foreign States: Broad streams of trade, capital investment and other business activities are constantly crossing State boundaries; millions of people work outside their home State (→ Migrant Workers) or live abroad as → refugees; even more visit other countries as tourists (→ Tourism). The jurisdiction of States has been extended in regard to territorial waters, → straits, archipelagic waters (→ Archipelagos), → exclusive economic zones, and the → continental shelf. This extension has led to increased contacts as well as more friction between States and foreigners. Although the rules of international law touching on all these relations between States and individuals have not grown in proportion, the relevant norms have greatly increased in number and applicability.

The growth of international law advantageous to foreign individuals has not been affected so much by an extension of the customary → minimum standard of international justice, but rather by an expansion of treaty law. Thousands of relevant treaties have been concluded since the end of World War II, and the number is still rising. The → most-favoured-nation clause is of no little importance here. In favouring individuals, most of these treaties follow the traditional pattern by limiting their benefits to nationals of the State parties. However, there is a fresh approach in the → human rights covenants and conventions, which cover all individuals regardless of their nationality (section C.2. *infra*). The more legal norms for the benefit of individuals and the more frequent their application, the more numerous are the cases of real or merely alleged violations. In short, in the last decades, the field for diplomatic protection has been greatly extended.

There are, however, old and new factors, caused by very diverging motives, which all result in limitations on diplomatic protection. There are, for instance, attempts to give individuals in international law → standing before international courts and tribunals, be it in matters of human rights, investment (→ Investment Codes; → Investment Disputes, Convention and International Centre for the Settlement of; for special postwar problems see → London Agreement on

German External Debts (1953), Arbitral Tribunal and Mixed Commission; → Arbitral Commission on Property, Rights and Interests in Germany), or in concession agreements. Such attempts aim at making the individual more independent of his home State and diplomatic protection more or less superfluous. Endeavors to restrict the legal protection of property rights against confiscation, expropriation and nationalization (→ International Economic Order) or insistence on the Calvo Clause (Calvo Doctrine) regardless of the traditional opposition may also limit the field of diplomatic protection. The same result may follow from endeavors to assimilate transnational enterprises to national corporations by, for instance, → codes of conduct.

Section B.2 *infra* will demonstrate the prevailing dependence of the individual on the home State in cases of harm caused by other States in violation of international law. At present it seems likely that this dependence will continue if international legal rules should emerge concerning international liability for transboundary harm arising out of acts not prohibited by international law. These rules might cover physical human activities within the territory or control of one State which cause loss or injury to persons or things within the territory or control of another State as, for example, in cases of → transfrontier pollution (see also Magraw (1986) and → Air Pollution).

2. *Nationality as Prerequisite for Diplomatic Protection*

(a) The general principle

Under customary international law, subjects of international law are entitled to protect only those individuals with whom they have a special relationship. This relationship is usually → nationality (cf. also → British Commonwealth, Subjects and Nationality Rules). In the → Panevezys-Saldutiskis Railway Case, the PCIJ held that a State's right of resorting to diplomatic action or to international judicial proceedings on behalf of individuals

> "is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse" (PCIJ, Series A/B, No. 76 (1939) p. 4, at p. 16).

The protection of nationals has constantly been practised by States. Numerous decisions of international commissions and tribunals affirming this right had preceded the corresponding statements of the → International Court of Justice (ICJ) in, especially, the → Nottebohm Case (ICJ Reports (1955) p. 4, at p. 24) and the → Barcelona Traction Case (ICJ Reports (1970) p. 4, at pp. 32, 33; cf. also → Mavrommatis Concessions Cases, PCIJ, Series A, No. 2 (1924) p. 6, at p. 12). Under certain conditions recognized by international law, a State may treat other individuals as its nationals for purposes of diplomatic protection (cf. Art. 3 (1) of the 1965 Warsaw Resolution of the → Institut de Droit International on the national character of an international claim espoused by a State for damages suffered by an individual (AnnIDI, Vol. 51 II (1965) p. 261)). Also, in exceptional circumstances, the power over and the international responsibility for a territory may entitle a State to diplomatic protection for its population. The following remarks are, however, concerned with the protection only of nationals. The exceptional → diplomatic protection of foreign nationals or of → stateless persons is examined separately (cf. also → German Secular Property in Israel Case). Constant State practice and prevalent doctrine take it for granted that a State may give diplomatic protection to its nationals against any internationally legal wrong, provided the traditional conditions discussed in this article have been met. New types of treaties, however, call for critical appraisal of this assumption (cf. section C.2. *infra*).

(b) Natural persons

(i) The principle

On principle international law leaves it to each State to pass laws on the acquisition and the loss of its nationality, and to implement these laws. The

discretion of States is, however, somewhat limited by customary international law and by treaties. There is a presumption of international validity at least regarding acts of naturalization. Yet in numerous decisions international tribunals have asserted their competence to examine whether an individual was actually a national of the State exercising protection (see, e.g. → Pinson Claim Arbitration (France v. Mexico); → Salem Case; → Flegenheimer Claim). In the Nottebohm Case, the ICJ held that the naturalization of the German national Nottebohm by Liechtenstein was an act in performance of Liechtenstein's domestic jurisdiction. Yet the Court proceeded to examine whether this naturalization would entitle Liechtenstein to protect Nottebohm against the defendant State Guatemala, where Nottebohm had resided for a long time. The Court found the social fact of attachment – the "genuine link" between Nottebohm and Liechtenstein – which it considered the necessary factual basis of the legal bond of nationality to be lacking. Therefore the Court saw no obligation for Guatemala to recognize Nottebohm's nationality. Accordingly the Court denied Liechtenstein the right to protect Nottebohm against Guatemala.

Most commentators disagree with this ruling. The criticism is based mainly on the following considerations: The criterion of the genuine link, although useful in certain cases of dual nationality, should not be applied to the case in question. Diplomatic protection should not be severed from nationality; in the Nottebohm Case, the Court should rather have examined the validity of the naturalization under international law. As the Court did not consider the naturalization invalid, Nottebohm should not have been relegated to the status of a stateless person for purposes of diplomatic protection. The Court's genuine link requirement was too vague; the Court itself mentioned habitual residence, center of interests, family ties, participation in public life, attachment shown and inculcated in his children, "etc.". The requirement was also in contrast to a number of nationality laws then in force. Nationality is usually acquired on the basis of *jus soli* or *jus sanguinis*. In either case the social attachment may not be stronger, the link between State and individual, more genuine, than in the Nottebohm naturalization. In the Flegenheimer Claim the Italian-United States Conciliation Commission expressly limited the doctrine of a nationality's → effectiveness to cases of dual nationality. The Commission expressed doubts regarding the existence of any proven criterion to disclose the effectiveness of a person's bond with a political community. To sum up, the genuine-link requirement cannot be considered a rule of general customary law.

(ii) Dual nationality

Diplomatic protection for individuals with dual or multiple nationality raises two main problems. First, is a State entitled to protect a national against another State of which this individual is also a national? In such cases, the majority of writers adheres to the principle of equality which found an expression in Art. 4 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws of April 12, 1930: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses" (LNTS, Vol. 179, p. 89; → Hague Conventions on Private International Law). Art. 4 a) of the 1965 Warsaw Resolution of the Institut de Droit International comes to the same conclusion. In the Advisory Opinion on → Reparation for Injuries Suffered in Service of UN, the ICJ called the practice of States not to protect their nationals against another State which also regards them as its nationals "the ordinary practice" (ICJ Reports (1949) p. 174, at p. 186).

Some international commissions and arbitral tribunals have, however, applied the principle of effective, or, more precisely, of prevalent nationality in such cases. Art. 5 of the 1930 Hague Convention describes – although in another context – the prevalent nationality as the nationality of the country in which the individual "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" (cf. also the formula of the Iran-United States Claims Tribunal, ILM, Vol. 23 (1984) p. 489, at p. 501). The most important decision applying the principle of prevalent nationality in these cases is probably that reached in the → Mergé Claim of 1955, which became the leading decision for about fifty parallel cases. The Mergé ruling relied partly

on the reasoning in the → Canevaro Claim Arbitration and on the – though somewhat different – Nottebohm Case. The Mergé result presupposes the genuine link concept of the Nottebohm Case. The Mergé decision has the advantage of not relegating an individual of recognized nationality to a stateless status for questions of diplomatic protection.

The Mergé reasoning cannot, however, solve the question why, of two valid nationalities, each based on a genuine link to two sovereign and equal States, one nationality should be more valid only because the social link is considered more genuine. The decision whether a valid nationality is based on a genuine link may already be difficult; the decision, which of two nationalities is based on the more genuine link, may be even more difficult. At any rate, despite the Mergé ruling, but concurring with Art. 4 a) of the 1965 Warsaw Resolution, States usually remain most reluctant to protect a national against another State which also *bona fide* regards that individual as its national. The theory of prevalent nationality may perhaps be useful in cases where either one nationality is legally doubtful or one social bond of attachment is entirely missing so that only one genuine link remains. According to Art. 4 c) of the 1965 Warsaw Resolution there should be no diplomatic protection of persons whose naturalization was conferred against their will and without any genuine link.

The second problem of diplomatic protection for individuals of dual or multiple nationality arises when each home State is willing to grant diplomatic protection against a third subject of international law. Under Art. 4 b) of the 1965 Warsaw Resolution, only the State to which the person in question has a stronger social bond of attachment is entitled to give diplomatic protection. This case of competition does not occur frequently.

(iii) The special situation of German nationality

Diplomatic protection given by the Federal Republic of Germany to Germans residing in the German Democratic Republic requires special attention. The Federal Republic adheres to the principle that the division of Germany into two States (→ Germany, Legal Status after World War II) has not terminated the common → German nationality, and that this common German nationality is at the same time the nationality of the Federal Republic. Thus in the Federal Republic of Germany, the German Nationality Statute (Reichs und Staatsangehörigkeitsgesetz) of 1913 is still in force. Thereby the Germans residing in the German Democratic Republic have remained German nationals/citizens. On the other hand, the Federal Republic recognizes the character of the German Democratic Republic as a State, though not a foreign State (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)). Therefore the Federal Republic does not claim jurisdiction over the Germans residing in the German Democratic Republic or using the latter State's passport abroad. Only when these Germans make use of their common German nationality/citizenship on the territory of the Federal Republic or at its embassies or consulates abroad, has the Federal Republic a constitutional duty to give diplomatic protection, if all prerequisites in addition to nationality have been met (see German Bundesverfassungsgericht, Decision of July 31, 1973, BVerfGE 36, 1, at p. 31). Thus the Federal Republic's diplomatic protection to residents of the German Democratic Republic depends on the implementation of the existing link in practice, including the expression of reliance on the common German nationality/citizenship. Most States recognize the common German nationality/citizenship in view of such expressions and accept the right of the Federal Republic to give diplomatic protection in these cases. The practice of the socialist States and some other States is different, however. Subsequent to 1967 at the latest, the German Democratic Republic has rejected the common German nationality. Following in practice the principle of equality of nationalities, the Federal Republic does not try to give German residents of the German Democratic Republic diplomatic protection against the latter.

(iv) The right of individuals to protection

Under customary international law a State has the right but not the duty to grant diplomatic protection to its nationals. International law leaves this decision to the domestic law of each State. There are great differences from State to State. Art. 27 (6) of the 1975 Constitution and Art. 50 of

the 1982 Constitution of the Peoples' Republic of China provide that the State will protect the legitimate rights and interests of Chinese nationals living abroad. The 1967 Nationality Statute and the 1979 Consular Statute of the German Democratic Republic contain similar declarations. These provisions do not, however, establish a legal duty of protection, much less an individual right to protection; they are – as a matter of course in socialist States – not enforceable in any court (→ Foreign Relations Power). Constitutional or statutory provisions like these, or, even more so, constitutional provisions containing an individual right to diplomatic protection such as Art. 3 (6) of the 1866 and 1871 German Constitutions and Art. 112 (?) of the 1919 German Constitution, are rare exceptions.

Yet in some States an unwritten constitutional right of individuals to diplomatic protection or at least an unwritten constitutional duty to grant protection exists, provided certain prerequisites have been fulfilled. A truly democratic society which considers citizens not as mere objects of State power, but as constituent elements of the State, will accept at least a moral duty of protection against foreign powers. In such States, the citizens' right of protection corresponds to their special obligation towards the State, compared with the lesser obligation of foreigners and stateless persons.

The 1949 Constitution (Grundgesetz) of the Federal Republic of Germany was not meant to give less protection than the Constitutions of 1866, 1871 and 1919. But in 1949 it was impossible to incorporate a corresponding clause, as the Constitution could enter into effect only on the approval of the occupation powers (→ Germany, Occupation after World War II). Even so, the constitutional tradition, the constitutional understanding of the main purposes of the State and of the counterbalance of citizens' rights and duties, as well as certain written constitutional provisions, have led to a consensus that the State authorities have at least a constitutional duty to give diplomatic protection to German nationals/citizens, if the prerequisites have been met. The Federal Constitutional Court (Bundesverfassungsgericht) and other courts in the Federal Republic have affirmed this duty (cf. especially Decision of July 7, 1975, BVerfGE 40, 141, at p. 177; Decision of December 16, 1980, BVerfGE 55, 349, at p. 364, and J. Berkemann, Bundesverfassungsgericht – Rechtsprechungsbericht 1984 Nr. 1, Europäische Grundrechte Zeitschrift, Vol. 11 (1984) at p. 403). The duty exists only when all conditions under international law have been fulfilled, and if diplomatic protection does not run counter to truly overriding interests of the Federal Republic. In the Federal Republic of Germany citizens have legal standing in the courts to sue the State for diplomatic protection. As was to be expected, the courts have conceded the political authorities of the State, especially the executive, a certain discretion in determining whether overriding interests of the State and the people as a whole preclude diplomatic protection, and which means of protection should be used (see the decisions mentioned above and → Acts of State).

Customary international law also permits States to exclude whole groups of nationals from diplomatic protection, for instance → deserters, nationals serving in foreign armed forces (→ Foreign Legion) or refugees.

(c) Legal persons and shareholders

(i) Legal persons

Diplomatic protection of legal persons first dates from the final decades of the 19th century. Today it is an established principle of customary international law that a State may give diplomatic protection to legal persons which are its "nationals". Up until the Nottebohm decision – which was concerned, however, with diplomatic protection for natural persons – there was no evidence of a genuine-link requirement as a general prerequisite for diplomatic protection of legal persons. In the Barcelona Traction Case the ICJ rejected an analogy to the special issues and the decision in the Nottebohm Case. Nevertheless, the "nationality" of legal persons is more complex than the nationality of natural persons.

As to the "nationality" of → national legal persons in international law, the ICJ has stated:

> "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate

entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siège social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another" (Barcelona Traction Case, ICJ Reports 1970, p. 4, at p. 42).

The element of uncertainty apparent in this decision still exists. It is of course especially acute in regard to the so-called multinational corporations or → transnational enterprises. For purposes of diplomatic protection, it is often possible to allocate a legal person to more than one State.

The question whether the State of incorporation or the State of the registered office has a better claim to grant diplomatic protection *vis-à-vis* a third State has not yet been resolved. In spite of the reservations mentioned *supra* in section B.2(b)(ii), it is plausible to apply the theory of prevalent nationality in these cases. However, in cases where both plaintiff and defendant State can *bona fide* claim the legal person in question as their "national", only the theory of legal equality seems appropriate.

The interest which the problems of protection of companies with dual "nationality" have found in legal theory is so far not quite justified by the frequency of such collisions in practice. States are usually very reluctant to protect a legal person in competition with each other or, even more so, against each other, if both can, in good faith, claim this legal person as their "national". A case in point is the practice of, for instance, the United States and Switzerland. For various purposes in the context of diplomatic protection, the United States considers only those companies as "nationals" which were organized under United States laws and of which at least fifty per cent is owned by United States citizens. Switzerland grants diplomatic protection only to companies which are mainly owned by Swiss citizens. Yet while this economic test of control is frequently more realistic than one which focuses on the registration or the seat of the company, the application of the control theory may lead to great uncertainty and new difficulties. It may even be impossible to unravel the ultimate financial interests in a joint stock company.

(ii) Shareholders

It is a question of some practical importance whether "the lifting/piercing of the corporate veil", as introduced by the control theory, entitles a State to protect its nationals in their capacity as owners/shareholders, or whether diplomatic protection may cover only the legal person, the company itself. The question is of special weight if protection of the shareholders is directed against the State under whose laws the company was founded and is still registered, and if that State is the shareholders' home State. The rules of diplomatic protection may somewhat differ according to the type of company, e.g. between partnerships with a legal personality and corporate enterprises (*Kapitalgesellschaften*), especially joint stock companies. Legal literature is mainly concerned with the latter.

In the Barcelona Traction Case the Court considered:

"that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands" (ICJ Reports 1970, p. 4, at p. 49).

Only under exceptional circumstances could it

be justified to lift the corporate veil far enough to grant the shareholders' home State the right of diplomatic protection. As the Court found these exceptional conditions lacking in this case, Belgium was not entitled to act against Spain and to protect the Belgian shareholders who owned 88 per cent of a Canadian corporation. The judgment was, however, criticized for applying too rigid a standard owing to an exaggerated fear of competing claims, thus neglecting the economic realities and leaving the real losers without protection. Some judges considered the shareholders' home State entitled to give diplomatic protection if the shareholders and the home State itself had been adversely affected economically.

There are some treaty provisions which allow the protection of shareholders by their home State under certain circumstances (→ Delagoa Bay Railway Arbitration; → Orinoco Steamship Co. Arbitration; → Lump Sum Agreements). Yet customary international law on the subject is neither comprehensive nor clear. There seems to be some agreement on two propositions. First, a State is entitled to diplomatic protection of its nationals in their capacity as shareholders when their rights have suffered direct damage in violation of international law. The most important examples are the expropriation of shares without due compensation of the shareholders and the prevention of the company's payment of due dividends. But for diplomatic protection in such cases to apply, the veil of corporate personality need not be lifted, as direct damage to the shareholders has occurred.

Second, there may be agreement about lifting the veil of corporate personality in certain cases where the shareholders have suffered damage through damage to the company. A company may be expropriated or dissolved. This may leave the shareholders without legal remedies, if these are only available through the company and its "home State". In such cases, strong reasons of justice and equity speak out for a right of the shareholders' home State to give them diplomatic protection (cf. Barcelona Traction Case, ICJ Reports 1970, p. 4, at pp. 39, 40). This situation obviously exists when a company is expropriated by its own "home State" at the expense of shareholders of another nationality.

There are some other types of cases for which dissenting or separate opinions in the Barcelona Traction Case or legal writers consider diplomatic protection by the shareholders' home State legitimate. One example is a home State's severe restriction of a company's activities, entirely preventing it from reaching its economic goals and leaving the shareholders no influence. In addition to entirely paralyzed or practically defunct companies there are some where a home State is not entitled or willing to protect them. In each of these groups the companies are unable, although for different reasons, to serve their shareholders. There is no general consensus, though, that the shareholders' home State is entitled to protect the shareholders in these cases. Neither is there agreement as to whether a possible right to grant diplomatic protection presupposes a substantial interest, or whether any amount of financial participation in the company suffices, as the ICJ believes (ICJ Reports 1970, p. 4, at p. 48). It is easier to demand of international law more consideration for economic realities in diplomatic protection of legal persons and shareholders than to agree on the rules necessary for implementing this demand (cf. for instance Harris at pp. 310–317).

(d) Ships and aircraft

Damage affecting a → merchant ship in violation of international law always means damage done to its owners, be they natural or legal persons, and, possibly, damage to the crew members as well (→ Ships, Visit and Search; → Ships, Diverting and Ordering into Port). Thus the home States of the owners, or respectively, of the individual crew members are entitled to grant diplomatic protection. This may lead to difficulties similar to those already mentioned above. There may be crew members of different nationalities or even dual nationality; the owner may be a legal person of uncertain "nationality". However, it does not make a fundamental difference whether a natural person has suffered an international wrong as a crew member or as a businessman or tourist. Moreover, there is no fundamental difference between the damage done to the owner of a ship or to the owner of real property or a company.

The main problem in regard to merchant ships arises from the fact that not only the owners and the crew members, but also the ships themselves,

are treated as having a "nationality" which can serve as a basis for diplomatic protection. This "nationality" rests on the right to fly the flag which usually presupposes registration. The United Nations Convention on the Law of the Sea is not yet in force (→ Conferences on the Law of the Sea). But its Art. 91 (1) is essentially a repetition of older treaty law (cf. Art. 5 of the 1958 Convention on the → High Seas) and an expression of customary international law. Under Art. 91 (1): "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly." The provision that "[t]here must exist a genuine link between the State and the ship" (ibid.) has particular importance as concerns → flags of convenience. Yet in these cases the criterion for the genuine link seems even more clouded than in the case of natural or legal persons (→ Ships, Nationality and Status). At least the problem of dual nationality is practically excluded, as ships may sail under the flag of only one State or else run the risk of being "assimilated to a ship without nationality" (Art. 92 of the 1982 Law of the Sea Convention and Art. 6 of the 1958 Convention on the High Seas; → Flags of Vessels). Since under various treaty provisions the flag State has jurisdiction over and control of the ship (cf. especially Art. 94 of the 1982 Convention), it seems likely that the flag State also has the right to give diplomatic protection against international wrongs committed in regard to the ship. Despite some doubts, this appears to be prevalent opinion and practice. But there is no certainty whether diplomatic protection based on the flag should prevail over competing claims to diplomatic protection based on the nationality of the owners or of crew members. There is also uncertainty as to the question whether a State connected with a ship under one of these factors may extend its protection against a State connected with this ship under another of these factors. The *I'm Alone* arbitrators emphasized, on the one hand, the position of the shipowners' home State rather than of the flag State, but on the other hand did not deny the flag State's right to protect a crew member who was not the flag State's national. Although this ruling stands out among the very few relevant cases, it is not sufficient proof for a corresponding rule in customary international law. It may not be unreasonable to grant the owners' and, in appropriate cases, the crew members' home States, the right to give diplomatic protection *vis-à-vis* the flag State.

In regard to the diplomatic protection of civil → aircraft, the legal situation is similar to that of merchant ships. As a rule, civil aircraft also have only one "nationality", the "nationality" of registration, and are mainly under the jurisdiction and control of that State (see especially Arts. 17 to 20 of the → Chicago Convention; → Air Law). In several cases, both the State of registration and the home States of a civil aircraft's passengers claimed compensation for a violation of international law committed by a third State in connection with the plane (→ Aerial Incident of 27 July 1955 Cases (Israel v. Bulgaria; U.S. v. Bulgaria; U.K. v. Bulgaria); cf. also BYIL, Vol. 41 (1965–66) pp. 385–390; → Korean Air Lines Incident (1983)).

3. Continuous Nationality of the Claim as Prerequisite for Diplomatic Protection

A corollary of the principle that diplomatic protection depends on the individual's nationality is the rule of continuous nationality. Some treaties make exceptions; see for instance the September 10, 1952 Agreement between the Federal Republic of Germany and Israel (UNTS, Vol. 162, p. 206). Yet this rule has recurred in innumerable treaties, for instance, in nearly all of the 200 lump sum agreements concluded after World War II. The rule has been considered a part of customary international law for a long time (PCIJ, Series A/B, No. 76 (1939), p. 4, at p. 16). The rule's first requirement is that the individual must have the nationality of the protecting State at the time of the internationally wrongful act. The second requirement is the continuity of nationality either until the claim has been presented by the protecting State or settled on the international level. Prevalent practice and opinion seem to favour the date of presentation over the date of settlement. This is in accordance with the 1965 Warsaw Resolution of the Institut de Droit International. Art. 1 b) of this resolution will admit only one general exception to the continuous nationality rule, namely for diplomatic protection given by a

State which has recently become independent to those of its nationals who, before independence, had the nationality of the former colonial power.

Obviously the bond of nationality must exist at the time of the international delict, if the claimant State itself is considered injured in the person of its national (cf. section B.2(a) *supra*; section C. *infra*). But the rule of continuous nationality leaves individual claims without any diplomatic protection if these have passed on to a holder of a different nationality during the time between the delict and the presentation. This can happen, for example, through succession on death, through an assignment to a non-national, and even through a change of nationality of the injured individual by means of → State succession. It is also illogical to consider the State as the sole holder of the international claim (cf. section C. *infra*), yet at the same time to prevent the State from pursuing this claim because the "nationality" of the underlying individual claim has changed. These considerations of → equity and logic have, however, hardly influenced State practice. As a rule States are not willing to give diplomatic protection to individuals who are not their nationals up to at least the time of the claim's presentation. This is true even of the United States of America, which is perhaps more inclined to protect its nationals than any other State (see e.g. AJIL, Vol. 76 (1982) p. 836; Vol. 59 (1965) p. 103, at p. 106; Vol. 57 (1963) p. 894, at p. 902. For Switzerland see P. Guggenheim, La pratique suisse: 1963, SchweizJIR, Vol. 21 (1964) p. 135, at p. 149). Naturally the defendant States are all the more reluctant to accept an espousal of claims not having continuous nationality. The possibility that the individual claim may be transferred to a national of a stronger State in order to gain or strengthen diplomatic protection is often mentioned as a motive for the stubborn insistence on this rule.

4. *Exhaustion of Local Remedies as Prerequisite for Diplomatic Protection*

A State may give diplomatic protection only to individuals who have exhausted the effective domestic remedies available under the law of the defendant State against acts or omissions in violation of international law (→ Local Remedies, Exhaustion of). This rule can be found in numerous, though not in all, relevant treaties; it has also become customary international law. A considerable number of decisions based either on custom or on treaty provisions mention the rule (see e.g. the Mavrommatis Concessions Cases, PCIJ, Series A, No. 2, (1939) p. 6, at p. 12 of the 1924 judgment; Panevezys-Saldutiskis Railway Case, PCIJ, Series A/B, No. 76 (1939) p. 4, at p. 18; → Electricity Company of Sofia Case, PCIJ, Series A/B, No. 77 (1939), p. 64, at p. 78). The local remedies rule was especially emphasized in the 1959 judgment of the → Interhandel Case, ICJ Reports 1959, p. 6, at p. 27; cf. also the decision in the Salem Case, the 1955 award in the → Ambatielos Case and the jurisprudence of the → European Commission of Human Rights as well as the → European Court of Human Rights.

The rule applies not only if the alleged violation of international law has occurred on the territory of the defendant State. It also pertains to violations of international law committed on or over, for instance, the high seas or even on the territory of the plaintiff State, provided there are legal remedies for such cases in the law of the defendant State. The exhaustion of local remedies is a legal prerequisite not only for coercive measures. A plaintiff State may, as a matter of course, at any time lodge a complaint based solely on moral or political grounds. But a defendant State may, before the exhaustion of local remedies, reject offhand a protest based on a violation of international law.

Whether the local remedies rule is a part of substantive or of procedural law is not only of theoretical but also of practical importance. Various authors opt for substantive character; they consider the unlawful treatment of the individual an international delict only after the failure of the defendant State to rectify it through its local remedies. So far this is the tendency of the → International Law Commission's latest work on State responsibility (cf. Art. 22 of the provisionally adopted Draft Articles on the source of international responsibility (YILC (1980 II, Part 2) p. 30; YILC (1981 II, Part 2) p. 142. See also YILC (1977 I) p. 250 and YILC (1977 II, Part 2) p. 30). Against this viewpoint one should endorse the result of the conclusion reached in the Encyclopedia article on the local remedies rule: The international delict has already originated with the injury to the individual; non-exhaustion

of local remedies is merely a procedural impediment to diplomatic protection, not a condition for the existence of the international wrong itself.

C. The Holder of the Claim

1. Traditional Treaties and Customary International Law

An international delict with injury to an individual is a necessary prerequisite for diplomatic protection (section B.1. *supra*). Such a delict may be the violation of a treaty which has become part of the internal law of the defendant State. In these cases the individual may have a material right of his own under internal law. Under traditional international law, however, the States parties to a treaty usually undertake obligations and grant material rights on the international level only *vis-à-vis* each other, not to individual beneficiaries. The nationals have the immediate benefit of, for instance, freedom of entry, residence and occupation or guarantees to liberty and property. Yet they enjoy these benefits not as holders of an international material right, but as mere third party beneficiaries of the real holders, their home States (for exceptions see section C.2. *infra*).

Already according to Vattel, assets of a national are to be considered assets of his nation *vis-à-vis* other States (Droit des gens (1758) Book II, Chapter 7, Section 81; cf. also Book II, Chapter 18, Section 346 and Chapter 6, Section 71). Some authors consider the theory that an injury to an individual is an injury to his home State a mere fiction. As long as only subjects of international law can have rights under international law, another approach would consider individuals who are treaty beneficiaries as subjects of international law within the limits of such treaties. So long as States do not accept the international status of individuals, individuals' lack of a procedural right to pursue their treaty benefits on the international plane is not an anachronistic deficit. Rather it is a necessary consequence of the lack of an international material right. This traditional view applied to customary international law also means that not the individuals, but their home States are the holders of the rights granted to aliens under the minimum standard of justice. Otherwise all alien individuals would be subjects of international law as far as this standard goes. States have not recognized this concept, much less practised it.

The traditional view that only subjects of international law can have rights under international law and that no such rights accrue to individuals from traditional treaties or custom meets with much and well-founded criticism. In the context of diplomatic protection, the most important inconsistencies are the following: The traditional treaties favouring individuals are based on the self-interest of the State parties; they are an expression of *do ut des*. State A grants rights to the nationals of State B, so that B will grant the same rights to the nationals of A (→ Reciprocity). Although the State parties act in their own interests, the first to benefit from these treaties and to suffer from their violation are the individuals. Without damage to the individual, there is no damage to his home State. Through the rule of continuous nationality, which some critics call a myth, the international claim of the home State remains dependent on the nationality of the individual (section B.3. *supra*). Unless the individual has exhausted the local remedies, his home State may not pursue the claim on the international level (section B.4. *supra*). The injury suffered by the individual serves at least in practice as a yardstick for the damages which his home State may legitimately claim. The claimant State usually forwards to the injured individuals the damages paid by the defendant State. As a rule, lump sums are distributed among individual claimants according to the extent of their damage.

These factors combine to make somewhat artificial the traditional view that, on the international level, the home State is the sole holder of the material right when its national has suffered injury from a treaty violation. Under the customary minimum standard of justice, the traditional view would leave stateless persons without the very minimum of material rights recognized by a general understanding of justice or → equity in international law. The traditional concept also runs counter to a growing awareness that, ultimately, international law is not made for the benefit of States, but for individuals in their capacity as human beings and not as mere parts of their home State.

There is no fast and easy solution between, on the one hand, the international neglect of the

individual and, on the other hand, his – presently impossible – elevation to a subject of international law as regards all relevant treaty law and customary international law. Even authors favouring a stronger position for the individual cannot very well maintain, first, that the individual may have rights under international law without being a subject of international law; second, that States, in concluding traditional treaties, want to make the individuals benefiting from them subjects of international law; and third, that States act accordingly in cases of treaty violations, especially in accepting individuals as claimants on the international level.

Thus various authors, intent on strengthening the position of individuals, assert the existence of two material rights: the right of the individual to be treated according to treaty conditions, and the right of the State to have its nationals treated according to treaty conditions. But, in addition, on the international plane, the State has the exclusive procedural right to implement the material rights. To other authors, the material right to a certain treatment is vested only in the individual, but the State has the exclusive procedural right to protect the individual's material right on the international level. The questions whether the individuals benefiting from treaties can be the holders of the relevant treaty rights without being subjects of international law and whether they are subjects of international law usually remain unresolved.

As a rule States are less concerned with legal theory than with results. States can live even with a theory that considers the material rights in a treaty as being vested exclusively in their nationals so long as such individuals have no say about these rights on the international plane and cannot successfully sue their home State for protection on the national plane. In international practice, States do as they please when claims arise from injuries to their nationals through treaty violations. They do not appear concerned with the systematic inconsistencies emphasized in legal theory. This situation is an illustration of Oliver Wendell Holmes' famous dictum in his "Common Law" of (1881): "The life of the law has not been logic: it has been experience."

Many decisions of international courts and tribunals are cited to affirm the traditional view "that 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" (Mavrommatis Concessions Cases, 1924 judgment, p. 6, at p. 12; cf. also → Serbian Loans Case, p. 17; Panevezys-Saldutiskis Railway Case, p. 18; Nottebohm Case, p. 24 of the 1955 judgment; Barcelona Traction Case, p. 45 of the 1970 judgment and separate opinion of J. Morelli, at pp. 222, 226), or at least to affirm the States' exclusive procedural right to decide on the material right on the international plane (*Prozeßstandschaft*). Some decisions can, however, also be interpreted as affirming a material right of the individual besides a material right of their home State. Especially in the Interhandel Case, the Court speaks of the State having "adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law" (p. 5, at p. 27 of the 1959 judgment).

In any event States constantly exercise their freedom to claim or not to claim reparations for illegal damage to their nationals, to settle a claim, often at a considerable loss to the individual, or to drop the claim entirely, regardless of the injured individual's wishes. Apart from internal law (section B.2(b)(iv) *supra*), the States's discretion finds obvious expression in lump sum agreements. Under such agreements the defendant State pays the claimant State a fixed amount in final settlement of certain individual damages; often the claimant State establishes a national claims commission to determine the validity and the amount of the underlying individual damage. Of the almost two hundred lump sum agreements concluded after World War II, some cover claims *ex gratia* or claims arising from a violation of purely internal law of the defendant State. Most of these agreements, however, deal with reparations for international delicts. The money which finally reaches the individual is hardly ever a full compensation for the damage, sometimes not even a fair compensation, and occasionally as low as 10 per cent of the value of the claim (see, e.g. the publications mentioned *infra* under section D. and R.B. Lillich, The United States-Hungarian Claims Agreement of 1973, AJIL, Vol. 69 (1975) p. 534). Even the lowest compensation in the agreement is conditioned on the obligation of the individual's home State to "wipe the slate clean". Whichever legal theory is selected to interpret the individual's

position, his claim is seen as totally submerged on the international level in the lump sum agreements and falling under the law of the claimant State (cf. Dames & Moore v. Regan, 453 U.S. 654 (1981); see also Persinger v. Islamic Republic of Iran, AJIL, Vol. 77 (1983) p. 312). Other examples of the home State's predominant international position are pronouncements like the one in a United States Memorandum of 1973: Although the United States will usually act only on request, it can legally pursue international claims without the request of the injured individual or even against his vigorous protest (A.W. Rovine, Digest of United States Practice in International Law 1973 (1974) p. 332).

The exclusive right of the State to pursue, on the international level, treaty rights beneficial to its nationals also appears in the context of the Calvo Clause. Most Latin American States tend to insert, in important economic contracts with aliens, a clause which, first, reserves exclusive jurisdiction over all contract disputes to their own courts and, second, excludes all but municipal law remedies; thus the individual waives protection through his home State. Prevalent practice and opinion outside Latin America consider the first part of the clause an affirmation of the local remedies rule and the second part, in cases of an international delict, incompatible with the home State's customary right to grant diplomatic protection: A private individual cannot prevent his home State from asserting its own right, violated in the person of its national (→ North American Dredging Co. of Texas Arbitration). However, from the viewpoint that on the international level the material right is exclusively vested in the individual and not in his home State, the renunciation of diplomatic protection should be possible. This result is even more plausible since the individual can undoubtedly prevent diplomatic protection simply by not exhausting local remedies.

2. *New Types of Treaties*

The concept of diplomatic protection dominating international practice rests ultimately on a view of the individual as a mere part of his home State. The assumption that the individual is granted certain treaty positions only as an element of his home State is backed by thousands of treaties based on reciprocity, the traditional *do ut des* between States. But since World War II, new types of treaties have come into existence which fit neither into the triangle of interests typical of diplomatic protection (section A.2. *supra*), nor into the legal framework of this institution.

Human rights conventions, despite considerable differences in detail, form the first category of such treaties. The → European Convention on Human Rights (1950), the → American Convention on Human Rights (1969) and the United Nations → Human Rights Covenants (1966) have one most important characteristic in common: The State parties do not grant rights to foreigners in exchange for rights which the foreigners's home State grants to their own nationals. In disregard of *do ut des*, the treaty rights are granted to all individuals as human beings, regardless of, among other factors, nationality (see also → Human Rights, African Developments; → Human Rights, Activities of Universal Organizations). The interest in individuals as parts of a State is supplanted by interest in individuals as part of mankind, in "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] . . . the foundation of freedom, justice and peace in the world" (Preamble of the 1966 Covenant on Civil and Political Rights). To consider the home State as the holder of the rights granted by these treaties to that State's nationals is incompatible with the purpose of these treaties, especially as these rights are granted even against the home State itself. Moreover, it is not possible to consider the State the co-holder of the rights granted to its nationals or concede it a position on the international plane superior to that of the individual. When human rights conventions provide for a certain protection of individual rights through State parties, as, for instance, in Arts. 24 and 44 of the European Human Rights Convention, the home State of the injured individual is in no stronger position than any other State party. As these treaties do not serve national interests of the individuals' home States, but the interests of all individuals and the legal community – an → international public order, for example, the European *ordre public* – treaty observance is to be supervised by all State parties equally.

As treaty rights accrue to individuals regardless of their nationality, the home State may not settle

claims over the head of the injured individual. This should hold true even in proceedings instituted by an individual's home State before the European Court of Human Rights under Art. 44 of the Convention. Any State party may begin such proceedings. But it is inconceivable that a State other than the home State of an injured individual should be permitted to drop them by renouncing the material rights of the individual. The home State may not do this either.

The emancipation of the individual from his home State under human rights conventions is nowhere more obvious than in the treaty rights granted all individuals against their own State, and in the right of all State parties to open proceedings on behalf of any individual against his home State (cf. Arts. 24 and 48, European Human Rights Convention, and the Covenant on Civil and Political Rights, Art. 41). Art. 60 (6) of the → Vienna Convention on the Law of Treaties supports the opinion that treaties of a humanitarian character protect individuals as such and not as nationals. This group of treaties includes the human rights conventions.

But there are two sides to the coin. The individual emancipated from his home State has achieved the status of an international law subject in regard to all material rights granted in these conventions *vis-à-vis* all State parties. But the individual has no corresponding procedural rights on the international plane to achieve the observance of the material rights through each State party. The international procedural status of the individual is delineated in a different manner in each convention, but is nowhere satisfactory. The individual has no defense against an international delict about to occur. In claiming restitution or compensation, the individual's international standing leaves much to be desired.

Even under the very favourable European Human Rights Convention, individuals may lodge complaints only against those State parties that have expressly recognized the competence of the European Commission of Human Rights. Individuals have no right to bring a case before the Human Rights Court. Under the 1966 Covenants and the 1969 American Human Rights Convention the individual's status is even weaker (→ International Covenant on Civil and Political Rights, Human Rights Committee; → Inter-American Commission on Human Rights; → Inter-American Court of Human Rights). It is disappointing that the tremendous expansion of material individual rights provided by the different human rights conventions is not accompanied by a greater extension of procedural means for individuals. This is no coincidence, however, but rather mirrors the state of the international legal community. Many, if not most, of the State parties to these human rights conventions, especially the UN Human Rights Covenants, would not have granted the material treaty rights in an *ipso jure* combination with procedural rights enforceable by individuals on the international plane. Even under the European Human Rights Convention, an individual right to enforce the material rights before the Court is not in sight. Moreover, considering the workload of the European Human Rights Commission and Court, such a right is hardly feasible, at least not without thoroughly overhauling the institutional framework. *A fortiori*, the same obstacles would hinder a worldwide treaty-enforcing system set in motion by individuals.

The emancipation of the individual under the different human rights conventions is accompanied by a further weakness. It is not at all certain that the State parties intended to accept any international decision-making and enforcement procedures for the protection of individual rights other than the ones provided for in the respective treaties. It is true that the human rights conventions, including Art. 62 of the European Human Rights Convention, do not expressly exclude diplomatic protection as a remedy permitted by customary international law against treaty violation. Yet until 1950 a comprehensive catalogue of human rights in an international treaty for all individuals, especially one which also applied against their home State, was unheard of. The scope of the material rights in these treaties is very wide, the limitations on State sovereignty are great.

Supervising and enforcement procedures based on customary international law besides those mentioned in a particular convention would greatly expand the permissibility of reprisals, probably more than many State parties would be willing to accept. Is it likely that State party A would want to permit State party B the protection of the numer-

ous and far-reaching rights of a stateless person, a national of State C, or even its (A's) own national by means of reprisals? As mentioned above, the home State of an injured individual is in the same legal position as any other State party. Each State has treaty rights in a formal sense; each one can demand treaty observance by the others in spite of the *obiter dictum* in the Barcelona Traction Case (ICJ Reports 1970, p. 47, para. 91). But as all are on an equal footing, none has been violated in the person of the individual. Given this assumption, the traditional customary law concept of diplomatic protection is not applicable. Some authors believe that human rights conventions without an adequate enforcement system, either by means of individual applications or by State actions, would be a mere sham. Therefore, they consider all State parties entitled to protect all individuals first by treaty means, but in the last resort also by reprisals. So far State practice does not bear this out.

In summary, if a State party to a human rights convention assists its nationals in obtaining their treaty rights through means provided for in the treaty, this is quite different from diplomatic protection in the usual sense (see the quotation from the Panevezys-Saldutiskis Railway Case (section B.2(a) *supra*)). But it is not different from the assistance any other State may give. Thus one should not speak of diplomatic protection, but one might speak of a new kind of human rights assistance and protection based on treaty law and limited to the means provided by the particular treaty. As diplomatic protection and human rights assistance or protection rest on somewhat different bases, each has to follow its own course in serving individual rights, although sometimes the courses may run parallel.

The practical impact of the question how far a State party to a human rights convention may legally go in aiding individuals is so far very limited. Most States are not eager to assist individuals against other State parties, even by the means expressly supplied in the conventions.

There is another kind of treaty granting individual rights whose safeguarding by the home State does not fit into the institution of diplomatic protection. Such treaties have been concluded for, among other purposes, the benefit of the State parties' nationals on the basis of *do ut des*. Reciprocity notwithstanding, these treaties, too, have important characteristics very different from the traditional treaties favouring individuals. Of the particularly relevant treaties establishing the → European Communities, the treaty on the → European Economic Community may serve as an example. This treaty establishes significant material rights for all nationals of all member States, especially the Four Freedoms: freedom of movement of goods, freedom of movement of persons, freedom to provide services, and freedom of capital movement. The procedural position of individuals in the Community *vis-à-vis* the State parties lags far behind their material rights (cf. Arts. 169, 173, 175, 177). Thus individuals depend to a considerable degree on the aid of a member State, which need not, however, be their home State (Art. 170). Any State assisting an individual against another member State of the Community would first, as a matter of course, have to use the means given by the treaty itself.

It is very doubtful whether the home State of an individual injured by another Community member may go further, especially by using reprisals in reliance on its customary right to grant diplomatic protection. The nationals of the State parties have received the material rights granted by the treaty in a process of *do ut des* between their home States. But they have, through the formation of the Community, surpassed the status of mere nationals of a State party. They have become *Marktbürger* (economic citizens of the community). Although this status depends on having the nationality of a Community member State, the *Marktbürger*, too has experienced emancipation. The rights granted to him are not merely rights granted in the interest of his home State, but at the same time basic principles of the Community as a whole. The Community could not exist as planned without the essential rights of its *Marktbürger*. Its character as a → supranational organization depends largely on these rights. The *Marktbürger* as such stands in a direct relationship to the Community and its organs. Under Community law he is a legal subject with his own rights and duties. The rights and duties of the Community itself, of the member States and of the *Marktbürger* are interdependent; they are inextricable interwoven. Once the Community began functioning, it could not be reduced to the network of trilateral

relations typical of diplomatic protection (cf. section A.2. *supra*). It is a fundamental principle of Community law that such law be applied generally and equally within the Community. One-sided enforcement of claims, as permitted under the customary institution of diplomatic protection, may be incompatible with this basic tenet. Thus it is not merely a matter of limiting diplomatic protection to a means of last resort after the unsuccessful use of every other recourse under Community law; rather diplomatic protection is excluded entirely.

Such complete elimination of diplomatic protection is open to criticism based on the inadequate procedural rights of the *Marktbürger* against the member States and on the discretion allowed to community organs in the protection of these rights. But the dangers of permitting diplomatic protection even as a last resort would, if this means of aiding one's nationals were put to use, outweigh the shortcomings. If, however, all Community members confine themselves to the treaty means for the protection of the *Marktbürger* the problem of diplomatic protection will have only theoretical, but no practical importance.

D. The Means of Diplomatic Protection

The choice of means for diplomatic protection is determined by various factors. The decision of a State to grant or to deny protection to its nationals depends largely on political considerations (cf. sections A.2. and B.2(b)(iv) *supra*). It is not surprising that these considerations also influence the decision on the means of protection. Relevant factors are: the kind of individual rights injured by the defendant State (e.g. life, liberty, property); the gravity of the injury; the importance of the damage to the individual and to the home State itself; the home State's attitude towards the defendant State's legal system and political orientation; the risk of worsening the relations to the defendant State by tough measures; the chance of using diplomatic protection as a tool for promoting other political or economic interests of the claimant State; membership in a political or economic bloc friendly or inimical to the defendant State; but also political prestige abroad and at home and domestic pressure through powerful individuals or groups. Even in the rare cases where the claimant State has a legal obligation under its internal law to grant protection, there is much discretion in the choice of means.

Usually the claimant State will begin by informal acts of → diplomacy or by a formal → protest (→ Démarche) or → negotiations. Many claims end this way positively or negatively. In other cases the claimant State may be entitled to bring the case before → international courts or tribunals or else proceed to apply various types of pressure. Among possible → unfriendly acts or retorsions are the refusal of → recognition of foreign governments or of → recognition of foreign legislative and administrative acts. The claimant State may also refuse to conclude a treaty favourable to the defendant State or withhold privileges to the latter's nationals. Under United States statutory provisions, the United States directors of some international banks have to vote against loans to States which have interfered in their domains with property rights of United States nationals (A.W. Rovine, Digest of United States Practice in International Law 1974 (1975) p. 418). Retorsions are sometimes more effective than reprisals, to which the claimant State may also resort. The claimant may, for instance, suspend treaty obligations (within the limits of Art. 60 (6) of the Vienna Convention on the Law of Treaties) or take over assets of the defendant State or its nationals. The United States has been more inclined to block foreign assets in order to obtain a lump sum agreement than, for example, most European States (cf. Iran-United States Claims Tribunal Reports, Vol. 1 (1983) at p. 3; R.B. Lillich, International Claims: Postwar British Practice (1967) and The Protection of Foreign Investment (1965); R.B. Lillich and G.A. Christenson, International Claims: Their Preparation and Presentation (1962); R.B. Lillich and B.H. Weston, International Claims – Contemporary European Practice (1982)). The settlement of a claim may take a long time (Ambatielos Case; Canevaro Claim Arbitration; → Cerruti Arbitrations; → Chevreau Claim Arbitration; Interhandel Case; → Kronprins Gustaf Adolf and Pacific Arbitration; → Martini Case; North American Dredging Co. of Texas Arbitration).

International law can limit the manner of diplomatic protection in different ways from case to case (→ Foreign Policy, Influence of Legal Considerations upon). An → arbitration clause in

a treaty whose violation occasions diplomatic protection may allow only arbitration as means of protection. Other treaties, for instance, general → arbitration and conciliation treaties or the → European Convention for the Peaceful Settlement of Disputes may contain obligations for a → peaceful settlement of disputes with the help of → good offices, → conciliation and mediation, → arbitration, or by decisions of international courts and tribunals, especially → mixed commissions, → mixed claims commissions and → mixed arbitral tribunals, or the International Court of Justice (cf. also → Judicial Settlement of International Disputes; Drago-Porter Convention). In the absence of treaty obligations, diplomatic protection is restricted solely by customary international law. The law on diplomatic → asylum and on reprisals offers examples of customary law limitations. The most important limitation is concerned with the → use of force.

The legality of using force short of war as a last means of diplomatic protection is a question without a ready-made solution. Two cases must suffice to indicate the scope and the difficulties of the problems involved. In 1976, pro-Palestinian terrorists hijacked a French plane, landed in Entebbe and kept 104 Israeli passengers and six French crew members → hostages in the air terminal. President Idi Amin of Uganda had the building ringed off, but did nothing to free the hostages. After a week Israel felt certain that Uganda had failed in its obligation to protect the aliens in its territory. Rather than give in to a seemingly final ultimatum from the hijackers demanding the release of some 50 terrorists, Israel flew in soldiers, who stormed the building. The Israelis liberated the hostages and rescued them by plane. In the process they killed about 20 Ugandan soldiers. To ensure the safe flight of their transport planes, they destroyed 11 Ugandan fighter planes. From a legal viewpoint the discussions in the → United Nations Security Council remained inconclusive.

In October 1983, revolutionary events shook Grenada, a Caribbean → micro-State, independent since 1974, with a population of about 100.000. There was no functioning government, shooting was occurring in the streets, some people were summarily executed, and some thousand American citizens were possibly endangered through armed violence. In cooperation with the Organization of Eastern Caribbean States (OECS), the United States had a military force establish order. The United States justified this intervention on three grounds: a (possibly dubious) plea for help by the legal head of State; an appeal for assistance by OECS States based on the Charter of that organization; and the right to secure and evacuate the endangered United States nationals, i.e. the right of diplomatic protection (cf. Joyner, pp. 131, 200, p. 655 at p. 661). As to the third reason: even assuming that this purpose justified the means, the United States troops remained on the island longer than necessary to carry it out (→ Abuse of Rights).

These and a considerable number of other cases (see also → Preferential Claims against Venezuela Arbitration; United States Diplomatic and Consular Staff in Tehran Case) raise the question whether the use of force can be justified as legal → self-help below the level of → self-defence (→ self-preservation) in spite of the principles of → non-intervention, of → territorial integrity and political independence, as well as of territorial sovereignty, all established in customary international law and in the → United Nations Charter (see especially Art. 2 (4) and Art. 51). The fundamental divergencies among various cases and the basic, but sometimes uncertain, legal principles which can clash here, preclude general answers. To this author, the Entebbe rescue seems justified despite critical legal comments. Taken as a whole the Grenada action seems more a case of → power politics than of justified diplomatic protection.

E. Evaluation of Diplomatic Protection

The considerations sketched above permit a short evaluation of diplomatic protection. This legal institution serves certain purposes which are essential in the international legal community. Diplomatic protection is a means to safeguard various important benefits for individuals which arise from traditional treaties or from a minimum standard of justice. Diplomatic protection can be particularly useful in facilitating the movement of people, goods, capital, and services across State boundaries and thus in expanding personal freedom. In this way diplomatic protection also promotes international economic relations. The

right of States to protect their nationals can serve as a warning signal to States inclined to ignore their treaty or customary law obligations favouring individuals. This has a wholesome effect, specifically on the treatment of individuals abroad. The prerequisites for protection, especially the local remedies rule, and various legal limitations on the means of protection help to prevent an overly frequent use and abuses by powerful States.

Yet the institution has serious flaws. The nationality rule leaves millions of stateless persons without any protection; the rule of continuous nationality can also work great hardship on a considerable number of individuals. Few States are willing to undertake an internal legal obligation to protect their nationals provided the international requirements are met and no overwhelming interests of the State as a whole stand in the way. One can hardly overlook the reluctance of States to protect their nationals even in cases where no such impediments exist. The firmer and fairer the diplomatic protection in such cases, the stronger the preventive effect. But even the greatest firmness and fairness may be of no avail against an obstinate opponent of far greater political or economic strength. On the other hand, there have been and still are instances, where the right to protection has been used as pretext for political intervention.

The greatest inherent weakness in the institution of diplomatic protection reflects the underlying weakness of international law in general: To the questions if and to what extent diplomatic protection is justified, and how much reparation is adequate in a given case, there is often no easy answer. Yet there is no general obligation for all States to submit their relevant disputes to a peaceful settlement through the binding decision of an independent and neutral authority. Therefore, plaintiff and defendant State often remain *judex in causa sua* with the result that the outcome of the case may depend on the relative strength of the parties.

The international jurist cannot help regretting the strong, frequently decisive, political aspects in the decision-making process, foremost on the international plane, but also often on the internal plane. The results of such decision-making can be judged from two different standpoints. Some observers deplore the fact that often individuals do not receive due protection; others point at the opportunity for strong States, especially for → great powers, to pursue goals outside diplomatic protection. Though → naval demonstrations and → blockades as means of diplomatic protection seem a thing of the past, the fear of economic coercion, power politics, → aggression, or other forms of imperialism has not yet subsided everywhere. From the viewpoint of an observer concerned more with individuals than with States, there seems to be rather too little than too much diplomatic protection in today's world. Abuse of States' right of protection is perhaps more spectacular but probably less frequent by far than needless neglect by States of their injured nationals.

The hope that diplomatic protection would become largely superfluous through human rights conventions has so far not materialized. From a realistic perspective, these treaties establish new and very far-reaching material rights for individuals, but not a corresponding basis for diplomatic protection by their home States. They rather give all State parties the right to grant a new kind of humanitarian assistance or protection to all individuals regardless of their nationality. For two reasons this right has proven almost ineffective: In most treaties the treaty machinery is inadequate; and, worse, the State parties are usually unwilling to use even that inadequate machinery. In spite of Art. 26 of the European Human Rights Convention the procedural status of the individuals themselves under the human rights conventions is so weak that it is no substitute for diplomatic protection. Thus in spite of all its shortcomings, which are typical also of the present gaps in the international order, diplomatic protection remains an indispensable means for improving the legal position of most individuals against foreign State power.

According to a former president of the ICJ, Jiménez de Aréchaga, protection of foreigners or of foreign investments is not the sole aim of diplomatic protections as a legal institution. The interests of States are also taken into consideration in the maintenance of a balanced system which, on the one side, affords a degree of protection to foreign interests but, on the other, respects State sovereignty and domestic jurisdiction, especially of the territorial State. The legal institution

mirrors the essential and historically developed conditions under which States are prepared to accept claims by other States on behalf of the latter's nationals. The relevant rules are a compromise evolved and accepted by States interested in extending diplomatic protection and by others interested in restricting it. Minor correctives can always be made, but fundamental improvements go to the core of the international legal system and will accordingly take a long time.

F. Diplomatic Protection and International Organizations

In some cases individuals suffer damage through acts of international organizations in violation of international law (→ International Organizations, Responsibility). The number of such cases will probably increase as international organizations conclude more treaties beneficial to individuals, for instance, the → commercial treaties of the European Economic Community. If the organization is a general subject of international law, the individual's home State is a member State, or if the home State has otherwise recognized the organization's international legal personality, it is reasonable to draw some parallels to diplomatic protection as outlined above. With some modifications, likely concerning the local remedies rule, the home State should be entitled to extend diplomatic protection against the organization. The legal position of member States in giving diplomatic protection can be more restricted than that of non-members. Due to the emancipation of the *Marktbürger* in the European Communities (section C.2. *supra*; cf. Arts. 173 (2), 178, 215 (2) EEC Treaty), his home State is not entitled to grant diplomatic protection against the organization.

More complicated is diplomatic protection against a State through an international organization for injuries suffered by individuals as agents of that organization. In the advisory opinion on Reparation for Injuries Suffered in Service of the United Nations, the ICJ used a functional approach (→ International Organizations, Implied Powers). The Court unanimously held that the United Nations has the legal capacity to claim its own damages. Against four dissents, eleven judges held that the organization is also entitled to claim reparation for damages caused to its agent or to persons entitled through him.

The majority view has found more and more approval in legal theory. Regardless of the dearth of international practice, the present writer subscribes to paragraph 176 of the American Law Institute's Foreign Relations Law of the United States (Restatement of the Law-Second, 1965) which reads:

> "(1) If an individual is injured in connection with the performance of his functions as an agent of the United Nations by conduct attributable to a state, the state is responsible to the United Nations to the same extent that it would be responsible to another state if the individual were an alien with reference to the first state and a national of the other state. Such responsibility arises even if the agent of the United Nations is a national of the respondent state.
>
> (2) In the case of any other international organization, subject of international law, having a constitution that provides for an independent staff, the same responsibility arises if the respondent state is a member of the organization or has otherwise recognized its international legal capacity and consented to the performance of the functions in question."

These conclusions may be based on the following reasons. As a matter of course an individual does not lose his nationality by becoming an agent of an international organization. But there is a certain separation from his home State as, for instance, reflected in Art. 100 of the UN Charter. In all official acts, the agent is legally isolated from his home State and responsible only to the organization. Therefore, an international delict injuring the agent in his official capacity does not damage his home State and its rights so much as, or more than, the international organization.

So far no cases are known where the functional claim of the organization has had to compete with a national claim of the agent's home State. The ICJ rightly expected no great problems from the possibility of competing claims. Obviously the defendant State should not have to pay the reparation twice; amicable solutions between the two claimants appear possible. In a case where the defendant State is the home State of the injured agent, the functional approach should prevail over the nationality principle. No international organi-

zation can act without agents, no agent can act in the exclusive interest of his organization without a certain separation from his home State. Especially if the agent's legal duty to act against the interests of even his home State materializes, protection by the organization may in practice be a prerequisite for fulfilling his duties. Thus some thirty-five years later, the dissents in the 1950 Advisory Opinion seem outdated.

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DIPLOMATIC PROTECTION OF FOREIGN NATIONALS

1. Admissibility, General Considerations

"Citizenship is usually an essential condition of diplomatic protection. In the matter of the presentation and enforcement of international claims, no rule is more strictly observed." Edwin Borchard's short characterization of the law as it stood in 1915 (p. 462) still holds true even though State practice in the 19th century was not uniform (see the examples mentioned in the article on → Protected Persons), and even though serious doubts have been raised as to whether contemporary notions of justice and fairness would not call for certain modifications.

According to the traditional conception of → diplomatic protection, a claim by a State against another State on account of an injury to one of its nationals has as its basis the injury which the claimant State has suffered through its national (→ Nationality). As a corollary to this construction, the principle has long been accepted that a State may not normally grant protection to non-nationals. Nevertheless, State practice has in the past occasionally conceded that under certain circumstances exceptions may be desirable. The → Permanent Court of International Justice (PCIJ) apparently considered, in a dictum in the → Panevezys-Saldutiskis Railway Case (Series A/B 76, at pp. 16 ff.), that such exceptions require a treaty. A less strict position was adopted by the → International Court of Justice (ICJ) in the case concerning → Reparation for Injuries Suffered in Service of UN (ICJ Reports 1949, p. 181) in which the Court referred to important exceptions to the nationality rule. This view is also reflected in the position adopted in 1965 by the → Institut de Droit International (AnnIDI, Vol. 51 II (1965) p. 268). According to Art. 3(a) of the resolution then passed by the Institut, a claim may be presented "when the individual is a national . . . or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection". It appears

questionable, however, whether any general formula can be found which adequately expresses the various nuances of State practice and its historical development. Each proposed or real exception to the general rule deserves specific consideration.

2. *Historical Development*

(a) Treaty-based protection of foreign nationals

No objection has been raised to a modification of the general rule where the States concerned act on the basis of a mutual agreement or *ad hoc* understanding. Due to the interests involved, a treaty is required between the claimant State and the State to which the claim is presented. The individual's home State must also express its approval. Given the great number of claims settled in the post-war period (see also → Lump Sum Agreements), it is noteworthy that non-nationals have not generally been protected. A prominent exception concerned the negotiations and the settlement of claims raised by Germany against Israel (→ see German Secular Property in Israel Case). In this context, Australian citizens who lost property rights at a time when they were German nationals were protected by Germany with the approval of Australia and Israel.

(b) Protection of foreign nationals in the absence of a treaty

(i) Historically, various categories of foreign nationals have frequently been granted diplomatic protection. Thus, Western States used to exercise their powers abroad in favour of Christian missionaries regardless of their national status.

(ii) Seamen serving on vessels flying a flag other than that of their home State were formerly protected by the flag State (→ Flags of Vessels). The rationale for this practice was not clearly established. Occasionally it was assumed that a seaman is so closely associated with the flag State that this connection could justify the flag State's exercise of diplomatic protection (see the opinion of Judge Hackworth in the case concerning Reparation for Injuries Suffered in Service of UN, ICJ Reports 1949, p. 181, at p. 202). In another perspective, it was at times assumed that the nationality of the vessel itself should be considered as the crucial element and that the seaman was covered, so to speak, by the invisible flag of the ship (see the opinion of Judge Badawi Pasha, ibid., p. 207). Moreover, under certain conditions it was assumed that the seaman's declared intention to become a citizen of the flag State should suffice, for purposes of diplomatic protection, to treat him as if he had acquired this new nationality. It must be noted, however, that these practices concerning seamen were selective on the part of flag States, and occasionally were objected to by third States. Case law concerning the admissibility of protection of alien seamen is inconclusive. Whereas a tribunal set up by Mexico and the United States found in 1868 in the McCready Case (J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Vol. 3 (1898) p. 2536) in favour of such a right to assist the foreign seaman, two later decisions ruled in the opposite sense.

(iii) A third category of persons who previously enjoyed diplomatic protection by States other than their own State concerned local citizens who were officially connected with the consulates or embassies of third States. According to a theory of "assimilation", the sending State of the consulate or the embassy claimed the power to exercise the right of protection. It appears that this practice was exercised mainly by Western States outside their own cultural sphere, sometimes based on treaties (see e.g. the multilateral arrangements entered into by Morocco on July 3, 1880, J.B. Moore, A Digest of International Law, Vol. 2 (1906) p. 747).

(iv) In the past certain forms of protection were exercised temporarily on behalf of persons who were nationals of States or territories without a functioning government. The United States, for instance, acted on behalf of certain Cubans in the period between Spain's relinquishment of her rights over Cuba and the formation of the State of Cuba.

(v) In previous periods, a State was also permitted to exercise its protection in favour of citizens residing in territories over which the State enjoyed special powers and responsibilities (→ Mandates; → United Nations Trusteeship System; → Consular Jurisdiction).

(vi) In addition to the protection of specific categories of non-nationals, the more powerful States have at times acted to assist non-nationals who were in immediate danger, especially in times

of → civil wars and riots. In modern terminology, these instances may be characterized as efforts to prevent grave violations of → human rights.

3. *Current Legal Situation*

The exercise of diplomatic protection on behalf of non-nationals remains important today in the case of a breaking down of diplomatic relations between two States (→ Diplomatic Relations, Establishment and Severance). On the basis of treaties or *ad hoc* arrangements, a third State may then assist the nationals of the two States concerned. The increase in the number of → micro-States may necessitate similar cooperative efforts in the future. In times of → war, the interests of one belligerent in the territory of another may be confided to that of a → protecting power (→ Occupation, Belligerent).

While such arrangements in principle are admissible and desirable, it is unclear to what extent contemporary international law tolerates those forms of diplomatic protection which were exercised in the past without the consent of all States concerned. It may be argued that a certain weakening of the nationality rule occurred when the ICJ recognized in the Reparation for Injuries Suffered in Service of UN Case that an international organization was empowered to bring a suit on behalf of one of its officers. However, it is also true that in the → Barcelona Traction Case of 1970 the ICJ considered that the right to exercise diplomatic protection generally has to be construed in a narrow sense. The latter judgment concerned the special context of the relationship between corporate entities and shareholders, but it would, nevertheless, appear questionable in the light of this judgment to assume that the protection of foreign missionaries, seamen, members of aircraft crews, or persons engaged by consulates or embassies may be protected by States other than their home State. These considerations are subject, however, to a detailed study of State practice. General information on modern practice seems to be rare for the cases mentioned. It may turn out that additional distinctions must be introduced, such as the one between seamen on → merchant ships and members of armed services in general. With regard to personnel employed by diplomatic and consular missions, the corresponding rules on immunity must be consulted in order to establish the current state of the law (→ Diplomatic Agents and Missions, Privileges and Immunities).

It could well be argued that the increasing doctrinal support for the notion that an injury to an alien violates both the rights of the home State and the alien should result in a recognition of the right of the home State to protect the injured aliens even where the latter have changed this nationality after the harmful event (see Magerstein). *De lege ferenda*, one might also question whether the lack of protection following from the traditional rules for → stateless persons should not be modified under certain circumstances, at least by recognizing that a third State should be allowed to present a claim on behalf of such persons.

The emphasis on human rights in current international law might in the future find its corollary in the right of each State to take protective measures in favour of all persons whose rights are immediately threatened. In this respect the earlier practice permitting the urgent protection of human rights of non-nationals, referred to above, should be remembered. In the → South West Africa/Namibia Judgment rendered in 1966, the ICJ refused to accept such a position in the context of a suit brought in favour of the black population in South Africa. Within the system established by the → European Convention on Human Rights (1950), the violation of accepted obligations may be brought to the attention of the competent organs by any member State.

It has been argued that the strict nationality rule finds its justification in the potential for abuses of power which would exist in case a more liberal régime were to be recognized. Indeed, a system allowing "protection shopping" by interested individuals could lead to practical problems from the point of view of small and weaker States. This was specially pointed out by Arbitrator Parker in the Administrative Decision No. 5 of 1924 for the United States-German Mixed Claims Commission (RIAA, Vol. 7 (1956) p. 119, at p. 141). At the same time, it must be recognized that strict observation of the nationality principle may lead to results which are clearly undesirable. In addition, since the foundations for the assumption that the State only claims reparation for the violation of its rights and not the rights of the injured individual have been eroded in the past decades,

the necessity to adhere to the traditional rule may be questioned from a doctrinal point of view as well.

Against this background, efforts toward a certain liberalization of the traditional rules, as called for by the 1965 resolution of the Institut de Droit International, deserve support. Along these lines, O'Connell has suggested that a State should be allowed to present a case for a non-national as long as an "adequate connection" exists, "one perhaps falling short of nationality, though ordinarily taking the form of nationality" (International Law, Vol. 2 (1970) p. 1033). Such arguments and proposals, notwithstanding their obvious merits, have hardly been reflected in State practice.

The absence of a central legislature for the → international legal community and the corresponding weakness in the growth and development of the rules of international law is specially felt in this particular context. One sign of the growing awareness of the deficiencies of the traditional system can be seen in the fact that Switzerland has taken the position that she is permitted to protect refugees who no longer are attached *de facto* to their home State, with the consent of the State against which the claim has been presented and has acted accordingly (see Note of January 26, 1978, reprinted in SchweizJIR, Vol. 34 (1978) p. 113). From an enlightened viewpoint, it is difficult indeed to find any justification for a system in which sailors, with a home State prepared to protect them, should receive the assistance of the flag State, whereas stateless persons travelling on the same boat but not belonging to the crew should find themselves without any protection whatsoever.

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See also the bibliography of the article Diplomatic Protection.

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DISCOVERY OF TERRITORY *see* Territory, Discovery

DISMEMBERMENT

1. Notion

Modern textbooks seldom rely upon the term "dismemberment". Presumably, the main reason for the reluctance to use the concept lies in the vagueness of its meaning. If employed in a broad sense, "dismemberment" may refer to all events which result in a State's territorial change, including (a) the disappearance of a → State on the basis of a → treaty or an → annexation, the former State becoming part of one or more States, (b) the diminution of a State's territory by way of an annexation, a cession or the → secession of one part, or (c) the disappearance of a State and the creation of two or more new States on the territory of the extinguished State (→ States, Extinction). The → Vienna Convention on Succession of States in Respect of Treaties (1978) indeed treats for its specific purposes all these cases together in Art. 34; it states that certain consequences arise "when a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist . . .". Remarkably, the Convention relies upon the term "separation" in this context and avoids the concept of dismemberment.

While "dismemberment" has indeed occasionally been used as encompassing all types of "separation" in the meaning of the Vienna Convention, and while no logical argument would prohibit such a use, a noticeable tendency can be discerned in those modern commentaries which use the concept to employ it in a more narrow fashion. Good reasons for rejecting the broad definition can be pointed out. A term which would encompass all major forms of territorial change would be of a purely descriptive nature without any legal contours and substance. Under contemporary international law, the conditions of legality and the consequences of intended or recognized territorial changes vary depending upon the presence or absence of the → use of force, the substance of the treaties involved, and other factors such as the exercise of a right of → self-determination or, perhaps, the time factor.

Against the background of this differentiating scale of categories and concepts governing territorial changes under current international law, the broad notion of dismemberment would have a descriptive function referring to the sum of the relevant rules, but it would be devoid of any analytical value because it would cover occurrences governed by different norms. Annexation is outlawed today and international law correspondingly provides for the preservation of → territorial integrity and political independence. It would serve no terminological purpose to define dismemberment so as to cover the relevant cases. Treaty arrangements concerning territorial change are governed by the special terms of the treaty involved. Finally, the case in which one part of a State breaks away while the old State remains in existence with a reduced territory is today generally referred to and discussed as secession.

Given this legal and terminological context concerning territorial changes, the only major case which falls under the broad concept of dismemberment and is not covered by any other generally recognized notion concerns the situation in which a State breaks up into two or more new States while the previous State completely disappears. These considerations suggest a need to define and use the term in a manner which only covers this particular case, and most modern commentaries in which the notion is found indeed follow this terminology.

2. Historical Development

Historical cases relating to → decolonization, involving the exercise of the right to self-determination, do not fall under the narrow concept of dismemberment because they do not involve the extinction of the colonial States or, generally, the predecessor State. Also, the disappearance of a State on the basis of annexations, such as was the fate of Poland in the late 18th century do not belong in this context if the above definition is followed. Major instances of dismemberment in the narrow sense which occurred in modern history concern the dissolution of the Holy Roman Empire of the German Nation in 1806 after the Napoleonic Wars and the disappearance of the Austro-Hungarian Empire after the First World War. In these cases, the previously existing States did not continue to exist (see also → Continuity).

3. Current Legal Situation

Annexation being unlawful today, few factual settings can be imagined which fall under the concept of dismemberment. If two or more parts of a given State separate without external involvement, be it on the basis of a treaty or a → civil war, a case of dismemberment exists if each of the parts forms a new State and neither of these States claims to be identical with the extinguished State. In State practice since 1945, it would appear that no development leading to a → divided State falls into this category. In the case of China, both the People's Republic and the Republic of China claim to be identical with the previous State.

Theoretically, a case of dismemberment may remain possible today in the wake of a → war after which the victorious powers occupy the defeated State (→ Occupation after Armistice; → Occupation, Belligerent), this occupation being followed by the creation of two new States on the territory of the previous State. In practice, what most often occurs is that at least one State claims continuity and considers that the other separated entity does not fulfil all the criteria of statehood. The current legal status of Germany illustrates the potential complexities and diversities of viewpoints which the various blocks within the international community may hold where the territory of the States concerned belong to different ideological groups (→ Germany, Legal Status after World War II).

One key issue in such a context concerns the circumstances under which a State may claim to exist alongside of the continuing predecessor State. Also, specific treaty arrangements or understandings among the victorious powers may be relevant, even though it is a cornerstone of current international law that treaties can only bind the parties to them. In addition, treaty arrangements between the States existing on the territory of the continuing predecessor State may have to be evaluated in such a situation. Finally, the legal positions held by the international community will have to be taken into account when the traditional rules of international law do not lead to a clear result.

In sum, these considerations indicate that the evaluation of a real or alleged case of dismemberment may depend upon specific factual and legal conditions, including highly complex questions, touching, *inter alia*, upon the notion of a State, the role of → effectiveness in international law, the rule of State continuity, and the power of the international community to fashion a régime not fully compatible with the classical qualities of statehood.

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BERNHARD SCHLOH

DIVIDED STATES

1. Notion

The notion of "divided States" (or of "multi-system nations") has been used to denote the specific legal situation of a number of States which previously belonged to a single → State (e.g. Germany, China) or to colonial possessions (→ Vietnam, → Korea) and which, in the period after World War II, found themselves divided into separate States.

There are no generally recognized principles of public international law or agreed definitions on the concept of divided State, or its legal implications. A survey of the solutions to the practical issues created by divided States indicates that no general concept exists in this area, but that the specific legal situation has to be examined individually in each case in order to arrive at viable solutions for the various issues raised. Thus even though all affected States are confronted with similar issues, the notion of divided States has no intrinsic legal quality from which specific conclusions may be drawn.

The notion indicates a status of transition, either between a previous condition of unified Statehood and its final → dismemberment into two or more independent States, or between a condition of division and eventual reunification. The main specific features of divided States are the → recognition of both parts by a large number of third States, for example → Taiwan until 1972, and at the same time the continued existence of a political will for reunification in at least one of the divided States. In the case of → Cyprus the unilaterally proclaimed Federal Turkish State of Cyprus still lacks recognition by third States, with the exception of Turkey, and is still under military occupation. Thus, under the above definition only China, Germany and Korea can today be regarded as divided States. Vietnam, having been reunified in 1975, remains an interesting historical example.

2. Special Legal Problems

The special legal problems experienced by "divided States" concern: (a) The legal status of each of the separate units; (b) the question of → nationality; (c) the → continuity of the formerly undivided State; (d) the mutual relations between the separate units; (e) these units' relations in regard to third States; (f) membership in international organizations (→ International Organizations, Membership); (g) succession in regard to the "old" State (→ State Succession); (h) and the principle of → self-determination, which may be applied to the people of the "old" State or to the peoples of the divided States.

(a) Legal status of the divided States

In principle each of the divided States is widely treated as a sovereign State (→ Sovereignty; → States, Sovereign Equality). Nevertheless, differences and exceptions exist in the specific situation of the various divided States.

In the case of Germany, both the Federal Republic of Germany as well as the German Democratic Republic have both gained wide international recognition as States (→ Germany, Legal Status after World War II). Each of the two States recognizes the Statehood of the other State in their relations with third States. Recognition is still outstanding, however, in regard to their mutual relations. A particular status has been attributed to the former capital → Berlin, which finds its expression in the Quadripartite Agreement on Berlin of 1971.

As to Korea, the Republic of Korea in the south as well as the Democratic People's Republic of Korea in the north do not recognize each other as States. The North-South dialogue since 1972, upheld by both governments, has led to dual recognition and dual representation of both States in a great number of third countries. Thus the common formula appears to be one nation, one State and two governments.

The People's Republic of China is now a universally recognized State. The status of the Republic of China (Taiwan) is less clear; it considers itself as a part of the "old" China thus excluding the concept of being a separate and divided State. The Republic of China (Taiwan) has lost its wide international recognition as a State, especially since 1972; it is often considered as a part of China under separate administration, i.e. a consolidated local *de facto* government (Crawford). In 1981, 23 third States still maintained diplomatic relations with the Republic of China (Taiwan).

(b) Nationality

The status of each of the divided States as sovereign States does not necessarily imply the existence of two different nationalities. The nationality of the formerly undivided State may either continue to exist in both parts or only in one of them.

In the case of China, the People's Republic of China as well as the Republic of China (Taiwan) still adhere to the concept of a uniform Chinese nationality. The same appears to apply to Korea; but there are a number of uncertainties. Thus citizens of these divided States seem to maintain the same nationality. If they take their residence in the territory of the other divided State, no formal procedure of naturalization seems to be necessary.

A different solution applies to Germany. Each of the two States follows a different concept. Whereas the Federal Republic of Germany continues to adhere to the former nationality of the German Reich, the German Democratic Republic has enacted its own laws on nationality in 1967, renouncing at the same time the old concept of uniform → German nationality. Thus citizens of the Federal Republic have to undergo a (simplified) procedure of naturalization if they decide to "emigrate" to the German Democratic Republic. On the other hand, citizens of the Democratic Republic may claim the application of the nationality of the former Reich if they come to the Federal Republic of Germany. No naturalization is required. The question of nationality is of practical importance in determining whether each of the divided States is entitled to grant → diplomatic protection to the citizens of the other State. Thus the German Democratic Republic grants this protection only to its own citizens, whereas the Federal Republic of Germany in principle provides diplomatic protection to all German nationals, i.e. to residents of the German Democratic Republic and of the Federal Republic of Germany. It then depends on the third State whether it allows the protection of nationals of one State by the government of the other.

(c) Continuity of the formerly undivided State

The existence of divided States does not necessarily presuppose the continuing existence of the formerly undivided State. Again, different concepts prevail in the various States under consideration.

In regard to Korea the opinion prevails, at least in the Republic of Korea, that the entire Korean State survived the proclaimed → annexation by Japan in 1904, the occupation by the Soviet Union and the United States after 1945 and even the proclamation of the two divided States in 1948. The continuing State of Korea is considered to be

a subject of public international law, yet at present not endowed with legal capacity. Only the two divided States seem entitled to act together on behalf of the formerly undivided State. Yet each government considers itself to be the sole legitimate government to represent the whole of Korea.

In regard to Germany the Federal Republic as well as a large majority of Western States recognize that the former Reich did not disappear in 1945. The military defeat of the Third Reich's armed forces and the following occupation of its territory did not lead to the extinction of the German State (→ States, Extinction). This situation was not changed by the foundation of the two divided States in 1949. All questions concerning Germany as a whole are still in the sphere of competence of the four Allied Powers. The German Democratic Republic as well as the Soviet Union maintain that the former Reich ceased to exist in 1945 by → *debellatio* or, at the latest in 1949, by dismemberment. In consequence only the Federal Republic considers itself to be partly identical with the former Reich.

The People's Republic of China and the Republic of China (Taiwan) both maintain that the formerly undivided Chinese State including the island of Taiwan, which in 1949 was under administration of mainland China, continues to exist. The difference between the two States consists in their responses to the question who is entitled to govern and to represent the whole China.

(d) Relationship between the divided States

Again no uniform pattern exists. In none of the existing cases under consideration has any divided State recognized the other and agreed to formal diplomatic relations (→ Diplomatic Relations, Establishment and Severance). It seems that those States which deny the continuing existence of the former undivided State would be willing to recognize the other State and thus the existence of two separate States, but so far no formal recognition has been expressed. Different opinions exist especially as to the legal nature of their mutual relations and the legal status of the common frontier. Whether this frontier is regarded as an international frontier or as a frontier between the territories of one former unified State, the frontier between divided States is in any case a juridical boundary in regard to which the general rules as to the prohibition of the → use of force apply.

As to Germany, the two States concluded an agreement in 1972 laying common ground for their future relationship (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)). On the side of the Federal Republic of Germany this agreement has been interpreted to establish *inter se*-relations. The special relationship between the two parts finds its expression in the exchange of permanent representatives instead of ambassadors (→ Representatives of States in International Relations). Both States recognize the existence of two States on the territory of the former Reich. None of them claims to be exclusively legitimized to represent the former German Reich. The Federal Republic of Germany considers that the German Democratic Republic is not a foreign State and that the common frontier is not a frontier as between States under public international law. This qualification, which is not shared by the German Democratic Republic, does not exclude the applicability of the rules on the ban on the use of force. The German Democratic Republic follows a policy of normalization of common relations which should lead to a mutual recognition under international law.

The two Chinese entities do not maintain any formalized relations. Each considers the other to constitute an unlawful government on the territory of China. Both entities argue that an undivided China still exists.

Differing views seem to be also held by the two Korean States. The Democratic People's Republic of Korea is said to emphasize more the existence of two sovereign States whose relationship could only be one under public international law. Yet the picture is not clear. A reunification of Korea could only be achieved by a mutual agreement between the two Korean States. Bilateral contacts have been established in order to improve the North-South relations and eventually to unify the country (cf. the agreement on basic principles of national unity of 1972). The → demarcation line has been consolidated into a full-scale juridical boundary for the purpose of the prohibition of the use of force, yet it still lacks the status of an international boundary between sovereign States. Both governments have always refused to recog-

nize each other as States or to open diplomatic relations.

(e) Relationship of divided States with third States

An important indicator for the whole concept of divided States is the reaction of third States. Thus in the case of Cyprus the northern part, occupied by armed forces from Turkey, has not yet been recognized by any third State. Consequently, the concept of divided States does not apply. In the case of Germany and Korea, the Federal Republic of Germany and the Republic of Korea for a long time considered themselves as the only legitimate representatives of the "old" States in international relations. These positions have been given up since the German Democratic Republic and the Democratic People's Republic of Korea have gained a large degree of recognition by third States. In the majority of cases foreign States maintain diplomatic relations with both States. Only the particular bilateral relationship between the divided States indicate, in the last resort, a continuing desire for reunification and thus the application of the concept of divided States.

In the case of China, both the People's Republic of China and the Republic of China (Taiwan) insist on the continuing unity of China. Whereas the Republic of China (Taiwan) after 1949 gained wide international recognition by third States, the People's Republic of China succeeded the Republic of China (Taiwan) in the → United Nations in 1971 after having been recognized by a considerable majority of third States. As far as can be ascertained, no third State has ever had formal diplomatic relations with the two Chinese States at the same time. The Republic of China (Taiwan) continues to maintain strong informal and trade relations with a great number of third States, and even maintains formal diplomatic relations with a small number of third States.

(f) Membership in international organizations

In addition to the question of status in regional organizations, which may be one of full membership or one of observer (→ International Organizations, Observer Status), membership in the United Nations continues to be a particular problem for divided States. Again, different solutions have been found, which have determined whether both States or only one of them was admitted as a member to the United Nations.

Both parts of Germany were admitted as full UN members in 1973 after having reached an agreement on mutual relations. The four Allied Powers affirmed that this admission did not affect their common rights and responsibilities as to the legal status of Germany as a whole. Both German States, when joining the regional organizations, the → European Communities or the → Council for Mutual Economic Assistance, respectively, successfully insisted on special treaty exceptions, allowing them to maintain the established system of "German internal trade".

In the case of China only one State applied and was admitted to the United Nations. After 1949 the Republic of China (Taiwan) was admitted to represent the whole of China. From 1971 onwards it was replaced by the People's Republic of China which likewise maintains the position that it is the only legitimate representative of China.

None of the Korean States has ever been admitted to the United Nations. The German solution of parallel membership of both parts was rejected by the Democratic People's Republic of Korea, fearing that such a solution would endanger the aim of reunification. A unilateral attempt by the Republic of Korea did not find support in the → United Nations Security Council. Both States have an observer status at the United Nations and are now members of a number of → United Nations Specialized Agencies or other international organizations.

(g) Legal succession in regard to the former undivided State

Depending upon the circumstances, there might be continuity, but also the rules of State succession may apply to divided States in regard to the former undivided State. In theory the old State may be succeeded by both of the divided States. But the succession may also be limited to the territory of one of the divided States. In this case it is difficult to determine the legal effects of succession in areas which are not linked with territory, such as those concerning general claims, debts and property abroad. Again, no common rules have emerged in the States under consideration. For Korea it is submitted that the old State of Korea was not an independent State when the division took place at

the end of the Japanese annexation. In the case of China the People's Republic claims to be identical with the former Chinese State. Consequently no major problems of succession seem to exist. In regard to Germany, the Federal Republic understands itself to be a State partly identical with the "old" State. Thus the Federal Republic has accepted the existing treaties and, in the → London Agreement on German External Debts of 1953, has recognized its responsibility for the debts of the Reich. The rules of the → Vienna Convention on Succession of States in Respect of Treaties (1978) and the → Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (1983) – not yet in force – may only be applied under consideration of the particular situation of the particular divided States.

(h) Self-Determination

The division of a State against the will of its people will not alter the legal subject of the right of self-determination. The people in the divided States may not automatically be considered to be separate subjects in regard to the right of self-determination. Given the common language, descent, history, culture, and the continuing belief in reunification, it does not seem justifiable to acknowledge the creation of different peoples, each having a right to self-determination. Thus a definite secession of one part cannot be justified by the principle of self-determination. When both divided States have been recognized by third States, it seems that a reunification may not be brought about against the expressed will of one of the peoples of the divided States.

3. Evaluation

The various examples of entities which are commonly referred to as "divided States" are hardly comparable and differ considerably as to their position under public international law. This is due to their specific historical and political situations. The main common denominator is the prior existence of an undivided State, at present divided into parts in regard to which the future reunification is still considered to be a legitimate aim, widely recognized by third States. The divided States exist in a situation of transition which may be terminated by a definite dismemberment of the old State, by the → secession of one part or by reunification. The legal opinions of third States and of the international community as expressed in the United Nations will have a decisive influence as to whether the transitional period comes to an end. Every existing divided State is located on a particular position on a continuum between final separation and reunification.

Due to its very nature, the transitory status of divided States cannot be assumed to exist *ad infinitum*; at the same time, it is also clear that the territorial status of a divided State may, under certain circumstances, remain unresolved for a long period.

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MEINHARD HILF

DOGGER BANK INCIDENT

During the night of October 21/22, 1904, the Russian Baltic Fleet, commanded by Admiral Rojestvensky and bound for the Pacific theatre of the Russo-Japanese War, fired upon a flottila of British fishing vessels operating around the Dogger Bank in the North Sea. Two fishermen were killed and others were injured; damage to property was also considerable. Great Britain demanded of Russia an official apology, reparations and the punishment of the officers responsible for the incident. Russia claimed the action had been provoked; Japanese torpedo boats had been seen surfacing and accordingly it was not possible to punish the commander of the fleet.

At length the parties agreed to appoint an international commission of inquiry which was not only charged with fact-finding in accordance with the provisions of Arts. 9 to 36 of Convention I in the Final Act of the first Hague Peace Conference (→ Hague Peace Conferences of 1899 and 1907), but was also required to state its findings on where the responsibility lay and on the degree of fault regarding those under the jurisdiction of the two contracting parties (→ Fact-Finding and Inquiry). The Commission sat in Paris and consisted of one senior naval officer each from Great Britain, Russia, the United States, France and Austria.

In its report, the Commission held that no Japanese torpedo boats had been present in the relevant area and therefore the Russian fleet's opening of fire could not be justified. The Commission also held the Russian Admiral responsible for what had happened but commented that the facts did "not cast any discredit on the military abilities or human qualities of Admiral Rojestvensky or the members of his squadron".

In the light of this finding Great Britain ceased insisting upon the punishment of Rojestvensky. Once the facts had been established, Russia paid £65,000 in compensation to the victims of the incident and the families of the dead men, thereby acknowledging her duty under international law to answer for the actions of organs which were in violation of international law, even when such actions were outside the powers vested in the organs and liability was not necessarily apparent on the basis of the facts (→ Reparation for Internationally Wrongful Acts). The experience won from the establishment of the Commission of Inquiry formed for the Dogger Bank Incident prompted further development of the Articles mentioned above during the second Hague Peace Conference in 1907.

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DOMESTIC JURISDICTION

1. Notion

The concept of domestic jurisdiction signifies an area of internal State authority that is beyond the reach of → international law. However, an immediate difficulty with the concept is the determination of its boundaries. One approach, which has been called the "essentialist" theory of domestic jurisdiction, holds that some matters by their very nature fall within the exclusive jurisdiction of individual → States. An example of this approach might be to say that how a → government treats its own nationals within its own territory is always a matter of domestic jurisdiction. But this example is belied by the recent vast development in the international law of → human rights. If a State were to commit genocide against a minority group of its own nationals, or torture or enslave any of its nationals, then even though such acts might be performed entirely within the territory of that State, such acts would be generally recognized as illegal under present international law (→ Genocide; → Slavery; → Torture). Therefore, to say that any subject-matter is by its nature a question of domestic jurisdiction is to decree that international law will never take legal cognizance of that subject. Yet the progressive development and expansion of international law makes any such position highly dubious and subject to future refutation.

A second approach to drawing the boundaries for domestic jurisdiction, which can perhaps be termed the "relative" theory, would be to say that the boundaries are coextensive with the rules of international law. This approach appears to have been behind the wording of Art. 15(8) of the Covenant of the → League of Nations, which stated:

> "If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

An early advisory opinion of the → Permanent Court of International Justice, on the → Nationality Decrees in Tunis and Morocco, expanded this approach in language that has often been quoted:

> "The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."

But clearly this second approach seems to beg the question of what constitutes the boundaries of domestic jurisdiction. For under this approach, domestic jurisdiction means that which is left over after the rules of international law have claimed their own jurisdiction. Those rules can expand or contract, depending on the development of → international relations. "Domestic jurisdiction" becomes simply another way of referring to that area which is not presently covered by international law. It gives the area no independent vitality.

Accordingly, a third approach has been to attempt to inject some substantive meaning into the concept of domestic jurisdiction simply by avoiding the question of delimitation of its boundaries. This approach may be found in Art. 2(7) of the → United Nations Charter, which states:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . . ."

The difficulty with this approach is that it appears to be an uneasy amalgam of the first and second approaches. It seems on the one hand to suggest a subject-matter categorization: whatever in 1945 (the time of adoption of the UN Charter) was not covered by international law is therefore beyond its reach. Yet this view would "freeze" the Charter as of 1945, when the vast majority of the → United Nations' present members had not even joined the organization. More relevant to the majority of States is the reach of international law at the time they became members of the United Nations. Additionally, the Charter, as a constitutional instrument, can hardly be read as unchanging through time. Thus, on the other hand, the Charter approach suggests the "relative" theory where the domain of domestic jurisdiction contracts as international law expands. But then Art. 2(7) offers no barrier to the United Nations so long as the latter "intervene" in the name of present norms of international law, since those norms would then constitute the boundaries of domestic jurisdiction.

A fourth approach to the notion of domestic jurisdiction, which would indeed invest the con-

cept with independent vitality, might be termed the "auto-interpretive" theory. For example, the so-called → Connally Reservation to the acceptance by the United States of the Statute of the → International Court of Justice (ICJ) recognizes the compulsory jurisdiction of the Court except, *inter alia*, with respect to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."

However, the difficulties with this auto-interpretive approach regarding the boundary question even exceed those of the "relative" approach. Here, the boundary between domestic jurisdiction and international law fluctuates according to the will of the individual State. International law is what is left over after the State determines the limits of its domestic jurisdiction. Yet different States may determine that boundary differently. Hence, under the auto-interpretive view, there is little room for international law to exist at all. For the auto-interpretive view would enable a State to opt out of any rule of international law disadvantageous to it, simply by declaring that the dispute arising under that rule is a matter of domestic jurisdiction. In sum, the auto-interpretive theory would appear to be ruled out by the very nature of international law. Its existence appears confined to the issue of compulsory jurisdiction of international tribunals, and even there it is on shaky ground.

Finally, a fifth view of the notion of domestic jurisdiction would be to regard it as expressing a concurrent jurisdiction with international law. Thus any given dispute may fall within the realm of domestic jurisdiction, or international jurisdiction, or both. This view, however, is not the one that is typically associated with the notion of domestic jurisdiction. Rather, the latter ordinarily signifies a domain within a State that is outside of the reach of international law. Interestingly, this latter concept of the exclusivity of the domestic and international spheres reflects international legal theory of the last hundred years or so and not the classical historical development of international law.

2. *Historical Evolution of Concept*

The concept of domestic jurisdiction does not appear to have been explicitly formulated prior to its articulation in Art. 15(8) of the Covenant of the League of Nations. The question therefore arises as to the reason for the non-appearance of such a concept. In the classical era of international law, the law of nations was viewed as a body of principles that permeated all States. No explicit distinction was drawn in that era between the *jus gentium* and the common law, except in so far as the subject-matters to which they related were often, but not always, different. As the positivist conception of international law made headway into the 19th century, there was again no need for a concept of domestic jurisdiction apart from international law, for under → positivism the reach of international law depended upon a State's consent. Since the State had the sovereign power, under this theory, to consent to anything, there could be no *a priori* barrier to the range of consent.

At about the time of World War I, however, a new question surfaced that helped pave the way for the need for a concept of domestic jurisdiction. Alfred Verdross, basing his ideas on the contemporary philosophy of Hans Kelsen, drew a distinction between a monist and a dualist conception of international law. The dualist theory was a logical extension of positivism: that if each sovereign State is the source of law, international law is only "law" to the extent that each State explicitly incorporates it and gives it domestic effect. In contrast, the monist theory holds that international law defines the areas of sovereignty of each State, and that no State can be sovereign in defiance of an international norm. Clearly, as between monism and dualism, the latter would render international law inoperative, as its extent would vary with the consent of separate States and it would have no ability to hold illegal any State act. The only theoretical system consistent with the existence and operation of international law is monism.

Yet the focus on monism-dualism helped sharpen perceptions as to the areas of competence between municipal and international law. Given that the only viable theory was monism, the question then was seen to be one of determining the limits of international law. If a State must act consistently with international law, then the only freedom that a State would enjoy would be in the area where international law is silent. That area became known as the area of "domestic jurisdic-

tion", and received its first prominent articulation in Art. 15(8) of the Covenant (→ International Law and Municipal Law).

3. *Current Legal Situation*

(*a*) *United Nations*

In 1945, the provision contained in Art. 2(7) of the UN Charter may have been very helpful in the ratification of the Charter, because many States were concerned lest the new organization become a powerful world government. Yet very early in the history of the United Nations it became clear that the term "intervention" would be loosely applied and that the phrase "essentially within the domestic jurisdiction of any State" would be interpreted by the United Nations itself. Even though Art. 2(7) is perhaps the most frequently invoked Charter provision in all debates over disputes arising before UN organs, it has not proved to have much vitality as a barrier.

As early as 1946, the → United Nations General Assembly condemned South Africa's discriminatory treatment of its own subjects of Indian origin. Despite South Africa's claims that the way it dealt with its own citizens in its own territory was clearly a matter of domestic jurisdiction, the General Assembly adopted Resolution 44(I), condemning South Africa's measures against the Indian minority as violating the human rights provisions of Arts. 55 and 56 of the Charter. Perhaps even more destructive of any "domestic jurisdiction" barrier was the General Assembly's condemnation, in that same year, of the form of government of a State. Resolution 39(I) proclaimed that the Franco government of Spain was a threat to international peace, despite the arguments of the United Kingdom and the Netherlands that the form of internal régime in Spain was essentially a matter of domestic jurisdiction.

Although Art. 2(7) specifically exempts → United Nations Security Council enforcement measures from the domestic jurisdiction limitation, the → veto has effectively blocked most enforcement matters before the Council. In 1950, the General Assembly stepped into the breach, adopting the → Uniting for Peace Resolution (Res. 377A(V)). The Resolution empowers the General Assembly, in the event of Security Council deadlock due to the veto, to take up questions involving a threat to or breach of the peace, and to make recommendations to member States for collective military measures (→ Collective Measures). Clearly this Resolution stretches to the breaking point any limitation that might be inferred from the word "intervene" in Art. 2(7). Yet fidelity to the language of Art. 2(7) was deemed less important than faithfulness to the underlying purpose of the United Nations to maintain international peace and security. In a conflict between one provision of the Charter, and the need to empower the General Assembly to effectuate the basic purpose of the United Nations in the face of Security Council deadlock, a purposive interpretation of the Charter seemed to require such a stretching of Art. 2(7).

However, to conclude that the concept of domestic jurisdiction has no force in the historical development of the United Nations would be erroneous. The United Nations was extremely cautious about debating or intervening in two prominent → secession cases: Biafra and Bangladesh. While the latter case was debated extensively, United Nations organs were extremely reluctant to pass judgment on what they regarded was an internal affair of Pakistan's. In sharp contrast, all colonial issues that have come before the United Nations have been emphatically regarded as not within the domestic jurisdiction of the mother country. Perhaps it would be going too far to regard these political developments in the United Nations as glosses on the term "domestic jurisdiction"; perhaps what is at stake is a certain sovereign sensibility that manifests itself in cases such as secession. This sensibility is coincident with, but not in explication of, the notion of domestic jurisdiction.

(*b*) *Other States*

The question whether the domestic affairs of one State are immune against → intervention by other States was answered very broadly in the General Assembly's → Friendly Relations Resolution (Res. 2625(XXV)) adopted by → consensus in 1970. That Resolution provides:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or

attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law."

While the Resolution itself proclaims this language to be "in accordance" with the UN Charter, it clearly goes beyond the various Charter provisions of Art. 2. For one thing, those provisions only prevented the United Nations itself, and not separate States, from various forms of intervention. For another, the Resolution may share common ground with the Charter but does in fact extend considerably beyond the Charter prohibitions.

But considered on its own merits, the non-intervention principle quoted above clashes with many recent developments in international law. Most pointedly, it would rule out cases of → humanitarian intervention. It would prohibit economic boycotts; it would invalidate much of the foreign policy of the superpowers in their self-designated → spheres of influence; and its language could also be construed to disallow exchanges of cultural information and communication (e.g., a television programme portraying racial equality might be construed as intervention in the internal cultural personality of South Africa).

Perhaps Res. 2625(XXV) on Friendly Relations is simply an artefact of what State representatives, meeting together, would like to view as an ideal of international law. In that idealistic picture, no State would treat its own citizens or minorities in such a way as to violate their human rights, and hence there would be no need for humanitarian intervention by other States. No State would do anything for which it would deserve interference from others. Perhaps such a vision is only to be expected of representatives who in concert each want to portray their own governments as morally pure. However, the Resolution, as adopted, conflicts with international law as a remedial mechanism when States act lawlessly. That remedial mechanism must exist irrespective of the aspirations of State representatives meeting to vote on an idealist statement of principles. This is but another way of concluding that the concept of domestic jurisdiction, however much it may surface in various forms (i.e. non-intervention) when State representatives meet to declare principles of law, erodes in practice just so far as is necessary to effectuate more important goals of international law, such as the newly developing goal of furthering individual human rights.

(c) *The International Court of Justice*

In cases before the ICJ, a respondent State will often claim that the matter at issue is within its domestic jurisdiction and hence not subject to international dispute resolution. Such a claim may have two aspects: (i) a preliminary objection denying that the Court has jurisdiction, and (ii) a substantive claim on the merits that the Court should decide for the respondent State.

In dealing with objections to jurisdiction, the Court follows the test of provisionality. Under this test, the Court looks to the claims only of the applicant State. If these claims *prima facie* establish the relevance of international law to the dispute, then the case will not be dismissed on jurisdictional grounds. For example, if the applicant State cites a treaty in support of its position that is allegedly binding upon the respondent, then so long as the treaty *prima facie* appears relevant to the facts in dispute, the Court will not decline jurisdiction on the plea of domestic jurisdiction.

However, it remains open to the respondent to argue on the merits that the evidence shows that the dispute is one within the respondent's domestic jurisdiction and thus judgment should be given for the respondent. Here the jurisprudence of the ICJ has followed the "relative" approach to domestic jurisdiction described in Section 1 above.

Mention should be made of the practice of the Court not to allow the claim of domestic jurisdiction as a barrier to a party that is asking the Court for → interim measures of protection under Art. 41 of the Court's Statute.

4. *Special Legal Problems*

(a) *Exhaustion of local remedies*

In international cases involving an alien or a corporation against a State, the claim will not normally be admissible before an international tribunal unless the complainant has exhausted the legal remedies available in the State which is alleged to be the injurer (→ Local Remedies, Exhaustion of). This rule sets up in effect a priority of domestic jurisdiction in this class of

cases. International law, however, circumscribes the exhaustion rule in certain respects. Foremost among these is that the local remedies must in principle be effective. They must also be available as a matter of reasonable probability and reasonable timeliness.

It is important to remember that this rule only operates as a rule of jurisdictional priority. The subject-matter of the dispute may well come under international law, but the exhaustion rule requires that the defendant State be given a first chance to resolve the dispute. In special classes of cases, for example, where a → denial of justice is alleged, the exhaustion of a local remedy may well operate to defeat the claim, regardless of whether the plaintiff wins or loses, if it can be shown that the availability of a fair trial at the local level itself negates the claim of a denial of justice.

(*b*) *Reservations to jurisdiction*

The so-called Connally Reservation has been quoted above as an example of an auto-interpretive theory of domestic jurisdiction. A handful of States, including the United States, use some version of this amendment to determine whether a matter falls within their domestic jurisdiction.

There are several ways in which the ICJ could react to such reservations. First, it might simply give them literal effect, allowing a defendant State to decide for itself if any given matter falls within its domestic jurisdiction. However, this approach might lead to absurd positions; for example, a State might claim that a treaty which clearly regulates the subject in dispute is nevertheless a matter of domestic jurisdiction. Therefore, the Court might try a second approach, reading the word "reasonably" into any such Connally reservation, thus inferring an objective standard that would be for the Court to adjudicate. Thus, in the case of the treaty, the Court might overrule a State's determination of domestic jurisdiction on the ground that such a determination would be clearly unreasonable. However, the inference of "reasonable" might not be warranted, given the intention of the State at the time it made a Connally-type reservation. Accordingly, a third approach would be for the Court to rule that any auto-interpretive reservation of domestic jurisdiction is logically self-contradictory and hence cannot be given effect by the Court. Judge Lauterpacht, concurring in the → Norwegian Loans Case, took this third position and would have ruled that the State in effect had not submitted to the jurisdiction of the Court. However, this third approach can lead to a different conclusion, expressed in the same case by Judge Guerrero, who filed a dissenting opinion. Judge Guerrero would simply erase the Connally-type sentence and leave the State under the jurisdiction of the Court, as if the State had never added the Connally-type language to its formal acceptance of the Court's jurisdiction.

These alternatives exist even after the Court's majority opinion in the Norwegian Loans Case, because in that case the respondent State had not itself made a Connally-type reservation but rather was relying upon such a reservation made by the applicant State. The Court allowed the respondent State to invoke the applicant's State reservation on the ground of → reciprocity. Crucially, the Court did not consider it necessary to inquire whether the reservation might be self-contradictory or subject to a "reasonable" objective test, because of the fact that the applicant State fully maintained the force of its declaration throughout the proceedings, and the respondent State simply relied upon it. The issue of the validity of the declaration, therefore, was not presented to the Court.

5. Evaluation

The weight of international practice accords with the dictates of logic in applying to all claims of domestic jurisdiction the "relative" approach. International law, under this approach, simply applies to whatever subjects it covers, and whatever is left is thus a matter of domestic jurisdiction. Furthermore, as international law extends its coverage to more subjects and issues, the domain of domestic jurisdiction will shrink accordingly. As a result, one might conclude that the claim of domestic jurisdiction has an impact that is more psychological than legal. Like the claim of → self-determination, it is hard to understand what "domestic jurisdiction" means exactly, but easy to appreciate the spirit in which it is invoked and the meaning that its proponents would ascribe to it in any given context.

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DONAUVERSINKUNG CASE

On June 18, 1927, the Staatsgerichtshof (Constitutional Court) of the German Reich ruled upon a dispute between the German states of Baden, Württemberg and Prussia (Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 116, Appendix p. 18; Annual Digest, Vol. 4, p. 128). The dispute concerned the upper course of the → Danube River, which is characterized by a particular geographical phenomenon: at several places in the former territories of Baden and Württemberg the water sinks into the lime stone ground and flows in subterranean passages into the river Aach, a tributary of the → Rhine River in Baden. Württemberg, supported by Prussia, claimed that Baden should take measures to stop the increased sinking of water caused by a barrage and that it should remove sediments in the bed of the river. Württemberg had closed natural cracks and pores in the bed of the river and had diverted water for the use of a power station. Baden, in turn, asked for an injunction requiring Württemberg to restore the original conditions. The Court rendered an interim decision and left the final settlement to an agreement between the parties; it held that Baden and Württemberg were each obliged to put an end to any interferences which increased or diminished the natural sinking process; furthermore, that Baden had to remove certain sand and graval banks without, however, being bound to improve the bed of the river by substantial alterations.

The parties were in most respects autonomous states within the German Reich. Therefore, the Court held that, in the absence of positive constitutional rules, their mutual rights and obligations with respect to inter-State waters were governed by the general principles of public → international law. Applying the rules on → international rivers, the Court held that in the exercise of its → territorial sovereignty every riparian must have regard to the interests of other → neighbour States to use the river according to the natural conditions and that a conflict must be resolved by an equitable balance of interests. At the same time, the Court emphasized that the close relationship between the states of the German Reich imposed particular restrictions on their territorial rights, especially with respect to the duty to perform positive acts such as the clearance of the river bed in compliance with modern minimum standards.

The recourse to the principle that riparians are entitled to a fair share in the use of an international river and must mutually have regard to the

interests of their neighbour States stands in line with the case-law developed by the United States Supreme Court in disputes between federal states and with the jurisprudence of the Swiss Federal Court on rivers common to several cantons (Entscheidungen des Schweizerischen Bundesgerichts, Vol. 4 (1878) p. 34) as well as with a decision of the Italian Court of Cassation (Annual Digest, Vol. 9, p. 120). In Wyoming v. Colorado (259 U.S. 419 (1922), at p. 464), the Supreme Court stated that the upper state on an inter-state stream "does not have such ownership or control of the waters flowing therein as entitles her to divert and use them regardless of any injury or prejudice to the rights of the lower state in the stream".

The principle of "equitable apportionment" of international waters is nowadays generally acknowledged (→ Water, International Regulation of the Use of). The decision of the German Staatsgerichtshof went one step further; the Court assumed that, as a general rule of international law, a riparian must refrain from all measures which affect substantially the natural use of an international river by another. It is doubtful whether this principle is sufficiently corroborated by international practice to be established as a rule of customary international law (cf. → Lac Lanoux Arbitration). Although the decision of the German Staatsgerichtshof ruled primarily on the basis of the interference with surface waters and the river bed, it may be pointed out that modern legal opinion tends to integrate the rules on the underground water régime with those on international surface waters through the notion of "international drainage basin" or the more vague term of "international watercourse system".

The decision of the German Staatsgerichtshof, albeit not referring to other sources for the application of international law and though also relying on the common bond between the parties as members of the German Reich, amounts to an important contribution to the concept of international rivers as coherent hydrographic systems of common interest to the riparians.

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MATTHIAS HERDEGEN

DUE DILIGENCE

1. The Washington Rules

The notion of due diligence became well known in international law after the → American Civil War (1861–1865) when the United States claims for compensation against Great Britain came to be settled. A number of → warships commissioned by the Confederates and built in England had caused considerable damage to the Union's shipping. One of these vessels, the → *Alabama*, had left the port of Liverpool, still unequipped and unarmed; the final equipping and fitting out had taken place partly in British territorial waters, partly near Terceira in the Azores.

Great Britain reluctantly agreed to settle the so-called Alabama Claims by way of → arbitration. The legal positions of the two parties as to the duties of neutral States in → sea warfare being obviously different, they agreed in the Treaty of Washington (1871) on certain rules which the Tribunal should use in deciding on the United States claims. The three Washington Rules appear in Art. 6 of the Treaty. The term due diligence is used in Rules One and Three, dealing with the responsibility of a neutral State for damages caused by private persons acting within its jurisdiction: A neutral Government is bound

"First: To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reason-

able ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction; to warlike use. . . .

Thirdly: To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

The cases and counter-cases of the parties as well as the internal discussions of the Tribunal during the arbitration proceedings in Geneva showed that the two sides interpreted due diligence in quite different ways. The British arbitrator Cockburn invited the Tribunal to consider, "whether the general principles of International Law, referred to in such 6th Article have, relatively to the rights and duties of neutrals, any and what effect in determining what constitutes due diligence or the want of it, or in extending or limiting the liability of a neutral State" and "whether a Government acting in good faith, and honestly intending to fulfil the obligations of neutrality, is to be held liable by reason of mistake, error in judgment, accidental delay, or even negligence on the part of a subordinate officer" (Martens NRG, Vol. 20 (1875) p. 722, at pp. 738–739; → Neutrality, Concept and General Rules; → Neutrality in Sea Warfare; → Good Faith). The British position urged restrictive interpretation of due diligence; lack of due diligence meant "a failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation".

The view of the United States was that a neutral State owed an "active diligence", commensurate with the emergency or with the magnitude of the results of negligence. It seemed "inconceivable that the belligerents were required to submit without redress to the injuries resulting from neutral negligence". If the neutral State's laws were insufficient, it was under an obligation to amend them.

The Arbitral Award of September 14, 1872 favoured the definition of due diligence advanced by the United States; the due diligence referred to in the first and third of the said rules had to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents might be exposed, from a failure to fulfil the obligations of neutrality on their part. It clearly resulted from all the facts that the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the ship, to take any effective measure of prevention in due time. The orders which it did at last give for the detention of the ship, were issued so late that their execution was not practicable; moreover, the measures taken for the pursuit and arrest of the ship after her escape were so imperfect as to lead to no result. Thus, the tribunal ruled that Great Britain's actions could not be considered sufficient to release her from the responsibility already incurred and that the British Government could not justify its failure to exercise due diligence by pleading the insufficiency of the legal means of action which it possessed.

The → Institut de Droit International, at its session at The Hague in 1875, attempted to improve the formulation of the Washington Rules in the light of the *Alabama* case. It was decided to replace the words "due diligence", which were believed to be too vague, by a more practical term. In conclusion III it was stated:

"Lorsque l'Etat neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empêcher, et de poursuivre comme responsables les individus qui violent les devoirs de la neutralité."

The question of State responsibility is clearly limited in conclusion V:

"Le seul fait matériel d'un acte hostile commis sur le territoire neutre, ne suffit pas pour rendre responsable l'État neutre. Pour qu'on puisse admettre qu'il a violé son devoir, il faut la preuve soit d'une intention hostile (Dolus), soit d'une négligence manifeste (Culpa)."

Art. 8 of the XIIIth Hague Convention of October 18, 1907 (AJIL, Vol. 2 (1908) Supp., p. 202) largely followed the wording of the Washington Rules, but used "employ the means at its disposal" in place of due diligence. Thus the

instrumentalities available to governments were emphasized rather than the efficiency and care with which they were used:

"A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war."

2. *Due Diligence and State Responsibility for Acts of Private Persons in Peacetime*

The *Alabama* case and the scholarly discussion subsequent to it added to the comprehension of the scope, applicability and limits of the notion of due diligence. In cases where the breach of an international obligation of a State was due to the actions of private individuals, it became increasingly common to view the State as liable only for the faulty conduct of its organs, i.e. normally for the omission to use due diligence to prevent and repress acts committed by private persons (→ Responsibility of States: General Principles; → Responsibility of States for Activities of Private Law Persons; → Reparation for Internationally Wrongful Acts). It further became clear that insufficiency in national legislations was no excuse for a lack of due diligence. Finally, it was demonstrated that it is difficult to determine clearly and unequivocally the degree of diligence due in a given situation. *Diligentia quam in suis* may sometimes be insufficient and in the field of neutrality, → international relations may require a higher standard. The *Alabama* arbitration itself serves as an example but the Tribunal's attempt to use the magnitude of possible damage as a yardstick for the degree of diligence due did not attract many followers, at least not in such wide terms.

The role of due diligence is undisputed, but the wording used in diplomatic practice, in treaties and decisions varies with the context.

The discussion on the definition and formulation of "due diligence" developed for obvious reasons within the field of international responsibility of States for injuries on their territory to persons or property of foreigners through acts of private individuals or during internal disturbances (→ Aliens; → Aliens, Property; → Minimum Standard). State practice and a continuously growing body of judicial and arbitral decisions provided an abundance of case material (see the digest of the decisions of international tribunals relating to State responsibility, UN Doc. A/CN.4/169 and A/CN.4/208, YILC (1964 II) p. 132 and (1969 II) p. 101). In preparation of the codification conference on international responsibility of States for injuries to aliens, the Institut de Droit International defined at its Lausanne session in 1927 the diligence due as "the measures to which under the circumstances, it was proper normally to resort in order to prevent or check such actions" (AJIL, Vol. 22 Supp. (1928) p. 330; original in French in AnnIDI, Vol. 33 (1927 III) p. 331). The term due diligence was thus avoided in favour of a somewhat more substantial definition.

In the same year, Strupp published a draft general treaty concerning responsibility of States for internationally illegal acts, in which he took up the Institut de Droit International's above mentioned conclusion: "In case of an omission, a State may release itself from responsibility by proving that it has not acted wilfully or has negligently failed to observe the necessary care."

Art. 10 of the Harvard Law School's 1929 draft expressly used due diligence to define the international responsibility of the State:

"A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case" (Harvard Law School, Research in International Law, Vol. II, Responsibility of States (1929) p. 228).

The pertinent commentary is persuasive:

"The phrase due diligence implies . . . jurisdiction to take measures of prevention as well as opportunity for the State to act, consequent upon knowledge of impending injury or cirumstances which would justify an expectation of a probable injury. Due diligence is a standard and not a definition."

In 1929 the Preparatory Committee of the Hague Codification Conference only succeeded with a first reading of an Art. 10 which defined this standard in a general manner:

> "The State is only responsible where the damage sustained by the foreigner results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress or inflict punishment for the acts causing the damage" (League of Nations, Conference for the Codification of International Law, Vol. III, Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (1929)).

The reason for the ultimate failure to attain agreement was controversy over the special protection of aliens.

3. *Codification of State Responsibility after World War II*

After World War II, the preparation of a codification of the responsibility of the State for injuries caused in its territory to the person and property of aliens was resumed, which prompted a further doctrinal discussion of this subject and also a re-examination of the questions related to due diligence. The Special Rapporteur to the → International Law Commission (ILC), García Amador, dealt in his second report (YILC (1957 II) p. 104) with this topic in the case of acts of individuals and of internal disturbances:

> "The learned authorities are in almost unanimous agreement that the rule of 'due diligence' cannot be reduced to a clear and accurate definition which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was 'diligent' in discharging its duty of vigilance and protection . . . . In effect, therefore, the rule of 'due diligence' is the expression *par excellence* of the so-called theory of fault (*culpa*), for if there is any category of cases in which it cannot be said that responsibility arises through the simple existence of a wrong it is surely the category dealt with in this chapter. Accordingly, though the rule is vague and, consequently, of only relative value in practice, there is no choice – so long as some better formula is not devised in its stead – but to continue to apply the rule of 'due diligence' in these cases of responsibility" (ibid., p. 122).

F.V. García Amador further pointed out that, as far as the cases of private individuals and internal disturbances are concerned,

> "the basic principle apparent in previous codifications, in decisions of international tribunals, and in the works of learned authorities is that there is a presumption against responsibility. In other words, the State is not responsible unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts" (ibid., p. 122).

In Art. 7 of his revised draft (YILC (1961 II) p. 46), García Amador tried to identify as far as possible the elements of due diligence:

> "1. The State is responsible for the injuries caused to an alien by illegal acts of individuals . . . , if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.
>
> 2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State.
>
> 3. The State is also responsible if the inexcusable negligence of the authorities in apprehending the individuals who committed the injurious act deprives the alien of the opportunity to bring a claim against the said individuals for compensation for the loss or injury or if he is deprived of such opportunity by virtue of a general or special amnesty."

García Amador had worked in contact with the Harvard Law School which, also in 1961, presented a (revised) draft convention on the international responsibility of States for injuries to aliens, dealing in a very comprehensive manner with the various aspects of due diligence.

In the new round of codification which began in 1963, the draft rules were no longer limited to the responsibility of States for injuries caused on their territory to aliens; the future convention was designed to define the general rules governing the

international responsibility of the State. The ILC decided for that purpose to strictly limit the draft articles to secondary rules, i.e. rules determining the legal consequences of a failure to fulfil obligations established by primary rules, customary as well as conventional. Due diligence was considered as an element of an obligation, i.e. a primary rule, and therefore banned from the draft. Ago, the Special Rapporteur, referred repeatedly, especially during the preparation of Art. 11, to the failure of the 1930 codification conference which was partly due to the linkage of the definition of State responsibility with controversial primary rules, namely the protection of aliens – a linkage unavoidable in view of the purpose of the conference. Ago's exhortations clearly carried conviction. His own draft Art. 11 (conduct of private individuals) had originally mentioned in para. 2 "the attribution to the State of any omission on the part of its organ where the latter ought to have acted to prevent or punish". This could have been understood as an allusion to the standard of due diligence in the sense of García Amador's commentary indicating that in this particular sphere the principle of *culpa* is relevant. However, discussion in the ILC led to an elimination of these words, even though some members of the ILC had voiced different opinions. The present para. 2 is without substance, a mere saving clause.

Part 1 of the draft articles on State responsibility for → internationally wrongful acts, the first reading of which was completed in 1979, has thus with a certain dogmatic purism, abolished any mention of fault. Wrongfulness is defined as the breach of an international obligation, unless objective circumstances can be shown which exclude it, e.g. consent, *force majeure*, fortuitous event and distress. Henceforth the notion of due diligence has to be sought in the sphere of primary rules. It will remain an open question, whether or not the mentioning of this blanket formula in Art. 11 para. 2 would have been valuable, at least as far as → customary international law is concerned.

Due diligence as a primary rule is, however, of continuously growing importance. The international responsibility of States for injurious consequences of acts not prohibited by international law was reserved to a special convention, when in 1973 the work on the draft articles began. Since then the problems of responsibility for transboundary environmental and other hazards have produced a torrent of activity in the field of treaty régimes of a universal or limited character trying to establish a common course of action or to regulate in advance the conflicting interests that may develop among the parties (→ Transfrontier Pollution; → Environment, International Protection). The question of liability for → damages has, however, been treated with extreme prudence. The preparation of the new draft convention on international liability for injurious consequences arising out of acts not prohibited by international law is therefore proceeding along a difficult path (→ Responsibility of States: Fault and Strict Liability). In his first report, Baxter, the Special Rapporteur, nevertheless stated that the régime of liability in these cases

> "is envisaged as being largely . . . the product of the duty of care or due diligence, the pervasive primary rule that is approved, and explained with equal facility, by the proponents of subjective and objective theories of responsibility. At a certain point along the way, one must admit the influence of a modified principle, more closely connected with the era of interdependence; for the duty of care will have to acquire a new dimension before it can account convincingly for such phenomena . . . ." (YILC (1980 II) Part I, p. 252).

The classic standard of due diligence may thus not suffice, it may require, depending upon the circumstances, a standard more exacting than its own as part of a special régime of protection. In this sense, the régime of absolute liability in the case of damage caused by space objects may be looked upon as "evidence of the standard of care which the authors of the Convention believed to be reasonable in relation to that particular activity" (ibid., p. 254; → Outer Space Treaty; → Spacecraft and Satellites).

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HORST BLOMEYER-BARTENSTEIN

DUTCH TERRITORIES, DECOLONIZATION *see* Decolonization: Dutch Territories

ENCLAVES

1. Notion

An international enclave is an isolated part of a foreign State's territory entirely surrounded by the territory of only one other State (the surrounding State) so that it has no communication with the territory of the State to which it belongs (the mother or main State) other than through the territory of the surrounding State. The same territory is an exclave from the point of view of the mother State. If the two states form parts of a common → federal State, any enclaves will lack a foreign element and remain domestic in nature. Only a quasi-enclave arises if a part of a State's territory, despite geographical connection with its main territory, remains inaccessible by way of its own territory because of topographical factors (insurmountable mountains; e.g. the Austrian communities of Jungholz and Mittelberg in relation to the Federal Republic of Germany). No enclave is in issue where part of a State's territory is surrounded by that of another but enjoys direct access to the sea (e.g. Ceuta in relation to Spain). Whether West Berlin can be considered as an exclave of the Federal Republic of Germany depends on the interpretation of the legal status of → Berlin and its western sectors.

2. Past and Current Examples

A large number of enclaves (estimated in the thousands) existed in former times – above all in Europe following the decline of the Holy Roman Empire. Not only German States (in great numbers), but also Spain, France, Belgium, the Netherlands and other States possessed exclaves whilst themselves enclaving the territories of foreign States. Nearly all such enclaves became the territories of the surrounding States. Although in India, the British, French and Portuguese enclaves came to an end, there remained in existence in 1973 in Bangladesh some 116 Indian enclaves and in Indian West Bengal some 71 Bangladesh enclaves (the so-called Cooch-Behar enclaves).

Today only a small number of enclaves survive

in Europe: Baarle-Hertog, a Belgian enclave in the Netherlands; Büsingen, a German enclave in Switzerland which is entirely enclosed by the cantons of Schaffhausen, Thurgau and Zürich (by a treaty of November 23, 1964 entering into force on October 4, 1967 (German Bundesgesetzblatt, 1967 II, p. 2041) the other German enclave in Switzerland, Verenahof, was ceded to the surrounding State); Campione d'Italia, an Italian enclave in the Swiss canton of Tessin; and Llivia, a Spanish enclave in the French department of Pyrénées Orientales. These enclaves are characterized by the smallness of their populations and territories and their close proximity to the frontiers of their main States. Baarle-Hertog is a special case; it is composed of some 30 enclaves some of which surround Dutch enclaves; thus enclaves exist within other enclaves.

3. Legal Status of Enclaves

(a) Under international law

From the point of view of the surrounding State an (international) enclave is foreign territory, subject to the → territorial sovereignty of the mother State. Hence Llivia, the Spanish enclave in France, was not occupied by German troops during World War II because of its status as territory belonging to a neutral State. Under international law the main State is entitled to establish its legal order throughout its exclave.

The → nationality of the enclave's inhabitants is that of the main State, provided they are not → aliens. There is no legal distinction under general international law between the mother State's subjects in the main territory and those in the exclave.

(b) Under national law

In principle, the nationals in the exclave have the same duties and rights as nationals in the main territory. The mother State may be entitled under its own national law to subject its nationals living in the exclave to special laws enacted to take account of the exclave's special situation.

Treaties between States may bind the States to introduce such differences into their legal orders. On the basis of a treaty between the two States concerned, the surrounding State may be entitled to include the enclave or quasi-enclave into its own customs territory (→ Customs Frontier) and currency area.

4. Legal Relations between States

Any two States concerned with enclaves are bound in their mutual relations by international law; each must respect the territorial sovereignty of the other. Thus the mother State is allowed access from its main territory to its exclave through the territory of the surrounding State only within the limits imposed by international law. Officials of the mother State must not carry out → acts of State during their transit through the territory of the enclaving States (→ Transit over Foreign Territory).

With enclaves, the most important problem in the relations between two States concerns the transit between the main territory and the exclave through the territory of the enclaving State (including its → territorial sea and airspace). The political and economic unity of the mother State's territories is only possible with continuous and comprehensive communications with its exclave. The enclaving State, however, will tend to aim to protect its own territorial sovereignty by restricting the other State's passage over its territory.

As a basis for the right of passage there may be treaties between the two States regulating the conditions of transit. In the absence of such treaties particular rules of → customary international law serve – if applicable rules exist – as the basis for the right of passage. Such bilateral customary law was applied by the → International Court of Justice (ICJ) in its judgment in the → Right of Passage over Indian Territory Case.

General customary international law contains rules on the right of passage. Between the interested States rules have developed over the years, allowing free passage to exclaves for private persons, civil officials and armed police in the exercise of their normal duties, but only to the extent necessary for the continuous maintenance of normal life in the exclave. These rules are to be applied by analogy in cases of quasi-enclaves. As to military forces and to the right of passage through the airspace of the surrounding State, general rules of customary law have not developed.

The duty of the surrounding State to tolerate a

right of passage charges the respective sovereign of the transit territory like an international → servitude. However, if no special treaty exists constituting the right of passage in favour of the respective mother State and charging the respective enclosing State, the above-mentioned duties and rights cannot be characterized as an international servitude, so much as special (mostly bilateral) customary law.

The same rights as described above can be deduced, as some authors have done, from the recognition by the enclaving State of the mother State's exclave. The construction put upon this recognition is that the recognizing (enclaving) State has consented to a reduction of its own territorial sovereignty by granting free passage for the purposes of enabling the mother State to fulfil its normal duties *vis-à-vis* the exclave and its people, to exercise its somewhat reduced territorial sovereignty over the exclave. The so-called *droit de voisinage* (→ Neighbour States), the principle of → good faith and other general principles of international law are ultimately too vague to allow the deduction of specified rights of passage.

Inasmuch as rules constituting rights of passage and balancing the interests of the two States concerned exist in general customary law, an inquiry under Art. 38(1)(c) of the ICJ Statute is not required. Authors denying the existence of such rules have to investigate the systems of internal law. A compulsory right of passage (easement of necessity) is expressed by statute or case-law as an idea of justice in the legal orders of a great number of representative States (see Rheinstein). Whilst some authors (e.g. Auhagen and Krenz) deny the applicability of these rules between States, others (e.g. Rheinstein) affirm their applicability.

There is, however, no general customary law regulating free passage for the enclaving State through the enclave existing in the midst of its territory. Special rules of customary law sometimes exist (e.g. as to Baarlę-Hertog in the Netherlands) and treaties between the two States concerned may regulate the matter (e.g. as in the case of Llivia in France).

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GERHARD HOFFMANN

ENEMY STATES CLAUSE IN THE UNITED NATIONS CHARTER

1. *The Enemy States Clauses of the UN Charter*

(a) Origin

From as early as the → Atlantic Charter of August 14, 1941, a distinction was drawn between "enemy States" and "peace-loving States". Despite its striving towards universality, the world organization conceived by the victorious coalition of World War II held fast to this distinction.

At the Conference between the → Great Powers at → Dumbarton Oaks held in the autumn of 1944, agreement was reached on a draft charter for the future world organization, which contained an enemy States clause in the transitional provisions. This "enemy States clause" was adopted unchanged as Art. 107 of the → United Nations Charter at the United Nations Conference on International Organization at San Francisco on April 25, 1945.

In San Francisco, on the initiative of France and the Soviet Union, the sole competence of the → United Nations to prevent → aggression was taken away from the organization with respect to the enemy States. This occurred by means of a special provision which was attached to the regulation of enforcement measures by regional agencies in Art. 53 of the Charter. In the opinion of the United States, the United Kingdom and China, the restriction of the competence of the → United Nations Security Council should be

limited in time. But France pushed through the principle that the United Nations should not be competent to prevent aggression in relation to enemy States until requested by the governments concerned. At the end of the consultations in San Francisco it was finally deemed desirable to define the notion of "enemy State". This was done in Art. 53(2) of the Charter.

The relevant provisions of the Charter now read as follows:

Article 53

"1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter."

Article 107

"Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

(b) Content of enemy States clauses

Enemy States clauses are special rules which exclude or restrict the application of the United Nations Charter in respect of the re-establishment of peace between the victors and the vanquished in World War II and the prevention of future aggression by the enemy States. The effect is to take the enemy States largely outside the United Nations peacekeeping system. In particular, the aim of the enemy States clauses is to free the victorious powers from the requirements of Art. 2(4) of the Charter, which provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

Art. 2(3) and Chapter VI of the Charter contain the corresponding obligation to settle disputes peacefully (→ Peaceful Settlement of Disputes). The legal extent of the enemy States clauses, particularly their binding force on the enemy States concerned, is a matter of dispute. The furthest-reaching interpretation is given to them in the theory and practice of Soviet international law. According to this doctrine, the outlawry of the aggressor is a general principle of modern international law, which is merely reflected in the Charter. However, little relevant evidence can be brought to support such a radical and far-reaching change in classical international law and its fundamental axiom, namely the sovereign equality of States (→ States, Sovereign Equality). Even the → Kellogg-Briand Pact of August 27, 1928, envisages in its preamble only "the loss of the advantages conferred by this treaty" as the consequences of aggression, and not measures that cannot be justified by general international law. On the contrary, use of force after the re-establishment of peace would itself violate the prohibition of force in the Kellogg-Briand Pact.

The enemy States clauses can thus be regarded only as permissive and competence-giving norms in the law of the United Nations, from which no binding effect can be derived beyond the area of the Charter's application. The enemy States are not therefore obliged to tolerate specific rights of intervention by the victorious States. The victorious powers are freed only from some specified prerogatives of the United Nations and its organs, namely the Security Council.

The concept of "enemy State" is defined in Arts. 53(2) and 107 of the UN Charter to mean any State which during World War II had been an enemy of any signatory to the Charter. Besides the German Reich and Japan, this definition also includes Bulgaria, Finland, Italy, Romania and Hungary. Thailand must also be added, although she had pronounced her declaration of war against Great Britain null and void. Austria and Korea do

not belong to the list of enemy States if regarded, in accordance with United Nations practice, not as defeated but as liberated States, whose territory was temporarily occupied by Germany and Japan respectively. As long as Germany as a whole (in her frontiers of December 31, 1937) continues to exist as a → subject of international law, the enemy States clauses weigh also upon the political system that arose on German soil in 1949 in the shape of the Federal Republic of Germany and the German Democratic Republic, as there is no part of the territory of either that cannot also be categorized at the same time as "Germany in her frontiers of December 31, 1937" (→ Germany, Legal Status after World War II).

Art. 107 of the UN Charter is in content and location in the Charter a transitional provision. It is limited to measures "taken or authorized as a result of" World War II. Such measures include treaty arrangements with the enemy States such as → suspensions of hostilities, → surrender and → peace treaties and other agreements regulating the consequences of the war between victors and vanquished. They also include such actions as → occupation, → *debellatio* and → annexation, as well as the forced conclusion of treaties and their implementation.

Since Art. 107 of the UN Charter refers to measures "as a result of that" → war, and as under the general laws of war only such States may take the measures as have been at war with the defeated States, not all members of the United Nations have powers under Art. 107 but only the adversaries of the enemy States. Of the victorious States of World War II, only the superpowers have, by virtue of inter-allied treaties, "responsibility for such action". Only the superpowers have adopted particular relationships to the defeated enemy States through the conclusion of surrenders and suspensions of hostilities.

The UN Charter itself does not demand that war-related and preventive measures be undertaken by the entitled victors jointly, nor does it limit the range of action of a victor to a specific area of the enemy State. The limitation of the victor's power to a specific sphere and the obligation to take war-related measures (relating for example to Germany as a whole) only on a collective basis arises solely from the inter-allied law of the victorious coalition.

The relations between the victorious powers with respect to their rights and responsibilities towards Germany are founded on a series of inter-allied agreements (e.g. the London Agreement on Control Machinery in Germany), which are now largely out of date owing to the collapse of the common organs of control. The responsibility for Germany as a whole conceived by the allies as a joint one is now essentially divided along power lines. For the application of the enemy States clauses to German territory, this concept means that no victorious power may intervene in an area for which it is not primarily responsible under the London Protocols and Agreements (→ Germany, Occupation after World War II). However, on questions of status, including the status of the enemy State itself, the victors who bear the responsibility still decide matters essentially in a joint manner.

Art. 53 prohibits enforcement action under regional arrangements without the authorization of the Security Council. Enforcement action against an enemy State may however be undertaken according to Art. 53(1) of the UN Charter. This may accompany the war-related measures under Art. 107 of the Charter, but may also repress the "renewal of aggressive policy" on the part of a former enemy State. The determination of what constitutes an "aggressive policy" is solely the responsibility of the victorious power.

The States that may take measures against enemy States under Art. 53(1) of the Charter are those "responsible" under Art. 107 as well as States parties to a regional agreement against an enemy State. The circle of actively legitimized States is accordingly larger under Art. 53 than under Art. 107, since any member of the United Nations may participate in a coalition against an enemy State.

The exceptional provision of Art. 53(1) is operative until the United Nations is charged, "on the request of the Governments concerned", with preventing further aggression by an enemy State. The governments concerned are those of States which have concluded an appropriate regional agreement, and also those of the responsible powers under Art. 107 of the Charter.

It was the understanding of the victorious powers of World War II that their total victory gave them unlimited powers over the defeated

enemy States. This meant a limitation on the universality of the world organization in the area of securing peace. But as all enemy States clauses only concern States, the competence and responsibility of the United Nations cannot be automatically ruled out in the case of measures of the victorious powers concerning → human rights. In the conflict between victor and aggressor, human rights (which in the modern view includes → self-determination) and the humanitarian law of war must both be observed (→ Humanitarian Law and Armed Conflict).

(c) Cessation of the special rights from enemy States clauses

The three Western allies declared in the London Final Act of October 3, 1954 (BFSP, Vol. 161, p. 395) that in their relations with the Federal Republic of Germany they would observe the principles contained in Art. 2 of the UN Charter. The Federal Republic agreed with the declaration and accepted for its part the obligations of Art. 2.

The Western Powers' declaration renouncing the → use of force in the London Final Act contains no renunciation of the rights arising from the enemy States clauses. The obligation to observe the principles of Art. 2 does, however, extend to measures falling under Art. 53, whereby the application of Art. 53 in relation to the Federal Republic is in practical terms reduced to nil.

In Art. 7 of the Bonn Treaty of May 26, 1952 (UNTS, Vol. 331, p. 327; → Bonn and Paris Agreements on Germany (1952 and 1954)), the Western victors largely renounce the use of unilateral and collective force in their future policy towards Germany and forgo the possibility of a dictated peace or a peace treaty brought about by force or the threat of force. In all other respects, the powers of intervention contained in Art. 107 of the UN Charter remain unaffected.

The mutual renunciation of force in Art. 2 of the Moscow Treaty of August 12, 1970 between the Soviet Union and the Federal Republic of Germany (ILM, Vol. 9 (1970) p. 1026) cannot be seen as a resolution of the enemy States problem because the inviolability clause in Art. 4 of the same Treaty allows the Soviet Union to revert at any time to the treaty provisions of Arts. 53 and 107 of the UN Charter, which cannot be affected by the Moscow Treaty.

The renunciation of force in Section 1, clause 2 of the Quadripartite Agreement on Berlin of September 3, 1971 (UNTS, Vol. 880, p. 116) applies to the whole of → Berlin and also covers measures under the enemy States clauses. The Agreement does not, however, confer any protection against collective measures by the four powers with reference to Art. 107 of the UN Charter.

The question whether the acceptance of an enemy State in the United Nations ends its status as an enemy State and thereby makes Arts. 53 and 107 inapplicable is a matter of dispute in international law doctrine. The prevailing view is that with the acceptance of a former enemy State into the world organization, the enemy States clauses cease to have effect with regard to this State. This view is supported by the argument that the concepts of "peace-loving" in Art. 4 and "enemy State" are mutually exclusive. The principle of sovereign equality laid down in Art. 2(1) is also often quoted in support. Although it cannot be deduced from the wording of Arts. 53(1)(3) and 107 of the UN Charter that the discriminatory treatment comes to an end with the acceptance of the enemy State in the world organization, the continued application of enemy States clauses for members would however mean a second-class membership, violating a basic principle of the United Nations, that of sovereign equality. In addition, the concept of a "peace-loving enemy State" would seem to be a contradiction in terms. There is, however, an exception to this basic result. The four powers responsible for Germany declared on November 9, 1972, that the admission of both German States into the United Nations did not affect their rights and responsibilities. To the extent that the four powers still have rights and responsibilities in respect of unresolved consequences of the war, the two German States cannot rely on not being treated as enemy States despite the four powers' agreement to their admission into the United Nations.

In connection with attempts to revise the UN Charter, there have been repeated demands in recent years for the elimination of Arts. 53 and 107 on the ground that their wording was anachronistic, since the enemy States clause contained therein is no longer applicable (see e.g. UN Doc. A/C.6/SR.1239, no. 28). The four responsible victorious powers, without whose agreement no

change can take place, still, however, regard change as inopportune. France and the Soviet Union in particular emphasized in the discussions that the Charter had met the test of time (see UN Doc. A/C.6/SR.1241, p. 3; UN Doc. A/C.6/SR.1240, p. 10 et seq.).

On the occasion of the → Helsinki Conference on Security and Cooperation in Europe, the clauses were discussed on the insistence of the former enemy States Italy and Romania, but without this leading to firm resolutions within the catalogue of principles. The Government of the Federal Republic of Germany exercises self-restraint in discussions on the abolition of the enemy States clauses.

2. *Art. 75 of the Vienna Convention on the Law of Treaties: Aggressor States Clause*

In connection with the discussions on the future Arts. 34 and 35 of the → Vienna Convention on the Law of Treaties, which lay down that an obligation only arises for a third State when it has accepted it in writing, a general exception for the special circumstances in respect of measures against an aggressor State was created by the → International Law Commission (ILC) on the initiative of Lachs (Poland) and Tunkin (USSR) (YILC (1964 I) p. 71). This rule, incorporated today in Art. 75 of the Vienna Convention, was introduced for definite political reasons. It reads as follows:

"*Article* 75

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

It was expressly intended that the Potsdam Agreement should be made binding upon Germany, even though it was a treaty imposing a burden on third parties (YILC (1964 I) p. 73). The initiative of Lachs and Tunkin was designed to counter the prevailing international law doctrine that, as far as Germany was concerned, the Potsdam Agreement was a *res inter alios acta* and therefore not legally binding (→ Potsdam Agreements on Germany (1945)).

Initially the views of Lachs and Tunkin found no favour in the ILC (YILC (1966 I) p. 64), and in order to avoid an unequivocally political interpretation of the proposal, the provision was generally formulated (YILC (1966 II) p. 268). "Aggressor State" within the meaning of Art. 75 of the Vienna Convention can also mean "enemy State" in the sense of Art. 53(2) of the UN Charter. Although it has often been claimed that a distinction must be drawn between "aggressor State" and "enemy State", both the letter and spirit of Arts. 53(2) and 107 imply that an "enemy State" (i.e. any State which during World War II was an enemy of a signatory of the UN Charter) is an aggressor State, since only aggression could justify the far-reaching discrimination against enemy States. According to this principle, "aggressor State" would be a generic name, including the group of so-called enemy States of World War II. Measures taken "in conformity with the Charter of the United Nations with reference to that State's aggression" can be measures of the Security Council under Chapter VII of the UN Charter, but can also be measures taken by the responsible governments under Arts. 53 and 107. The non-retrospective effect of the Convention, laid down in Art. 4, does not solve the problem of enemy States in treaty law. States which use intervention by means of treaty law derive their competence not from the Vienna Convention on the Law of Treaties, nor from the law of treaties in general, but from their victory over the aggressor. They are principally concerned that they should be able to continue practices inconsistent with the Vienna Convention and treaty law, for example conclusion of treaties which burden third States (→ Treaties, Effect on Third States) or offend against the principle of → *jus cogens*, even after their entry into force.

At the Vienna Conference on the Law of Treaties, the delegations of the Federal Republic of Germany and Japan tried to circumvent such intentions. In a declaration of May 17, 1968, it was established without opposition that the concepts of "aggressor State" and "attack" are to be determined by binding decisions of the Security Council in the light of Chapter VII of the UN Charter. In other words, the determination whether an aggression has taken place and whether one is dealing with an "aggressor State" is the task of the Security Council alone (which is deliberately

excluded in the case of the enemy State clauses).

The Federal Republic of Germany made reference to the declaration of May 17, 1968, when signing the Vienna Convention on the Law of Treaties.

Incursions into the general law of treaties by war-related or war-preventive measures are a fundamental problem within the international legal order. Just as the waging of a "just" war cannot free States from observing the *jus in bello*, so single States, groups of States and even the United Nations cannot avoid the general law of treaties. Art. 75 thus appears to be a foreign body in the Vienna Convention, which violates the supposed political neutrality underlying the codification of the law of treaties. According to the prevailing doctrines of international law outside the Eastern bloc, to which the Federal Republic of Germany subscribes (see German Bundestag Drucksachen 10/1004 of February 13, 1984, p. 47), Art. 75 does not contain a valid principle of general → customary international law. The norm therefore has only a treaty law character and must be interpreted restrictively. As a rule, the competences of the Security Council under Chapter VII of the UN Charter only permit temporary measures of mediation (e.g. the ending of aggression). The correct view is that, even *vis-à-vis* the aggressor State, the Security Council is not empowered to lay down final terms of peace, concerning, for example, geographical areas and the status of territories.

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EQUAL TREATMENT OF STATES *see* States, Equal Treatment and Non-Discrimination

EUROPEAN CONVENTION ON STATE IMMUNITY

1. Historical Background and Developments

The law of → State immunity is one of the fields in international law where a previously rather uniform custom broke down due to changes in legal concepts and political and economic circumstances during this century, particularly after World War II. The European Convention on State Immunity represents an effort undertaken within the framework of the → Council of Europe to overcome the resulting differences which have arisen in State practice by means of a treaty of general character. Following an Austrian proposal on the subject, the Council of Europe set up a committee of experts in 1964 which, after having submitted a preliminary draft in 1968, presented a draft of the Convention in 1971. The final draft was, after some modifications, opened for signature in Basel on May 16, 1972. The Convention entered into force on June 11, 1976 and as of December 31, 1986 had been ratified by Austria, Belgium, Cyprus, Luxembourg, the Netherlands, Switzerland and the United Kingdom. An Additional Protocol entered into force on May 22, 1985 and as of December 31, 1986 had been ratified by Austria, Belgium, Cyprus, Luxembourg, the Netherlands and Switzerland.

2. Major Provisions and Problems

(a) Survey of the Convention

The Convention applies to proceedings in courts of a contracting State against another contracting State. To a large extent the Convention codifies existing rules of → customary international law; in some respects, however, it has a progressive character, whereas in others it lags behind the present state of customary international law. The Convention consists of five main chapters, final provisions and an annex. Chapt. V (Arts. 27 to 35) contains general rules, including an enumeration of legal fields falling outside the scope of the Convention (social security, damage or injury in nuclear matters, customs duties, taxes, penalties, maritime disputes relating to State-owned vessels or cargoes). In these areas recourse must be had to special treaties (e.g. the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels of April 10, 1926, LNTS, Vol. 176, p. 199, and its Additional Protocol of May 24, 1934, LNTS, Vol. 176, p. 214) or general international law. Moreover, the Convention leaves unaffected the immunity a contracting State enjoys in respect of its armed forces stationed on the territory of another contracting State or its diplomatic missions and consular posts under treaties (e.g. the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces of June 19, 1951, UNTS, Vol. 199, p. 67 and the agreement to supplement this agreement in regard to foreign forces stationed in the Federal Republic of Germany of August 3, 1959, UNTS, Vol. 481, p. 262 (→ Military Forces Abroad; → Military Bases on Foreign Territory) or the → Vienna Conventions on Diplomatic and Consular Relations of April 18, 1961 and of April 24, 1963) or under general international law (Arts. 31 and 32). Chapt. II (Arts. 16 to 19) tackles procedural problems, for example the service of documents and taking of evidence. Chapt. I (Arts. 1 to 15) contains a list of cases in which immunity cannot be claimed. This list includes provisions requiring certain links between actions brought under the Convention and the State of the forum. Such incorporation of elements of international jurisdiction has been provided for because the Convention omits reference to measures of execution, confining itself to imposing an obligation on contracting States to give effect to judgments rendered against them under the Convention (Chapt. III, Arts. 20 to 23). The connecting links called for in Chapter I are designed to ensure the performance of this obligation (→ Recognition and Execution of Foreign Judgments and Arbitral Awards).

(b) Provisions and problems in detail

The Convention reflects a restrictive concept of the "State". It does not extend to the constituent states of a federally organized contracting State (Art. 28(1); → Federal States). The same applies to any other entity of a contracting State, irrespective of the functions having been assigned to it (Art. 27 (1)). The appropriateness of this approach seems doubtful, as States may for legitimate reasons find it necessary to decentralize public functions and entrust them to political subdivisions or agencies which have legal personality and are capable of suing or being sued, for example central banks. However, the far-reaching consequences of Arts. 27(1) and 28(1) are mitigated by a provision for an immunity *ratione materiae*: According to Arts. 27(2) and 28(1) a court of a contracting State is barred from entertaining proceedings in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*) by a constituent state or any other entity in terms of Art. 27(1). Moreover, a contracting State may by notification declare that its constituent states shall have the rights and duties of a contracting State under the Convention (Art. 28(2)). Up to now such a notification has only been made by Austria.

To avoid difficulties which may arise when ascertaining on whom a document instituting proceedings against a contracting State should be served, the Convention provides that service shall be made on the ministry of foreign affairs, which may pass it on to the authority competent to represent the State in the proceedings. The ministry is obliged to accept the document (see Art. 16(1) and (2)). As to the method of service, Art. 16(1) requires that the document shall be transmitted "through the diplomatic channel". As a rule, a defendant contracting State which appears in the proceedings is deemed to have waived any objection in respect of the service (see Art. 16(6)). Judgments by default may be given only where it is established that service of the document instituting the proceedings has been proper and the time-limits provided for in Art. 16(4) have been observed; immunity must be noted *ex officio* (see Art. 15).

According to Art. 15, a contracting State may be subjected to jurisdiction only in a case covered by Arts. 1 to 14. It is suggested that the Convention thereafter starts out with a presumption in favour of immunity and requires to impose on the claimant the burden of asserting (and proving) the facts entitling a contracting State to subject another contracting State to its jurisdiction under the Convention. It is suggested, moreover, that Arts. 1 to 14 do not confer rights on private individuals; a contracting State is in principle not barred from deviating from Chap. I in favour of another contracting State.

Arts. 9 and 10 and Arts. 1 to 3 deal with exceptions to the principle of immunity traditionally recognized as such in State practice: proceedings concerning immovable property situated in the forum state, proceedings relating to succession, and waiver of immunity. According to Art. 9, immunity cannot be claimed, *inter alia*, in proceedings concerning rights in or the use of immovable property situated in the forum State (e.g. proceedings relating to mortgages, to the existence or non-existence of a lease or tenancy agreement, or to possession or eviction) and in proceedings concerning payments due for the use of such property or parts thereof. As the exercise of jurisdiction must not affect the official functions of diplomatic or consular missions (see Art. 32), courts may not order the surrender of premises used for diplomatic or consular purposes.

Art. 10 subjects contracting States to foreign jurisdiction in proceedings relating to rights to property arising by way of succession *causa mortis*, gift or *bona vacantia*. Owing to fundamental differences between national legal systems, Art. 10, unlike other provisions of Chap. I, does not require any territorial link as a condition for the exercise of jurisdiction. Instead, Art. 20(3)(a) provides that a contracting State is not obliged to give effect to a judgment rendered under Art. 10, if, *inter alia*, the court could have based its jurisdiction on "exorbitant" grounds only, had it applied, *mutatis mutandis*, the rules of jurisdiction operating in the adjudicated contracting State. The exorbitant grounds referred to in Art. 20(3)(a) are listed in the annex to the Convention.

Art. 2 embodies the generally accepted rule that explicit submission to jurisdiction (i.e. waiver of immunity in respect of a specific court or courts of a specific State), even if in the form of an out of court declaration *vis-à-vis* an organ of the forum

State or a private person, is a basis for exercising jurisdiction. Any person or body empowered to conclude a contract in the name of a contracting State is deemed to have the authority to make such a submission in respect of disputes arising out of the contract.

Arts. 1 and 3 concern cases of implicit waiver by conduct in court. As a rule, a contracting State instituting proceedings, actively intervening in proceedings, making a counterclaim or pleading to the merits before claiming immunity in a court of another contracting State thereby submits to the jurisdiction of this State (Art. 1(1); Art. 3(1)). Consequently the contracting State which submits to jurisdiction is principally subject to the rules of procedure applying in the forum State: Appeal proceedings may be entertained and the payment of judicial costs or expenses may be ordered against it (see Art. 17). However, a counterclaim is only admissible if it arises out of the same legal relationship or the facts on which the principal claim is based and if it could have been brought as a separate claim according to the provisions of the Convention (Art. 1(2)). Moreover, a contracting State must not be subjected to measures of coercion by reason of its failure or refusal to disclose documents or other evidence, notwithstanding that the court may draw any conclusion it thinks fit from such failure or refusal (Art. 18). This rule is also to be applied in proceedings in which a contracting State is a defendant and not a claimant or intervenor.

Under general international law a foreign State concluding an arbitration agreement with a private individual submits to the jurisdiction which is exercised in respect of arbitration agreements, arbitration proceedings and arbitration awards by the State on whose territory the arbitration is to take place or whose law governs the arbitration, unless it can be concluded from the agreement that the parties wanted to exclude State influence on the arbitration (→ Commercial Arbitration). Based on this rule, Art. 12 permits the exercise of jurisdiction in respect of proceedings relating to the validity or the interpretation of an arbitration agreement, the arbitration procedure, particularly its initiation and judicial control, and the setting aside of the arbitration award. However, this provision is confined to cases in which the arbitration relates to a dispute concerning private conduct (*acta jure gestionis*). Proceedings concerned with the enforcement of arbitral awards are outside the scope of the Convention.

Arts. 4 to 8 and Art. 11 are shaped by the concept of functionally restricted immunity, although they do not entirely reflect the distinction between *acta jure gestionis* and *acta jure imperii*. According to Art. 4, a contracting State, notwithstanding an agreement in writing to the contrary, cannot claim immunity in proceedings concerning an obligation which by virtue of a contract must be discharged in the territory of the forum State, unless the contract has been concluded on the territory of the contracting State and is governed by its administrative law (e.g. contracts concerning scholarships or subsidies). Art. 5 relates to proceedings in respect of contracts of employment. It provides that a contracting State cannot claim immunity in proceedings concerning any kind of employment which is to be performed in the State of the forum. Art. 5(2) and (3) provide for exceptions to this rule in respect of the nationality or the habitual residence of the employee; moreover, the requirements of Art. 5(1) can be avoided by contractual agreement, unless the State of the forum claims exclusive jurisdiction by reason of the subject-matter of the contract. One must remember, however, that the official functions of diplomatic and consular missions must not be interfered with by the exercise of jurisdiction under Art. 5 (see Art. 32).

To a large extent the heart of the concept of *acta jure gestionis* is covered by Arts. 6 to 8. Art. 6 concerns proceedings relating to a right or an obligation of a member of a company, association or other legal entity, which is not an international organization, in which a contracting State and one or more private persons participate. According to Art. 7, a contracting State is, notwithstanding any agreement in writing to the contrary, subjected to the jurisdiction of another contracting State in respect of industrial, commercial or financial activities (e.g. the issue of loans) carried on by it through an office, agency or establishment on the territory of the forum State "in the same manner as a private person". Monetary activities of a central bank cannot as a rule be regarded as being carried on in this way. According to Art. 8, immunity cannot be claimed in proceedings relating to a patent, trade-mark, industrial design or

similar right (including the right to use a trade name) which is applied, owned or allegedly infringed by a contracting State, provided there is an adequate connection between the subject-matter of the action and the forum State (→ Industrial Property, International Protection).

Art. 11 goes beyond the limits of the concepts of *acta jure imperii* and *acta jure gestionis* by allowing the exercise of jurisdiction in proceedings relating to redress for injury to the person or damage to tangible property, including *pretium doloris*, irrespective of whether the injury or damage was caused by the contracting State in the exercise of its sovereign authority (*jure imperii*) or in its private capacity (*jure gestionis*). Like other provisions of Chap. I, Art. 11 requires a connecting link: An action against a contracting State brought under Art. 11 (e.g. an action based on the contracting State's ownership or possession of a vehicle) can only be successful if the facts which occasioned the injury or damage arose in the territory of the forum State and the author of the injury or damage (e.g. the driver of the vehicle) was present in that territory. It is suggested, however, that proceedings may be entertained under Art. 11 if the claimant asserts that injury or damage was caused in the forum State due to the failure of a person responsible for the performance of a contracting State's obligation to make safe for persons or vehicles the land or premises in the territory of the forum State. On the other hand, jurisdiction in proceedings relating to → transfrontier pollution caused in a contracting State and leading to injury or damage in another contracting State, i.e. the State of the forum, may not be exercised under Art. 11 of the Convention. Furthermore, it must be remembered that Art. 11 does not apply to injury or damage in nuclear matters.

According to Art. 14, a court is not prevented from administering property, such as property held in trust or the estate of a deceased person or of a bankrupt, if a contracting State has a right or an interest in the property.

Art. 23 of the Convention prohibits measures of execution or preventive measures against the property of a contracting State in the territory of another contracting State unless an express consent in writing has been given in the particular case. However, attachment of State property for the purpose of establishing jurisdiction is not excluded by Art. 23. In order to safeguard the interests of private litigants the Convention imposes an obligation on contracting States to give effect to judgments rendered against them under the Convention if certain conditions enumerated in Art. 20 are met. Settlements entered into by a contracting State and a private person before a court of another contracting State must be given effect even if these conditions are not complied with (Art. 22). If a contracting State refuses to give effect to a judgment or a settlement in court, the respective private party is entitled to have the competent court of that State determine whether this refusal is lawful under Arts. 20 or 22 (Arts. 21(1), 22(2)). In respect of such determination proceedings, the Convention provides for far-reaching procedural facilities as well as a → minimum standard of international procedural justice.

Contracting States, having made a declaration under the optional system of Art. 24, are entitled to exercise jurisdiction beyond the limits of Arts. 1 to 13 against any other contracting State. However, in respect of *acta jure imperii*, immunity must nevertheless be granted (Art. 24(1)). Furthermore, jurisdiction may not as a rule be exercised if it is based on an exorbitant ground mentioned in the annex to the Convention (Art. 24(2)). If a contracting State, against which a judgment has been rendered under Art. 24, has itself made a declaration under Art. 24, it is obliged to give effect to the judgment (Art. 25). Under this condition, even provisional or executory attachment of another contracting State's property in the forum State is permitted, provided that, *inter alia*, the judgment against the former State relates to an industrial or commercial activity performed by it in the same manner as a private person, and the property subject to attachment is used exclusively in connection with such an activity (see Art. 26). Declarations under Art. 24 have been made by Belgium, the United Kingdom, the Netherlands, Switzerland and Luxembourg.

The Additional Protocol to the Convention provides for the establishment, competences and procedure of a European Tribunal in matters of State immunity. The Tribunal is initially to be composed of the members of the → European

Court of Human Rights. A private person seeking to enforce a judgment rendered under the Convention against a contracting State, which is a party to the Protocol and which has not made a declaration under Art. 9 of the Protocol, may have the Tribunal determine in place of the competent national court (see Art. 21 of the Convention) whether the State is obliged to give effect to the judgment. Furthermore the Tribunal is competent to decide upon disputes between contracting States which are parties to the Protocol as to the interpretation or application of the Convention; to this extent the competence of the Tribunal replaces the corresponding compulsory jurisdiction of the → International Court of Justice to which the contracting States have submitted under Art. 34 of the Convention.

3. Evaluation

Owing to its compromisory character and the difficulties of the problems it has undertaken to solve, the Convention has a fairly complicated structure. This might be the reason why it has been ratified rather reluctantly so far and why there are doubts whether it entirely meets the needs of the modern world. Nevertheless, the Convention has inspired and influenced significant national legislation in the field of State immunity, for example in the United States and the United Kingdom. Moreover, in the framework of the present efforts to establish an international convention on State immunity, the Convention has received great attention and to some extent played the role of a model. Regardless of undeniable weaknesses, at least in these respects it may be considered a landmark in the development of the modern law of State immunity.

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EXTRATERRITORIAL EFFECTS OF ADMINISTRATIVE, JUDICIAL AND LEGISLATIVE ACTS

1. Basic Principles, Problems and Notions

Administrative, judicial and legislative acts of States are emanations of a State's sovereign jurisdiction (→ Jurisdiction of States; → State). Since the relationship between States nowadays is still dominated by the principle of sovereign equality (→ States, Sovereign Equality) and by the exclusive sovereignty over national territory (→ Territorial Sovereignty), every extension of the reach of the effects of such an act over the State's border has to be tested as to whether or not these fundamental principles are violated.

To this end it is necessary to make a distinction as to which type of State acts are involved. Some authors look at the issuing State power, namely the administration, judiciary or legislature. Others prefer to make a substantive distinction between prescribing, enforcing and adjudicating acts. It is submitted that from a public international law point of view the only significant difference is that between prescribing and enforcing acts, irrespective of the issuing organ.

Such acts may have extraterritorial effects of differing grades: (i) State law may be applied outside the territory because of the power that public international law confers upon the regulat-

ing State, as for example concerning laws related to embassies, ships or nationals abroad in general; (ii) a State may authorize another State to perform official acts on its territory or to administer parts of its territory in certain respects, such as in customs matters; (iii) a State may recognize official acts of another State as prerequisites for the recognition of legal titles under its own law, for example with regard to the validity of a marriage or the acquisition of property, or it may assist the foreign State in the execution of that State's law with its own means of enforcement; (iv) acts of State may have a factual extraterritorial effect if they order the performance of an obligation abroad. Even if this obligation can only be enforced inside the acting State's territory, the consequences of such enforcement, such as the confiscation of assets, may be so weighty that the addressees abroad cannot reasonably afford to disregard the order without suffering considerable hardship.

The first two cases may be called extraterritorial jurisdiction in the proper sense. The third case is exclusively a matter of the jurisdiction of the recognizing or enforcing State. The last case is one of territorial jurisdiction, but with extraterritorial effects.

2. *Historical Remarks*

In the early Middle Ages Europe was dominated by tribal rather than by State entities. Consequently the law of these tribes was not confined to a distinct territory but attached to membership in a tribe. This naturally led to enormous difficulties, as people living in the same region might have been subjected to various and different legal orders according to their descent.

The emergence of larger territorial States marked a shift away from the personal scope of application of law toward the principle of territorial jurisdiction. However, the former principle survived in the form of the principle of → nationality, requiring the allegiance of a national abroad. There was a steady development to strengthen the territorial limits of the effects of State acts during the centuries until this doctrine found its most explicit and radical formulation in the famous three axiomata of the Dutchman Ulricus Huber (Praelectiones juris romani, Pars II (liber I tit.III) 4th ed. 1749): (i) A State's laws are binding only within the State's territory; (ii) they are binding on every person present in this territory; (iii) other States will exercise → comity so as not to countervail the validity of a State's acts on their territory, but without in any way prejudicing their own sovereignty.

While the doctrine of strict territorial jurisdiction, which was only modified by the → consensus of the States to extend their laws to certain criminal offenses committed abroad (e.g. piracy), was never accepted to its full extent in continental Europe, Huber's principles had a considerable effect in the Anglo-Saxon world. English law was always very restrictive in accepting an extraterritorial reach of acts of State. In the United States, Huber's doctrine prevailed for almost a century under the influence of Joseph P. Story's Commentaries on the Conflict of Laws (2nd ed., 1841). It was only after 1945 that the United States' practice moved away from strict territoriality and successively extended the scope of application of its laws in such a way that it aroused the protests of a large number of other States.

3. *Extraterritorial Jurisdiction*

In some cases public international law provides for detailed rules concerning the exercise of extraterritorial jurisdiction, i.e. the prescription and enforcement of rules on facts and behaviour occurring outside a State's territory. This may be due to the fact that a State may lawfully exercise power over a particular territory although it is not the territorial sovereign, such as in the case of military occupation (→ Occupation after Armistice; → Occupation, Belligerent; → Occupation, Pacific). Embassies and consular premises are subject to the territorial laws, but the sending State is entitled to issue the regulations necessary for upholding the functions of the mission and may also perform acts of State abroad within the scope of consular tasks and rights (→ Consuls). Furthermore, States have a right and a duty to regulate the law aboard ships, aircraft and spacecraft flying their flag (→ Flags of Vessels). These regulations are exclusive as long as the vessel is on the → high seas, in space or in the air. Finally, a State may regulate the rights and duties of its nationals abroad, although the State is not entitled to enforce its laws outside its territory. In the latter

case conflict may arise between the rules of the home State and those of the host State (see *infra* 7.).

Apart from these cases regulated by general international law, a State may bilaterally allow another State to exercise jurisdiction on its territory. Parts of a State may be included in the customs area of another State, for example the Kleinwalsertal in the Alps, which is Austrian territory but part of the customs area of the Federal Republic of Germany (→ Customs Frontier). States often agree to exercise a common customs control on the territory of one of them. The railway station Badischer Bahnhof in Basel is located on Swiss territory but largely administered under German railway regulations (→ Railway Stations on Foreign Territory). In matters of law enforcement a State may allow agents of another State to perform acts of State on its territory, such as serving official communications or taking evidence. It should be emphasized that in such cases the consent of the individual addressees of the extraterritorial acts alone could not justify the exercise of jurisdiction, since it is the sovereign right of every State to allow or forbid such acts within its territory.

4. Extraterritorial Effects by Virtue of the Law of Another State

States may decide to apply the law of another State so that the substance of the norm which determines the outcome of a given issue is drawn from the foreign law while the binding force comes from the territorial State's decision to apply such law. This is a common technique in → private international law. There is at present an almost general consensus that States are not obligated under international law to apply foreign law unless they are parties to one of the numerous conventions on the harmonization of private international law matters. Even if a State decides to apply another State's law to particular situations, it is always free to modify this decision if its own public order is at stake (→ Ordre public (Public Order)).

Since public law regulates the relationship between a particular State and the persons subject to its legal order, it is unusual for a State to apply foreign public law within its own territory. But it is not unusual for a State to recognize foreign acts of State which have conferred legal titles, such as title to property, on persons within the territory of the latter, or to refuse to review such acts. A special development in this respect is the "act of State doctrine" in common law countries (→ Act of State). States may also accept the argument that an impossibility of performing legal duties in their own territory arises out of legal acts, such as prohibitions or injunctions, of a foreign State.

Presently there is increasing discussion about the recognition of foreign mandatory laws which have an impact on private international law cases. This reflects the need to find conflict of laws solutions for public law questions in a world of increasing public interference with the private choice of law freedom. However, there is no general duty under international law to recognize foreign acts of State, at least if the forum State itself has jurisdiction over the matter at issue, and even if the forum State normally does recognize such acts, it is always free as well to give precedence to its own public order in a particular case.

Furthermore, a State may give its assistance to another State to enforce the latter's law on the former's territory. This happens particularly in tax matters, in criminal prosecution and in the field of → recognition and execution of foreign judgments. A duty to provide such assistance exists only when both States are bound by an international treaty providing for mandatory → legal assistance.

5. Extraterritorial Effects Justified by General International Law

The principle that States may not enforce their law abroad without the consent of the sovereign of the affected territory does not preclude the possibility of an extraterritorial reach of a State's legislative, administrative and judicial acts, as far as the jurisdiction to prescribe legal norms is concerned. A State may threaten to punish persons for acts committed abroad if such perpetrators are later found within its own territory. A State may also threaten to confiscate part or all of the assets of a defendant which are within its territory, even if this defendant is abroad.

Such a threat may be so weighty that a State can psychologically force persons to comply with its orders even while they are abroad. The State is

thereby in a position to prevent people abroad from acting in a way that is considered harmful to its interests.

This leads to the question as to the circumstances under which a State may command or prohibit behaviour outside its borders or regulate the legal status of things abroad. The → Permanent Court of International Justice addressed this problem in its → Lotus decision stating:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."

The Lotus decision is an offspring of positivistic legal thinking and as such one of the most disputed results of international jurisprudence. The decision has led to broad assertions of national power by assuming that only an express prohibition under international law could prevent a State from exercising jurisdiction with extraterritorial effects at will. On the other hand, the Lotus judgment does recognize that international law restrains the power of States at least in respect to such a prohibition. This latter finding can serve as a point of departure for stating limitations of international law. There is no need to go deeper into the doctrinal underpinnings of the decision, since the evolution of the international legal order has aroused serious doubts about whether its particular findings are still good law.

6. General Rules of Public International Law

The Lotus decision did not seek to lay down general limits for the jurisdiction of States. It was confined in its scope to the area of criminal law. It states only two basic rules of public international law regarding jurisdiction. The first is that no State may exercise its jurisdiction on the territory of another State without the latter's consent. This is pertinent with respect to the jurisdiction to enforce State law. The second generally accepted principle is that no State may exercise its own jurisdiction over persons, property and acts abroad without a "close, substantial, direct, weighty" (Mann) or "reasonable" (Restatement Revised) point of contact. This doctrine may be called a "minimum contact rule". Practice shows, that the qualification of adequate minimum contact cannot be determined *a priori* for all fields of State jurisdiction. It is a value judgment and as such is closely attached to the particular field.

This is why the limits of jurisdiction with an extraterritorial impact have always been defined for one area at a time. A long-standing tradition of doing this through general principles of → customary international law can be found in international criminal law and to a much lesser extent in private international law. Other areas, such as international → taxation law and international → labour law, have developed a network of international treaty law to cope with problems of jurisdiction. But the most disputed areas are presently found within the regulation of the economy: → antitrust law, export administration, investment regulation, securities regulation, → monetary law, foreign trade law and corporations law. It is here where clashes between States have drawn questions of jurisdiction into the limelight of international attention. The same is true of the frequent disputes about the power of a judge to issue orders regarding the taking of evidence abroad or the production of evidence that is within the sovereignty of another nation.

Although the issue of adequate points of contact should be dealt with in respect to the particular area of regulation, the greater part of the doctrine of points of contact developed in international criminal law seems to be universally accepted. There is no doubt that a State may exercise jurisdiction over all persons, property and acts inside its own territory (principle of territoriality). Furthermore a State may regulate the behaviour of its own nationals, corporations and residents abroad as long as such behaviour does not exclusively concern the interests of the host State (principle of personality).

It is also recognized that a State may protect the security of its territory and internal system against attacks from abroad (protective principle). The principle of passive personality which is intended to protect a State's own nationals while abroad was accepted in the aforementioned Lotus decision but later restricted in State practice so that

there is an ongoing discussion as to whether it still is an adequate point of contact.

The effects principle has been much discussed in matters of economic regulation. The classical formulation of this purportedly new principle can be found in the United States antitrust decision, United States v. Aluminum Co. of America (ALCOA):"... it is settled law . . . that any State may impose liability, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends" (148 F.2d 416, 443 (2d Cir.1945)). The question whether such effects should be further qualified as "direct", "substantial" or "intended" is still unresolved and especially disputed in the antitrust area.

The effects principle, which is especially useful in matters of economic regulation, appears in the practice for example of the United States, the → European Communities and in West Germany and is considered by a majority of authors as an admissible point of contact, although its limits remain to be agreed upon. The United Kingdom has protested several times against other States using this principle, but it is submitted that such a protest cannot make a valid point of contact illegal. The effects principle is in fact not an entirely new principle, but rather a variation of the objective territoriality principle. The latter, recognized in criminal law, sees the point of contact in the domestic consequences of behaviour abroad. Arguments about the effects principle have arisen because, unlike in criminal law, the regulatory purposes in matters of economic regulation are often controversial, and in addition, because this principle may allow too broad an exercise of jurisdiction if the notion of effects is not limited by some qualification.

It can hardly be denied that the principle of sovereignty allows a State to prevent facts or behaviour outside its territory from exerting detrimental influences inside its territory. On the other hand, an unlimited use of regulatory power over whatever effects of facts and behaviour abroad may be felt within a State's territory would reduce the sovereign equality of States and the principle of non-interference in the → domestic jurisdiction of other States to mere declarations, without effect, given the increasing interdependence of economies and movement of goods, services, capital and persons over national borders. Sovereignty may be legitimately restricted by such interdependence, but one of the main aims of sovereign equality, namely the right of a State freely to choose and develop its economic and social system, as guaranteed for example by the → Friendly Relations Resolution of the → United Nations General Assembly must be taken into consideration by drawing limits to the jurisdiction of States. One of the principles that secures this freedom and constitutes a major factor in promoting peace and the rule of international law is the duty of non-intervention (→ Non-Intervention, Principle of).

An evaluation of this duty in the light of the interdependence referred to above shows that the jurisdiction of a State may only be extended to facts and behaviour abroad that have a substantially detrimental effect within its territory. Furthermore, the necessity of preserving as much as possible the sovereign rights of the other State involved requires that a State's jurisdiction only be exerted in such a way that these rights are impaired as little as possible (rule of → proportionality). This means that the regulation must be necessary to reach the national regulatory goal and restricted to the least impairing means of reaching this goal. The same concern leads to a restriction of the "possibility to prevent detrimental effects of future facts or behaviour abroad" as contact points. Such contingencies can only serve as valid points of contact if they can reasonably be deemed as leading with a high degree of predictability to the detrimental effect, and there must be a possibility to rebut this presumption.

These rules are admittedly not a very effective means to prevent clashes of jurisdiction between States since the formulation of the regulatory goal, and thus the qualification of an effect as substantially detrimental, rests within the sovereign decision-reaching authority of a State. But public international law has so far not developed a general yardstick for reviewing the justification for such a decision. Thus it may very often happen that States can lawfully claim parallel jurisdiction over the same facts or behaviour. This may lead to a situation of inextricable hardship for individuals who are caught between the lines of two conflicting regulatory orders of different States.

7. *Conflict Resolution*

Such conflicts may involve different levels of interest in the States concerned. If there is very limited interest in one State to enforce its own rule and thus provoke a conflict with the other State, a resolution may be found pragmatically. On the other hand, even the absence of a rule in a State may not indicate indifference since it may be the expression of a deliberate grant of freedom to individuals which should not be restricted by the regulation of another State.

The classical law of → aliens provides only a very limited tool for conflict resolution since it does not intend to resolve conflicts between the substantive law of different States. The development of modern → human rights standards also fails to provide sufficient help since it is far from clear whether even the principle *nulla poena sine culpa*, accepted by many human rights instruments, can help individuals to avoid the negative consequences of the fact that, by following one State's regulation, they must unavoidably violate one of the conflicting orders of the other State.

Finally, the rules developed for conflicts of laws in private law matters are not appropriate to be applied in public law matters. Private international law departs from the public law assumption that national laws are basically equal. Public law focuses on the set of mandatory rules issued by a State designed to shape a national economic, social, cultural and political system. Each State may have different values reflected in such rules and those values may often be different, conflicting and irreconcilable.

This may lead to situations where one State prohibits behaviour that is at the same time ordered by another State. A court may order the production of documents which are located abroad and subject to a prohibition of disclosure there. A cartel law may prohibit a merger abroad that has been expressly ordered for structural reasons by the home State of the enterprises. Some States have reacted expressly to orders of foreign States with extraterritorial reach by enacting blocking statutes that prohibit compliance with such orders on their territory. Some scholars try to resolve such conflicts by assuming the predominance of the order based on the principle of territoriality. But State practice, especially in the field of economic regulation, does not warrant such a rule.

In the United States a "foreign government compulsion doctrine" has been developed by the courts which mitigates the consequences of non-compliance with United States law if the addressee has made "good faith efforts" to comply, but was unsuccessful. However, this doctrine provides no true conflict resolution, since it is not designed to give way to foreign law but only to modify harmful consequences for the individual. Furthermore, the practice of the doctrine does not consistently balance the interests of the States involved on an equal footing.

Nevertheless, United States courts and practice have developed a "balancing of interest" method that parallels the one used by courts to resolve jurisdictional conflicts between the states within the United States. Such balancing takes into account the conflicting State interests, the intent, expectations and hardship of individuals, → reciprocity, effectiveness of enforcement and several other factors that vary among the different drafts of codification based on this practice. The (revised) Restatement claims, moreover, that such a balancing of interests is already part of public international law and gives examples of balancing criteria. The obligatory legal character of such criteria is of little importance so long as such conflicts are dealt with on a diplomatic level. The legal character is only decisive if a court is to apply a rule in conflict with foreign law.

There is no uniform opinion among scholars as to the latter point. Some argue that the United States practice is not sufficient to create general international law. In fact there is as yet no balancing of interest practice outside of the United States. Furthermore these scholars stress the point that the existing practice considers the balancing method as a matter of international comity as opposed to an international legal obligation. Finally, they submit that the balancing of interest method is presently even diminishing in importance within the constitutional order of the United States since an honest and really impartial balancing of State interests is not possible.

Other authors recognize a general predominance of the *lex fori* and thus reject the possibility of balancing of interests altogether. However, an increasing number of scholars presently deem such balancing as in principle required by public international law. It is submitted that a duty to balance in good faith arises from the fact that

parallel and conflicting jurisdiction always impinges upon the principle of sovereign equality and affects the goal of protecting the principle of non-intervention.

Nevertheless, balancing based on this premise is a rather unsophisticated tool that can only cope with gross differences of interests. Foreign jurisdiction based on nationality, for example, would have to give way to jurisdiction based on territoriality in matters regarding the territorial integrity or security of a State. On the other hand, jurisdiction based on nationality would normally prevail in cases regarding the personal allegiance of a national owed to his home State. Furthermore, a State would be able to rely on the *tu quoque* principle, thus extending its jurisdiction the same way the State with the conflicting regulation does.

Apart from such rather clear-cut cases a balancing analysis needs a *tertium comparationis*. Only values common to all the States involved can serve as a starting point for evaluating the conflicting interests. Such values may exist with respect to specific regulatory matters, for example historically in criminal law, or they may be subject to treaty obligations such as in tax law.

But in most matters of economic regulation, common values cannot yet be derived from a uniform and sufficiently widespread State practice. A balancing of interests of the States concerned by a court in this broader sense, apart from the above-mentioned clear-cut cases, is thus still a unilateral attempt to find conflict of law rules without an agreed upon international yardstick. It still is not governed by international law rules. The power of a court to unilaterally create such rules depends upon its position in national law.

Where a court does not have such power, it can rely only on the rather general and crude principle of non-intervention. In this case, a more thorough resolution of jurisdictional conflicts is a subject either for a unilateral policy decision of a legislature or a government or, more appropriately, for internationally agreed conflict rules that should be developed in the near future in order to enhance and, in some matters, restore legal security in a closely interwoven international society.

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FEDERAL CLAUSE, COLONIAL CLAUSE

1. Pluri-legal States

Numerous States are pluri-legal, i.e. they have various systems of law applicable either in a given territory or to a given category of persons regardless of the place of their residence. Often laws in force in the metropolitan territory differ from those in dependent territories (e.g. colonies, trust territories) for the → international relations of which the State concerned is responsible (→ Colonies and Colonial Régime; → Mandates).

Federal States have usually different laws in their constituent units. However, regions having distinct law may be also in some non-federal States (e.g. Scotland within the United Kingdom; Poland between 1918 and 1945, with four regions of law and her own private inter-regional law).

2. Federal Clauses

The basic feature of a → federal State is the division of constitutional powers between the federal government and member States of the federation, with the power to conduct foreign policy being normally vested in the federal authorities.

As → subjects of international law, federal States have the power to conclude international → treaties. In some of them, however, treaties requiring changes in laws cannot be implemented without additional legislative action (→ International Law and Municipal Law). Federal governments can usually modify federal laws. In some federal States, the federal legislature can also enact all laws necessary for the execution of treaties, even if the matter normally belongs to the competence of the member States, but the federal government might be reluctant to take such steps. In other federal States, the constitutional situation is different. When the matters covered by a treaty are within the jurisdiction of the legislative assemblies of the constituent units of a federal State, the cooperation of the governments of such units can be indispensable for the implementation of the treaty. Some governments and legislative assemblies of the constituent units (states, provinces, cantons) might agree to implement a given treaty while others might not, leaving the federal government to implement the same only in a part of its territory. The same applies to a denunciation of a treaty. Federal clauses in multilateral treaties allow their ratification by a federal State even when they will be implemented only in a part of such State.

For example, Art. 19(9) of the Constitution of the → International Labour Organisation provides: "Members ratifying Conventions shall accept their provisions so far as practicable in respect of all territories for whose international relations they are responsible."

An early example of the federal clause in the → United Nations is Art. 41 of the Convention relating to the Status of Refugees of July 28, 1951 (UNTS, Vol. 189, p. 137):

"In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent

to which effect has been given to that provision by legislative or other action."

Similar provisions are contained in Art. XI of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (Art. XIII(2); UNTS, Vol. 330, p. 38) and in Art. 25 of the Council of Europe Draft Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of January 10, 1980 (ILM, Vol. 19 (1980) p. 284).

Such wording has been criticized, as it appears difficult to apply only some articles of a convention.

A wording more convenient for federal States appears in Art. 31 of the UN Convention on the Limitation Period in the International Sale of Goods of June 13, 1974 (ILM, Vol. 13 (1974) p. 949):

"1. If a Contracting State has two or more territorial units in which, according to its Constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. 2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies. 3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State."

Thus in the latter case there is the presumption that the Convention applies to the whole State.

The UN Convention on Contracts for the International Sale of Goods of April 11, 1980 (ILM, Vol. 19 (1980) p. 671) follows the same pattern in its Art. 93, adding the following paragraph:

"(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends".

A similar wording was incorporated in the Inter-American Conventions signed at the First Inter-American Conference on Private International Law, held in Panama in January 1975 (OAS Doc. CIDIP/64 Vol. 1; ILM, Vol. 14 (1975) p. 325), and at the Second Inter-American Conference on Private International Law held in Montevideo in April and May 1979 (OAS Doc. CIDIP/103 Vol. 1; ILM, Vol. 18 (1979) p. 1211). The corresponding wording is:

"If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification and accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which this Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of the receipt" (Inter-American Convention on Conflicts of Laws concerning Checks, Art. 6; OAS, Serie sobre tratados, No. 49; ILM, Vol. 14 (1975) p. 334).

There is no requirement of approval and no possibility to object.

The American Convention on Human Rights (OAS, Serie sobre tratados, No. 36; ILM, Vol. 9 (1970), p. 99), which was signed on November 22, 1969 and entered into force in 1978, contains a federal clause in Art. 28 which reads as follows:

"1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over which subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over which subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt

appropriate provisions for the fulfillment of this Convention . . . ."

The insertion of a federal clause was discussed during the preparation of the → Human Rights Covenants, but no such clause was finally adopted. On the contrary Art. 50 of the International Covenant on Civil and Political Rights and Art. 29 of the International Covenant on Economic, Social and Cultural Rights stipulate: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."

3. Clauses concerning Laws applicable to certain Categories of Persons within a State

A legal system may be applicable in a given territory or to specified persons regardless of their residence within a "pluri-legal" State. The Convention on the Recognition of Divorces and Legal Separations of The Hague Conference on Private International Law, concluded on June 1, 1970 (UNTS, Vol. 978, p. 393) deals separately with laws in force in a territory (Art. 29) and laws applicable to certain categories of persons (Art. 23). According to Art. 30, a denunciation of the Convention may be limited to certain of the territories to which the Convention applies. It is to be noted that the existence in a given territory of a system of law differing from that of another territory of the State is not mentioned in Art. 29. Thus, it appears that a State may declare that the Convention shall extend to its territory A but not to its territory B even on the hypothesis that the same system of law is applicable in both of them.

4. Colonial Clauses

Provisions in an international multilateral treaty defining its application to the dependent territories of the contracting States have been known as colonial clauses (→ Treaties, Territorial Application; → Non-Self-Governing Territories). They may take one of three forms. They may provide for the optional application of an instrument to the dependent territories of the contracting States, so that the instrument does not apply to the dependent territories of any contracting State unless the latter chooses to extend the application of the instrument to all or any of its dependent territories. On the other hand, they may provide for the optional exclusion from the application of the instrument of the dependent territories of the contracting States, so that the instrument applies to the dependent territories unless a contracting State chooses to exclude from the application of the instrument all or any of its dependent territories. A third type of colonial clause may provide for the automatic application of the instrument to the dependent territories of all contracting States.

While colonial clauses are found mostly in treaties concluded prior to World War II, such clauses did not fall in desuetude immediately after 1945. In fact the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 (UNTS, Vol. 78, p. 277) contains such a clause in Art. XII (→ Genocide).

Also the colonial clauses in Art. 11 of the Convention for the Suppression of the White Slave Traffic of May 4, 1910 (→ Traffic in Persons) and in Art. 7 of the Agreement of May 4, 1910 for the Suppression of Obscene Publications have been maintained by the UN Protocols of May 4, 1949 (UNTS, Vol. 30, p. 23), although there were some opposing views.

In 1950 for the first time a provision was included in an international multilateral treaty adopted by the → United Nations General Assembly making it applicable to all non-metropolitan territories of the contracting parties. Art. 23 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of March 21, 1950 reads in part: "For the purposes of the present Convention the word 'State' shall include all the colonies and Trust Territories of a State signatory or acceding to the Convention and all territories for which such State is internationally responsible" (UNTS, Vol. 96, p. 271).

In addition, Art. 13(3) of the UN Convention on Declaration of Death of Missing Persons of April 6, 1950 (UNTS, Vol. 119, p. 99) contains a colonial clause which allows the exclusion of dependent territories.

The Conventions of the → Council of Europe permit the specification of "the territory or territories to which the Convention shall apply", e.g. Art. 63 of the → European Convention on Human Rights of November 4, 1950 ("territories for whose international relations it is respons-

ible"); Art. 34 of the → European Social Charter of October 18, 1961 ("non-metropolitan territory"); Art. 31 of the European Convention on the Punishment of Road Traffic Offences of November 30, 1964 (simply "territory"; UNTS, Vol. 865, p. 99); Art. 19 of the European Convention on Information on Foreign Law of June 7, 1968 (simply "territory"; UNTS, Vol. 720, p. 147); Art. 12 of the European Convention on the Suppression of Terrorism of January 27, 1977 (simply "territory"; ILM, Vol. 15 (1976) p. 1272; → Terrorism).

Colonial clauses have been used for a long time and are still used in the → Hague Conventions on Private International Law, e.g. in Art. 33 of the Convention on International Access to Justice of October 25, 1980 (ILM, Vol. 19 (1980) p. 1505).

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FEDERAL STATES

A. Notion

A federal State is a union of states in which both the federation and the member states embody the constitutive elements of a State: territory, citizens, and legislative, executive and judicial power over them. State authority is divided between the federation, on the one side, and the member states on the other, both of which possess certain assigned competences and functions. However, a uniform type of federal State with a fixed physiognomy does not exist (R. Ago, Annuaire de la Commission du Droit International, Vol. 2 (1971) p. 1, at p. 276). In some federations each side is strictly limited to its own sphere of legislation, administration and adjudication without any institutionalized cooperation. It is according to this system of strict distinction of all spheres of State functions that the United States, Canadian and Australian federal systems have been established. But it is also possible that the competences of the federation and of the member states gear into each other. The powers of both sides can be harmonized in such a way that the member states are principally responsible for administrating not only their own but also the federal laws and collect both their own taxes and those of the federation, as for instance in the Federal Republic of Germany or in the Socialist Federal Republic of Yugoslavia.

The federal State is distinct from a confederation and also from an → international organization because these unions do not possess the character of a → State (→ Confederations and Other Unions of States). A federation can be defined as a union under constitutional law in which the competences of each side are determined by the federal constitution. Confederations and international organizations are described as unions governed by international law, the union being dependent on the constituent units. This characterization is, however, controversial. The act of creation of a federal State ought to be an act of the *pouvoir constituant*, but can also be in the form of an international treaty concluded by the member states. Such a treaty was intended in November 1870 when the North German Federation and the States in Southern Germany agreed upon a federal constitution which, however, did not become effective. On the other hand, a federal State must not necessarily be based on a pact of

the member states by which they transfer certain competences definitely and irrevocably to the federation and subordinate themselves under the federal constitution. A federal State can also be created by an act of a unitary State. The member states of Austria, a federal State since 1920, were established in this way. The mode of creation of a State is not decisive for its characterization as a federal State, though a federation created by a treaty involving originally independent States is, at least originally, politically more federalist than a State which has established its member states by an act of the union.

The distinction between a federal State and a confederation is indispensable in deciding whether a union must be qualified as a State or not. Thus the distinction has obvious importance for international law, for instance with regard to membership in the → United Nations (Art. 4 of the → United Nations Charter) or the capacity to be a party to a case before the → International Court of Justice (Art. 34(1) of the Statute). However, this distinction is not quite clear, especially because an organ of a confederation may also possess competences typical of a State, such as the competence to obligate directly subjects of the member States. In the German Confederation of 1815 and the Swiss Confederation until 1848 such competences were definitely transferred to the union. Moreover, the development of international organizations indicates a slight trend towards transferring State competences to an organization and recognizing such an organization's decision as valid independent of any interference by State authorities. Especially → supranational organizations, and above all the → European Communities with its legislative, executive and judicial powers, are immediately directed towards individuals and do not only obligate the member States. In addition, some international institutions for the protection of → human rights exercise judicial competences. Nevertheless, neither the European Communities nor other organizations with such immediate inherent powers possess Statehood because of the limitation of their competences to special matters and their lack of territorial and personal sovereignty. A union's limited international personality is not sufficient to indicate the existence of a federal State but is typical of a confederation; moreover, it is possible for an international organization to take part in → international relations to a limited extent without being classified as a federal State.

In a unitary State there generally is no division of State authority between the State and its subdivisions. All State power normally emanates from the unitary State. The constitutions of France since 1791 for example have referred to the State as being "one and indivisible". Nevertheless, for some decades there has been a tendency towards regionalization in several unitary States in Western Europe which has aimed not only at devolution of functions from central to regional and local authorities but also at decentralization of competences from the State to self-governing bodies. The question whether such regionalization is a special modern manifestation of federalism must be answered in the negative. The crucial issue is the legal qualification of the member units. Unlike a federal State a regionalized State is not composed of territories possessing the quality of States. The units remain dependent on the unitary State. Regionalization may be the starting signal for federalization, as perhaps may be the development in Belgium, but normally it signifies a mere deconcentration and decentralization of the "one and indivisible" State. Moreover, it is characteristic of a federation that its member states have equal competences notwithstanding a weighting of votes in federal organs corresponding to population. If, with the aim of more or less limited autonomy, competences are granted only to one or several units of the State, as in Italy, Portugal or Spain, a distinctive mark of a federal State is lacking. However, in respect of the application of international treaties to the municipal legal order similar problems as in the case of federations may occur in States which have delegated powers to → autonomous territories. As far as legal considerations of the competences of units of a regionalized State or of members of a federation is concerned, it is more helpful to look at the actual distribution of powers than to overvalue the mere classification of a State as federal or regionalized or unitary with autonomous territories.

The manifestations of federal States are multifarious. Though federated unions existed earlier (e.g. the League of the Forest Cantons (1291), the United Netherlands (1579), the Holy Roman Empire (until 1648)), the first federation in the

modern sense was established by the United States Constitution in 1787. In the 19th century new federal States were founded in Central Europe, Latin America and Canada. The Commonwealth of Australia was established in 1900. A new type of federation was created after the Russian Revolution. In 1922 the Soviet Union was set up by a fusion of the Russian Socialist Federal Soviet Republic with other Soviet republics (→ Soviet Republics in International Law). The essential basis of this federation was the ethnic principle that the language communities should be given autonomy as member states or lesser ranking units of the federation. This system was copied by Yugoslavia in 1944 and was adopted in Czechoslovakia in 1968. The federal constitution of India of 1949 was modelled on a similar idea. During the period of → decolonization after 1945 several federations were established in Asia, Africa and the West Indies, some of which have since abandoned their federal system.

B. Territory and Citizenship

1. Territory

The territory of a federal State is composed of the territories of the member states and, in some federations, of federal territory not belonging to a member state. Examples of federal States solely composed of the member states' territories are the Soviet Union, the Federal Republic of Germany, Switzerland, Austria and the Socialist Federal Republic of Yugoslavia. In some federal States, parts of the country, especially the federation's capital (e.g. District of Columbia, Australian Capital Territory, Distrito Federal in Brazil, Delhi), possess the status of federal territories not constituting a territorial entity with the same competences as a member state. Such lesser status normally, but not necessarily, applies only to the territory's competences and not to the civil status of its citizens and their rights regarding their legal position in the federation. Federal territories of this kind exist for instance in Canada (Yukon and North-West Territory), Australia (Northern Territory), Brazil (Amapá, Fernando de Noronha, Roraima, Distrito Federal) and India (nine Union Territories, Delhi included), and existed in Germany until 1918 (Reichsland Elsaß-Lothringen, admitted to the Council of Constituent States in 1911).

Sovereignty over the → internal waters and the → territorial sea is divided between the federation and the affected member states. In United States v. California (332 U.S. 19 (1947)) a marginal belt was created purely as an attribute of federal sovereignty. But in 1953 the United States Submerged Lands Act granted to the states title to and ownership of all lands underlying navigable waters within their boundaries which in no event may extend beyond three nautical miles from the coastline. Sovereign rights for the purpose of exploring the → continental shelf and exploiting its natural resources as well as the rights, jurisdiction and duties of the coastal State in the → exclusive economic zone may be divided between the federation and the member states as for example in the Federal Republic of Germany. Nevertheless, some federations (e.g. the United States and Canada) claim exclusive sovereign rights over the continental shelf and the exclusive economic zone while the member states are excluded from these maritime areas.

In most present federations the member states are the fixed result of an historical development and cannot be abolished by the federation. The formation of new member states and the alteration of areas and boundaries of existing member states is generally not possible without the consent of the affected states (see e.g. Art. 78, Constitution of the Soviet Union). However, in some federal States the reorganization of territory can be introduced merely by federal laws without the decisive participation of the states concerned. The Basic Law (Grundgesetz) of the Federal Republic of Germany provides for the decision as to the preservation of each member state and the establishment of new states to be reserved to the legislative branch of the federation. Moreover, confirmation by referendum in the states thus affected is necessary; the states themselves are only to be consulted (Art. 29). In India, the federal parliament may by law form a new state by separating territory from any member state, or increase or reduce the area and alter the boundaries of any member state (Art. 3, Constitution of India). Provisions such as these manifest a dynamic federal State which does not render permanent the present territorial division but

leaves room for future developments. The establishment of new member states formed by separation from existing member states (e.g. in the United States: Vermont from New York, Kentucky from Virginia, Tennessee from North Carolina, Maine from Massachusetts, West Virginia from Virginia; in India: Haryana from Punjab, Mahalya from Assam; in Brazil: Mato Grosso do Sul from Mato Grosso; in Switzerland: Jura from Berne) is just as common as the unification of member states (e.g. in the Soviet Union: the Karalian Soviet Socialist Republic with the Russian; in the Federal Republic of Germany: Baden with Württemberg-Baden and Württemberg-Hohenzollern, forming Baden-Württemberg).

2. Citizenship

Citizens of a federal State hold the → nationality of the federation. The existence of federal citizenship is one of the main distinctive criteria of a federation although subjects of member states of a union established under international law may in certain matters enjoy equal rights in all member states, as for instance all citizens of the member States of the European Communities have the right of establishment. Federal nationality may either be obtained by acquiring member state citizenship or is granted by the federation irrespective of the acquisition of such citizenship. Since the units of a federation have the character of States the existence of member state citizenship is logically required for federal citizenship though, in reality, such dual citizenship is rare: usually no rules on member state citizenship exist and no legal consequences emerge from it. In any event several types of legal construction are possible with regard to federal and state citizenship. In Czechoslovakia, for example, every citizen of the federation is simultaneously a citizen of the Czech or of the Slovak Republic. Every citizen of a member state is at the same time a subject of the federation (see, for example Art. 33(1) and (2) of the Constitution of the Soviet Union). With regard to international law the point of reference is, without exception, the individual's federal citizenship. Consequently, citizens of a federal State enjoy → diplomatic protection and assistance by the federation when abroad.

C. Allocation of Competences

In the presently existing federal States the allocation of competences to the federation and to the member states varies considerably. The powers of the member states are greatly emphasized in the Soviet constitution, according to which each Union Republic shall even retain the right freely to secede from the federation (Art. 72). In the same way the member states of the Federal Socialist Republic of Yugoslavia hold a strong position. However, the federal system of the socialist States is overlapped by the unitary and centralized organization of the Communist Party which is decisive in all political questions.

The functioning of federalism is dependent above all on a well-balanced and continually updated distribution of the financial resources. Generally, a federation with a flexible financial and fiscal policy is more stable than a federal State with an unalterable system of tax-allocation or with a financial structure to the disadvantage of one side. One reason for the slow development of functions of the member states of most and especially the Latin American federations (Argentina, Brazil, Mexico, and Venezuela) is ultimately a lack of sufficient financial resources to sustain state government and its assigned competences.

The conduct of foreign relations is a proper function of the federation, "a necessary concomitant of nationality" (United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936); → Foreign Relations Power). From the point of view of international law there is generally no difference between a federal and a unitary State because both are → subjects of international law with equal rights and duties under such law. Consequently, in most federal States the units have no competence at all regarding foreign affairs and thus no power to conclude treaties with foreign countries, to exchange diplomats and consuls or to join international organizations. In these cases international relations are exclusively reserved to the federation to the total exclusion of all member states which cannot be directly affected and addressed by international law.

Notwithstanding the usual assignment of competence for foreign relations to the federations, there are some federal States which also permit their member states to enter into relations with foreign States. The right "to conclude treaties with

them, exchange diplomatic and consular representatives, and take part in the work of international organizations" is only granted to the member states of the Soviet Union (Art. 80, Constitution). None of these states makes use of this power, except for the Ukrainian and the Byelorussian Soviet Socialist Republics, which, however, do not exchange consuls, and the Lithuanian Soviet Socialist Republic, which maintains treaty relations with Poland. Diplomatic and consular relations are not permitted to member states of other federations. Apart from the membership of member states of the Federal Republic of Germany in local international institutions (→ Lake Constance), joining international organizations is a privilege of the Ukraine and Byelorussia, which are members of the United Nations and the → United Nations Specialized Agencies. The right to enter into relations with foreign States, limited to the conclusion of treaties, is explicitly permitted member states by the constitutions of the United States (Art. I Sec. 10 para. 3, the Soviet Union (Art. 80), the Federal Republic of Germany (Art. 32(3)) and Switzerland (Art. 9), whereas the republics of the Federal Socialist Republic of Yugoslavia are empowered to "realize" cooperation with organs and organizations of foreign States and international organizations (Art. 271(2)) without having the competence to conclude treaties. The treaty-making power is limited to restricted matters within the competence of the member states and is subject to federal approval. There are also a few cases where member states of a federal State have extorted or tried to extort for themselves the right to conclude treaties with foreign countries without explicit authorization by the constitution, for instance the Canadian province of Quebec, which concluded cultural agreements with France on February 27, 1965 (text: Education Weekly, A Department of Education Bulletin (1965) p. 199) and November 24, 1965 (text: External Affairs, Vol. 17 (1965) p. 521). The Canadian Federal Government approved these agreements only after they were concluded.

D. Federal States and International Law

1. Member States as Subjects of International Law

The constitution or, as in the case of the Franco-Canadian agreement of November 17, 1965 (External Affairs, Vol. 17 (1965) p. 514), a special act of approval by a federal State may enable its member states to act in the sphere of international law. However, their recognition as → subjects of international law is solely a question of the international legal order, which can only be answered by the members of the community of nations. Because of the heterogeneity of the presently existing federal States and the variety in the allocation of powers to their member states, a general rule of international law on treaty-making competences of member states does not exist. Attempts by the → International Law Commission (ILC) on the occasion of preparing the → Vienna Convention on the Law of Treaties and by the → International Law Association in drafting a resolution on State succession aimed at codifying a general norm have failed. However, in accordance with the prevailing opinion there is no doubt that as far as a federal constitution permits, member states of a federation can enter into international relations with foreign powers; as soon as a foreign State enters into such relations with a member state the latter is, at least partially, recognized as a subject of international law. Moreover, a foreign State may only entertain international relations with the member state of a federation if the federation's constitution so allows or special approval is provided. Obligations and rights governed by international law can only be established for member states with the consent of the federation. Art. 28 of the → European Convention on State Immunity of May 16, 1972 provides that member states do not enjoy immunity unless the federation has given notice of the immunity to the Secretary General of the → Council of Europe. If there is no federal consent, a foreign State's relations with member states constitute an unauthorized → intervention in the affairs of the federation. Recognition of the member state of a federation as an international treaty partner is a special case in which international law defers to the municipal laws of a State (→ International Law and Municipal Law).

2. Treaties

(a) Conclusion of treaties

(i) Conclusion of treaties by the member States

In federal States which permit their members to conclude treaties with foreign powers this right is

limited to treaties falling within the internal constitutional competences of the member states, if no additional restrictions exist, as for example according to the United States Constitution. The member states may only conclude treaties on matters whose settlement does not fall under federal competence, as provided by the constitution.

According to the Basic Law of the Federal Republic of Germany the competence of the member states to conclude treaties is linked to the power to legislate (Art. 32(3)). The states may conclude treaties in the fields in which legislation is exclusively reserved to them and also on such matters of concurrent legislation which have as yet not been settled by the federation, though in this field the room for action is rather limited, since the federation has almost exhausted its concurrent competences. The question whether the states may also conclude agreements on matters falling under federal legislative competence but state executive competence is disputed. Since the states execute federal laws essentially as affairs of their own (Art. 83), it has been argued that the states are authorized to conclude agreements on all subjects falling under their administration, including federal laws. This view, however, is not endorsed in the text of the constitution. On matters which concern federal legislation, the states are not entitled to conclude any administrative agreements with foreign countries, nor are they authorized to do so in the case of concurrent competence, if the federation has made use of its legislative competence. The administrative practice, too, seems exclusively to follow the legislative but not the administrative competence in these cases.

The parties to international treaties with member states of the Federal Republic of Germany are, first of all, foreign States. In respect to treaties it is irrelevant whether these foreign States are full subjects of international law or mere member states of other federations, provided that the latter are authorized to conclude treaties under their own federal constitutions. The prerequisite for the right of the member states to conclude treaties with foreign States, however, is their recognition as subjects of international law by the federation. It would be contrary to the principle of political homogeneity inherent in the federal State, if a member state were to recognize a foreign country as a subject of international law whilst the Federal Republic itself refused this recognition. In addition to concluding treaties with foreign States the member states should be permitted to join non-political international organizations. The states can, within their legal competence, become parties to treaties providing for the establishment of international commissions, as, for instance, the International Commission for the Environmental Protection of Lake Constance. In addition, objections are not likely to be raised when states participate in international arbitration aimed at the settlement of a dispute resulting from a treaty. The conclusion of → concordates with the → Holy See also falls under the competence of the member states though, according to the Federal Constitutional Court (German Bundesverfassungsgericht, Decision of March 26, 1957, BVerfGE 6, 309, 332), concordates are not treaties within the meaning of Art. 32(3) of the Basic Law.

Since member states of federations with the exception of the Ukrainian and Byelorussian Soviet Socialist Republics have no foreign service at their disposal, they may either appoint delegates *ad hoc* or make use of the federal diplomatic service when concluding international treaties. During → negotiations, such representatives possess diplomatic immunity abroad. If the foreign partner makes use of his diplomatic representatives at the federal level, the latter will require specific authority with regard to concluding treaties with the member state. In addition, the federation must be notified thereof and its approval must be obtained, as foreign diplomats are only entitled to conclude legal acts with the government which has accredited them.

The rights of the member states to conclude international treaties is subject to federal consent, which in the Federal Republic of Germany must be given by the federal government. By its decision whether or not to consent, the government exercises preventive federal supervision in order to avoid a conflict between a member state's treaty and federal interests. Federal consent thus always means *nihil obstat* with regard to federal interests and is a prerequisite for the internal effectiveness of a treaty. Such consent must be obtained before the conclusion of a treaty, invari-

ably requires a cabinet decision, and must be addressed to the member state and not to the foreign power. Moreover, federal consent is a prerequisite for legal → effectiveness in international law because the member states of a federation are given the opportunity to conclude treaties only through and within the framework of the federal constitution. A member state which fails to conform to this framework acts *ultra vires* according to municipal law, to which international law in turn refers. If constitutional law makes it possible for member states to be subjects of international law, the limits to their international personality created by the constitution must also be decisive internationally. Therefore treaties concluded without federal consent are in any case invalid (→ Nullity in International Law).

(ii) Conclusion of treaties by the federation

There is disagreement as to whether the member states of the Federal Republic of Germany are solely competent to conclude treaties in fields where legislative competence is exclusively reserved for them, or whether the federation also possesses treaty-making powers in these fields. From the federal point of view the treaty-making power of the states does not limit that of the federation because, according to the Basic Law, relations with foreign States shall be conducted by the federation (Art. 32(1)); the treaty-making competence of the states (Art. 32(3)) is only an exception to this general principle and thereby does not confine the federation only to treaties on matters over which it has power to legislate. The constitution provides that a member state must be consulted in sufficient time before the conclusion of a treaty "affecting the special circumstances of a state" (Art. 32(2)). Practice largely follows the opinion which favours the federation since, in many cases regulated by treaty, the legislative competences of the federation and the states are more or less indissolubly mixed. It is mainly for practical reasons that the idea of an exclusive allocation of treaty-making power to the member states in matters affecting state legislation has been rejected. Therefore some of the member states have shared this opinion although the majority have refused to accept it. From the latter point of view, there is no reason to deviate from the internal allocation of competences regarding the conclusion of treaties with foreign States. Under the constitution, the federation cannot be placed in the position of executing treaty obligations on matters within the legislative competence of the member states with the consequence of creating ineffective treaties.

In order to overcome the difficulties arising from the conflicting opinions of the federation and the majority of the states, both sides have agreed on a feasible → *modus vivendi* while retaining their diverging legal points of view. In the Lindauer Abkommen (Agreement of Lindau) of November 14, 1957 (text: ZaöRV, Vol. 20 (1959–1960) p. 116, note 102) the Federal Foreign Office and the heads of the state chancelleries agreed that the states would make some concessions under certain clauses of the Basic Law, so as to cede to the federation full competence for consular treaties, trade and navigation agreements, treaties on settlement and residence, trade and payments agreements, and treaties providing for the accession to or the establishment of international organizations. The federation was authorized to conclude treaties on matters under the exclusive legislative competence of the states, especially cultural agreements, provided it previously obtained the consent of all member states. Regarding treaties affecting "essential interests" of the states, whether they concern state legislative power or not, the federation was obliged to inform the states in advance in order to enable them to express their demands in time.

In accordance with the Lindau Agreement, a Permanent Treaty Commission of the States has been established as interlocutor of the Foreign Office. Every member state is represented in this commission by the head or an officer of its permanent mission at Bonn. The Commission, chaired by Bavaria, seeks to coordinate the states' politics and to reach accordance with the federation through discussion with the Foreign Office. Cultural agreements are also treated in the Permanent Conference of the State Ministers for Education and Cultural Matters in the Federal Republic of Germany. Though in political practice this procedure of participation of the states is fairly time-consuming, it grants the state governments the right to participate in the performance of treaties as far as the legislative competence of the states or their essential interests are concerned.

The competence of the state governments in the Council of Constituent States (Bundesrat), concerning the legislative procedure for federal laws governing the conclusion of treaties, are not thereby affected.

This method of reaching an agreement at governmental level is not entirely unobjectionable from a constitutional point of view. An interpretation agreement may, perhaps, be of some help for the executive, but it cannot bridge the lacking treaty competence of the federation. There is no doubt that the member states were not authorized to delegate to the federation their competences in some areas within their legislative power. Therefore there is a consensus that the Lindau Agreement does not legally obligate the federation and the states but is only a → gentlemen's agreement which sufficiently solves the questions which arise in practice. The Enquête-Kommission Verfassungsreform (Commission on Constitutional Reform) of the Federal Parliament recommended sanctioning the procedure established under the Lindau Agreement by constitutional amendment. Its proposal had, however, no chance at all of being accepted because of the opposition of the states. It was also rejected by the Commission on Foreign Cultural Policy.

(b) Implementation of treaty law

The adoption or transformation of treaty obligations into national laws on matters under the legislative competence of the member states does not seem to cause serious problems in most of the present federal States. In most countries the federation has the power to enact any law to implement treaties (see e.g. Art. 253 of the Constitution of India). Treaties may be carried into effect and executed in no other way than by internal law. Regarding treaties concluded by the federation on matters within the legislative competence of the states, there is no difference with regard to the implementation and execution of internal federal laws. The member states are bound either by constitutional provisions or by unwritten law to respect any treaties entered into by the federation and, if their active participation is required, to help implement and execute them. For instance, the Austrian Constitution obliges the states to take such measures within their autonomous competence as may become necessary for the implementation of international treaties; if a state fails to comply with this obligation in due time the competence for such measures, especially that for enacting the necessary laws, is to be taken over by the federation. In implementing treaties the federation is likewise authorized to execute its right of control also in matters which fall under the autonomous competence of the states (Art. 16 B.-VG = Federal Constitutional Law of 1929, BGBl. Nr. 1/1930). Regarding implementation of treaties no principal differences exist between federal States which reserve to the federation an all embracing competence of concluding treaties and those which concede to the member states a limited treaty-making power.

The decision of the United States Supreme Court in Missouri v. Holland (252 U.S. 416 (1920)) established that treaties made by the federation, irrespective of whether they affect matters of federal or state legislation, can in any case be implemented internally by United States federal authorities. Nevertheless, the problem whether the states are bound by treaties and treaty implementing laws of the federation or whether they may legislate contrary to existing federal norms has not been satisfactorily solved. It may happen that, for instance, regulations of a state on environmental protection are issued contrary to rules of a treaty concluded by the union.

In some federal States, however, the federation may constitutionally be completely incompetent to implement treaties on state matters without the co-operation of the member states. This was true for Australia and still applies for the Federal Republic of Germany. The Australian Constitution vests in the Commonwealth Parliament law-making power with respect to external affairs (Sec. 51(29)). In so far as this provision authorizes laws implementing treaties, a controversial question has existed as to whether Sec. 51(29) is just as extensive as or more limited than the plenary federal executive power to conclude treaties. In Koowarta v. Bjelke Peterson ((1982) 39 ALR 417) the High Court of Australia held by a bare majority that the federal law in dispute was authorized under the external affairs power. The decision itself provided no conclusive answer as to the extent of federal power to implement treaties. In Commonwealth v. Tasmania ((1983) 46 ALR 625) the Court stated with a majority of four to

three that the federation can implement all genuine treaty obligations and treaty benefits. According to the minority view of the Court a treaty cannot be implemented domestically in Australia unless its subject-matter concerns substantial relations with other countries.

The situation in the Federal Republic of Germany is similar to that in Australia before the decision in Commonwealth v. Tasmania. Without the consent and co-operation of the member states the federation is not able internally to implement treaties on matters under the legislative competence of the states because it is constitutionally incompetent to do so by itself and, according to the German Federal Constitutional Court (BVerfGE 6, 309, 353–354), there is no enforceable right of the federation towards the states with regard to their passing the necessary implementing legislation. The federation cannot order the states to provide for necessary legal norms in the states' own sphere of competence. Federal treaty-making power on matters under the legislative competence of the states is virtually a meaningless right unless the states co-operate with the federation. Even non-self-executing treaties made by the federation affecting matters within state legislative competence may remain unimplemented if the federation does not have special organs or agencies for this purpose at its disposal and the states do not co-operate in the execution of such treaties. Thus, the federation is not able to infringe upon the constitutional division of competences by way of a treaty with a foreign power. On the other hand it is unobjectionable for the federation to enter into an obligation within its competence, to seek to influence the states or to suggest that they adopt certain legislative measures by way of implementation. The federation is also authorized to conclude treaties containing a federal clause, such as Art. 18(7) of the Constitution of the → International Labour Organisation or Art. 34 of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972 (→ United Nations Educational, Scientific and Cultural Organization), since no obligations which might be impossible to fulfil are entered into in this respect.

In the actual state practice in the Federal Republic of Germany the legal difficulties are overcome by the Lindau Agreement. Under its provisions the states do not only agree that the federation may negotiate and sign a treaty in areas of their legislative competence, but also give their consent to ratification, partly in advance. In accordance with the federation the states accept the tacit obligation, if necessary, to take all measures for the treaty's internal implementation. Three south German states adopted as early as the 1960s the practice of obtaining parliamentary consent by law or resolution (*Beschluß*) in their states for federal treaties affecting matters within their sphere of legislative competence. Most of the other states have followed this practice since the seventies. Berlin adopts all laws and treaties of the federation if the latter so requires.

Treaties concluded by the states relating to matters within their legislative competence (Art. 32(3), Basic Law) require the consent of the state parliament, in accordance with the respective state's constitution, either in the form of a law or by resolution, as internally required. If there is any change in the allocation of competences, the treaties concluded by the states remain valid. When the federation makes use of its concurrent legislative authority with regard to a matter on which a state has previously concluded a treaty with a foreign State, the continued validity of the treaty is limited to the territory of the affected member state. The federation's succession to the state's treaty obligations is justified by its consent to the state's treaty, by which it has accepted a certain co-responsibility for the implementation of the treaty.

3. Other International Relations

(a) External exchange and State visits

With the exception of the Ukrainian and the Byelorussian Soviet Socialist Republics regarding their relations to the United Nations and its Specialized Agencies, no member state of a federation exchanges representatives with diplomatic status. The German Constitution of 1871 conceded to its member states the right to exchange diplomats, but not → consuls (→ Diplomatic Agents and Missions). The major member states at first made use of this right. Finally, only Bavaria maintained diplomatic missions in a few foreign countries. The 1919 Weimar Constitution no longer conceded this privilege to

the states. Bavaria, nevertheless, still had a French and a Vatican mission in Munich until 1934. Visits of heads of State, heads of government and other official representatives of foreign States to the member states of a federation are in no way different from visits of these persons to territorial subdivisions of unitary States. As member states have no foreign relations competence except within the limits of their treaty-making power, they are not authorized in respect of State visits to act as equal partners of a foreign State but only as territorial entities of the federation.

(b) Partnership relations

Irrespective of the competence of the member states of some federations to conclude treaties governed by international law, member states may maintain partnership relations with foreign States or subdivisions of foreign States. There are many examples of international co-operation and exchange activities by member states of federations as well as by territorial and functional entities of unitary States, such as regions, counties, municipalities, universities or chambers of commerce or handicrafts, which are not governed by international law. These are generally covered in treaty provisions of the respective federal or unitary States, are subject to private law, or fall outside the legal sphere entirely (→ Cultural and Intellectual Cooperation; → Transfrontier Cooperation between Local or Regional Authorities). Agreements such as the partnership treaties between Rwanda and Rheinland-Pfalz (a member state of the Federal Republic of Germany) of 1982 or between the French region of Burgundy and Rheinland-Pfalz of 1962 or arrangements of co-operation such as those between the member states and regions in the Alps or in the basin of the Saar River, in Lorraine and in Luxembourg are not governed by international law but involve instruments without strictly legally binding effect. Nor do partnership agreements with municipalities or universities involve instruments governed by international law. Rights and obligations cannot be created by these agreements; the act which establishes legally binding duties and rights is not the agreement itself, but either parallel or corresponding internal acts or an international treaty concluded by the respective States. An example of the latter is the treaty between Luxembourg and Rheinland-Pfalz of 1974 on the joint accomplishment of functions concerning water supply and regulation by municipalities and other governmental bodies, authorizing these entities to co-operate across the frontier. Moreover, some member states of the Federal Republic of Germany maintain agents in several countries though not necessarily in their capitals, on a *jure gestionis* level and not accredited to the foreign State in order to promote trade, exchange or → tourism.

Partnership relations of this kind are only permitted within the limits set by the respective State. The Constitution of the Socialist Federal Republic of Yugoslavia explicitly mentions municipalities and other autonomous governmental entities as units which may engage in international co-operation with corresponding foreign organs and entities, but also confines this co-operation to the scope of the foreign policy determined by the federation (Art. 271(3)). Therefore it would offend against the constitution and also against international law according to the reference of international law to municipal law, if a member state tried to evade the constitutional allocation of competences by making an agreement with a foreign State on the level of a gentlemen's agreement or by exchanging agents on a quasi-diplomatic level.

E. Federal States and the European Communities

The Federal Republic of Germany is the only federal State in the → European Communities, but in Belgium, Portugal and Spain similar legal questions may arise because of the allocation of legislative authority to autonomous regions in these States. The treaties establishing the European Communities do not provide either for the participation of the federal units of the Communities' member States in the Communities' law-making process or for their representation in its organs. From the Communities' point of view, federal units are nothing but administrative units of the organizations' member States, a view which fails to take into account that the Communities have taken over some of the competences of the member States which, in the case of the Federal Republic of Germany, have been distributed between the federation and the federal states in

accordance with the Basic Law (Art. 24). As a result the federal units of the member State lack the rights of participation in legislation and administration by the Council of Constituent States although their own legislative competences are affected.

The absence of the federal units' right to participate in the legislative procedure in the Council of Constituent States is not compensated by their right according to Art. 2 of the law of consent to the treaties of Rome of 1957 (BGBl. 1957 II, 753) to obtain information from the Federal Government on developments in the Council of the European Communities before its final decision-making. The procedure for providing information was established by an interdepartmental agreement of January 21, 1963. If the Council of Constituent States rejects a proposal of the European Communities, the Federal Government is not obliged to instruct accordingly its representative in the Council of the European Communities.

The federal units of member States are totally excluded from legislation on all matters within their legislative competence delegated to the European Communities, some of which are quite important for them, such as professional training, traffic, transport and, since 1984, communication, improvement of regional structure, and precedent determination of decisions on joint tasks (Art. 91(a), Basic Law). Nevertheless, the federation refused to establish a procedure similar to that created under the Lindau Agreement, arguing that the member states' competences have a lesser priority than the federal "integrating competence". In a letter to the Chairman of the Conference of the Heads of State of the Federal States of September 19, 1979, the Federal Chancellor declared that the Federal Government would inform the states in time and extensively on the intentions of the European Communities. On matters touching the exclusive legislative competence of the states, the states have the opportunity to express their ideas extensively and in detail. The federation expects the states to contribute to the objectives and necessities of the federation's foreign and integrating policy. The federation is bound to exert itself to arrive at a mutually agreed standpoint which it will try to realize in the European Communities as far as possible and from which it shall deviate only for reasons of foreign or integrating policy. While preserving the diverging legal viewpoints of the federation and the states, the Chairman of the Conference of the Heads of Government of the States adopted the Chancellor's declaration in a letter of September 26, 1979. The states agreed on a three-stage procedure which is still being tested: notice to the member states, formation of the states' opinion, negotiation with the federation. Engaged in this procedure is the Beobachter der Länder bei den Europäischen Gemeinschaften (Observer of the states to the European Communities) who, as an agent of the states, represents them both before the Federal Government and before the organs of the European Communities. The federation may appoint this observer as a member of its delegations in negotiations and talks with the organs of the European Communities.

F. International Law in Federal States

In the first period after the establishment of federal States, which emerged from confederacies (e.g., in the United States, Switzerland and the German Reich), the prevailing opinion was that, though a federation had been set up, the relations among the formerly independent member States remained governed by international law (H. Triepel, p. 201). This opinion must be rejected because international law, the legal order to which States and other subjects of international law are subject, cannot be directly applied to the relations of the federal State units among one another and with the federation without being adopted and transformed by the internal law of the federation. Without such an incorporation the inter-State and the federation-State relations cannot be governed by international law. Such a partial reference by municipal law to international law was upheld, for example, by the United States Supreme Court in Kansas v. Colorado (206 U.S. 46 (1907)), the Swiss Federal Court (W. Schaumann, p. 121) and the State Tribunal of the German Reich (Entscheidungen des Reichsgerichts in Zivilsachen 112, Anh. 21; 116, Anh. 18; 121, Anh. 1), but was rejected by the Federal Constitutional Court of the Federal Republic of Germany (BVerfGE 6, 309, 366). According to the latter court and the prevailing view in pertinent modern literature, intra-federal law, while being a law created by

→ consensus and thus having a similar structure to international law, constitutes rather a federal common law or common constitutional law. Nevertheless this intra-State legal order cannot fully avoid the reception of international law especially in areas not sufficiently settled by the federal legal order. Where gaps exist in intra-municipal law they usually must be filled by international law, because no other legal order is available to be applied (G. Kisker, p. 68). The more that intra-federal relations and legal regulations increase, the more the reception doctrine becomes obsolete.

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WALTER RUDOLF

FEDERALISM IN THE INTERNATIONAL COMMUNITY

1. Notion

Federalism is a compromise between two extremes: on the one hand, an authoritarian order and on the other a state of anarchy. It is a system which seeks to make that which is common interest subject to the authority of the whole, while leaving that which is the particular concern of its component parts firmly within their domain. It recognizes that diversity is good, and seeks to limit individual State freedom only to the extent necessary to ensure the common good. In its essence it is a compromise between States to create amongst themselves a common régime where appropriate, while recognizing and permitting maximum freedom and → self-determination in those areas of interest and activity which are not or need not be common.

Within a federal system in a narrower sense → sovereignty is divided between a central authority and the regional authorities. Through the normative prescription of a constitutive act there is a division of competences between the two levels of authority governing the same persons and territory which are each within their proper sphere autonomous and sovereign. There may be coordination between the two levels, but if so it must emerge from sovereign sources. If the central authority is derived not from the existence of sovereignty but rather a delegation of competences, however broad, subject to withdrawal by its constituent parts, the system is not federal but an → alliance or confederation (→ Confederations and Other Unions of States). Equally and conversely, regional autonomy which is subject ultimately to a central authority is a function not of federalism but of devolution. In order to meet federal criteria, both levels of authority must possess competence in areas of jurisdiction which are substantial, which regulate directly activities within those areas, and which are within the system sovereign and not subject to unilateral amendment.

Traditionally, → international law has responded to the particular problems of federalism by ignoring them. A federal division of competences was purely a municipal matter. International law constituted a higher norm, to which all municipal rules must give way. Federations were therefore assimilated alongside unitary States, and international personality was considered to be subsumed by and reside exclusively with the central authority, regardless of the federation's constitutional rules to the contrary. Thus the opinion of the independent umpire in the 1875 case of The Montijo (J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Vol. 2 (1898) p. 1421 at pp. 1439–1440) regarding the then Colombian federation:

> "For treaty purposes the separate States are nonexistent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through . . . the federal or general government . . . . [I]t, and it alone, is responsible to foreign nations."

Thus taking Kelsen's three orders within a federal union – the legal order of the component regional parts, the legal order of the federation considered as a partial community, and the legal order of the entire system considered as the total community of the regions and the federation – international law has traditionally refused to distinguish between the latter two.

However, the traditional view is unequal to the challenge of an evolving international order, and particularly the post-war integration which has introduced the concepts of supranationalism, "functional" federalism or "quasi-federal" systems. Classical federal systems are created instantaneously, by the revolution of the constitutive act

from which springs immediately a "mature" federation. Federal theory has always recognized a dynamism of process through entropic and enthalpic pressures within the limits of the system. But post-war international cooperation has seen States seeking federal solutions to international problems by divesting themselves by → treaties of various competences in evolutionary progression to new central authorities which do not fit into the parameters of State cooperation which hitherto obtained. One may therefore now speak not only of the dynamic pressures within federal systems but also of their gradual emergence and decay. Response to this phenomenon marks a new phase in the evolution of international law.

In sum, the notion of federalism can be used in three different contexts: as describing the special situation of federal States under international law, the growing interdependence between the States in general and the ensuing legal consequences (cf. → International Law of Cooperation; → International Legal Community), or, finally, closer regional communities between States with federal features.

2. *Fundamental Legal Problems*

Inherent problems of federalism in the international community arise from both within the federal system and without, and both are bound intimately to the issue of sovereignty. The primary members of the international legal community are → States. The State alone as juristic person is both the only primary source of international law and, with few exceptions (see → Piracy; → Genocide), the only primary → subject of international law. State personality is therefore original, that of other entities derivative.

By traditional legal theory, the existence of federations poses relatively few problems. Once a system is recognized to satisfy federal criteria, the international legal personality of its component states is extinguished and a new State, a new primary member of the international community, possessed of all ensuing rights and obligations, is created. The internal sovereignty of that State may by its constitutive instrument be divided between various authorities, but this is a matter independent of international legal personality; it is a function attributed by international law to the exclusive internal competence of the State. But where a federative pact creates a new authority which has substantial competences in its own name, both as amongst the States party to it and with third States, yet the system as a whole cannot be characterized as a mature federation, a new entity emerges which is not fully a State, the locus of sovereignty falls into question and the traditional distinction between original and derivative personality becomes blurred.

(a) Internal questions

The plenitude of powers enjoyed by States as primary members of the international community includes the power to divest themselves of any of their various competences. Indeed, any international treaty will entail a limitation of State sovereignty. However, if a treaty effects not only a limitation but also a transfer of sovereignty to a new authority, the treaty may take on the character of a constitutive act and the system that of a federation.

The matter is simplest of course when this is the express intention of the treaty. In such a case a new federal State emerges and traditional legal theory may apply. But where there is no such express intention, guidance must be sought in the nature and general intent of the constituent pact. Even where such an intention is present, various federal mechanisms must be implemented if the system is to prove effective.

The primary indicator is whether or not there is an explicit or implicit surrender of sovereignty to a new and self-sustaining central authority. A delegation of competences betrays a system which is confederal in nature. But a transfer of sovereignty, with a reasonable degree of certainty that it is irreversible, is the hallmark of a federation. The constitutive treaty must also vest the new entity with the authority to create rules of law within its spheres of competence independently of the authorities of the component States; it must be vested with *compétence de la compétence*. Its laws must be binding not only upon the States (a feature of confederations) but also upon natural and legal persons directly and automatically (→ Van Gend en Loos Case). To safeguard their uniformity, the treaty must ensure that they will have priority over all inconsistent rules emanating from the States (→ Costa v. ENEL); to safeguard their application, there must be a court of

compulsory jurisdiction competent to arbitrate on matters in which they arise – in effect, a constitutional court.

Power to transfer sovereignty from the State will further be a function of the State's constitution. Some States may be incompetent to enter into federative treaties, not as a matter of international law, but owing to limitations imposed by their constitutions. Others may encounter difficulties which are less abrupt. The sovereignty of the new authority derives from that of the State. However, if the State itself is by constitutional proscription incompetent to infringe certain matters, for example fundamental → human rights or guarantees emanating from the rule of law or of *Rechtsstaatlichkeit*, then that State can, as a matter of its municipal law, surrender no sovereignty by which the new authority may do so. In the event of their breaching such a constitutional guarantee, rules created by the new authority will be binding in international law, binding in its own (federal) legal order, but may not be effectively binding upon the authorities of the original State in so far as they are competent to apply them (see e.g. the decisions of the German Bundesverfassungsgericht of May 29, 1974, BVerfGE 37, 271 (→ Internationale Handelsgesellschaft Case); of the Italian Corte Costituzionale (No. 232) of November 22, 1975 (1976) 128 Giur.It. I, 209; and of the English Court of Appeal in Macarthys Ltd. v. Smith (1979) 3 All E.R. 325).

The problem is most acute in dualist States in which the source of the new legal order in municipal law is not the treaty itself but its incorporating statute. Such device, however, bears the hallmark of delegation and hence confederation. If by its constitution a State reserves the right to secede from the system (→ Secession), and that right can be effectively implemented whatever the breach of the founding treaty or the system's legal order, the integrity of the total community cannot be fully guaranteed. A federative pact requires a true shift in the *Grundnorm* to the constituent treaty, even to the extent of constitutional revolution in the municipal legal systems of the component States if there be need. If component States of a larger community do not derogate from the latter's norm because they are unable to do so, and not merely because they choose not to, the community is at least in part federal and acquires a degree of original personality of its own.

(b) External questions

Federations have always had difficulties in effective participation in the international community owing to the mutually antagonistic requirements of traditional international legal theory and the divided sovereignty within the system (→ Federal States). Typically, they arise where the treaty-making power rests exclusively with one (traditionally the central) sovereign authority and the treaty implementing power, at least in some areas of jurisdiction, with another (see A.-G. Canada v. A.-G. Ontario (1937) A.C. 326 (PC)). Neither authority is competent to act upon the behalf of the total community; external sovereignty can coexist concurrently within a federation only in Soviet theory (→ Soviet Republics in International Law). The fundamental norm, the constitution of the total community, creates two autonomous and sovereign legal orders. If neither may invade the jurisdiction of the other, and either is incompetent to act in international law, the result is a *non possumus* in the international plane, need of recourse, in treaty matters, to the inequitable and cumbersome → federal clause, or the necessity of a mechanism by which the two may speak for the total community.

A measure of international personality for the component states of mature federations is now generally recognized in international law. Draft Art. 5(b) to the → Vienna Convention on the Law of Treaties (UN Doc. A/6309/Rev. 1), which was ultimately repressed, sought to codify their right to enter into treaties if this was permissible within the federal constitution. The existence of one, undivided personality is no longer a strict requirement of international law; divided sovereignty can manifest itself in the external as well as the internal sphere, provided that authority to do so can be found in the constitutive instrument. For integrating international communities, this is at least implicitly manifestly the case.

An international treaty may confer international personality upon a new entity either expressly (see e.g. Art. 210 of the treaty establishing the → European Economic Community (EEC)) or by implication (→ Reparation for Injuries Suffered in Service of UN (Advisory Opinion);

→ Effectiveness). Generally, an authority which is competent in a sphere within the system will enjoy competence in that sphere's external functions (→ European Road Transport Agreement Case). The matter is more difficult in an integrating community owing to the fluidity of sovereign authority; in this, questions of *vires* might be resolved by the court of compulsory jurisdiction (see e.g. Art. 228 of the EEC Treaty), although its jurisdiction will not extend to bind third States. The issue of personality of the component States is not apparent in that sovereignty is flowing from them, with whom third parties have traditionally dealt; in effect, the burden is on the new central authority to establish jurisdiction. As with mature federations, the personality of the different levels of authority is legitimized through → recognition by third States. But particular problems arise in that emerging competence in a sphere hitherto within the jurisdiction of the component States will engender a shift in the locus of State responsibility (→ Responsibility of States: General Principles).

3. *Evaluation*

Most mature federations emerged during the early period of → decolonization and were therefore the result of constitutional legacies bequeathed by the imperial powers. Federal arrangements emerging through treaties amongst modern and hitherto sovereign States are new and wholly remarkable phenomena. Precisely because States have enjoyed a monopoly upon international personality, it is they which must breathe first life into the new entities, while this very monopoly makes the latters' existence as members of the international community precarious. Nevertheless, growing interdependence and integration trends have engendered communities which are not fully States, but which are qualitatively more than international organizations, to which international law must adapt. Owing to the heterogeneity of the international community, foreseeable developments will occur at the regional level only. Yet one might discern the embryo of a type of global federalism in the existence and further expansion of rules of → *jus cogens*, the emerging network in a number of areas of universal multilateral treaties (→ Treaties, Multilateral), and the rapid growth of new → customary international law, all of which contribute to the erosion of the absolute sovereignty of the State. But even these devices will require enforcement mechanisms if they are to become effective, and, infinitely more remote, a compulsory, permanent and universal law-creating authority if they are to become federal.

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FOREIGN POLICY, INFLUENCE OF LEGAL CONSIDERATIONS UPON

1. *Introduction*

The role of → international law in → international relations is not easily defined. Since the rise of the modern → State system, much has been written on the topic but disagreement has been widespread, due principally to the changing nature of international society, differing perspectives on the relations between States, and controversy over the nature of international law itself.

Since international society has greatly changed in the present century, the writings of even the most highly respected earlier commentators must be read in historical context. Modern writers have routinely cited the Russian Revolution of 1917, the multiplication of international organizations since 1900 (see articles on → international organizations), the post-World-War-II era of → decolonization, the advent of weapons of mass destruction (→ Nuclear Warfare and Weapons), the development of high technology, and the use of global communication and surveillance systems (→ Spacecraft and Satellites) as turning points in

the development and, by necessary implication, the role of international law.

Even commentators writing contemporaneously have differed markedly in their views. Their differences reflect not only differences in ideology along East-West and North-South lines, but also differences within particular geo-political groups. Differences within groups can be attributed to differing views on the nature of international law and to contrasting professional perspectives, such as those of the diplomat, administrator, political scientist, international lawyer, and others.

2. The Views of Modern Writers

Myres McDougal and Hans Kelsen, two highly respected jurists, may be taken as representative of two poles of modern Western thinking on the nature and role of international law (→ International Law, Doctrine and Schools of Thought in the Twentieth Century). These two jurists attach different relative weight to the international political context of any given international legal problem. This difference is exemplified in the degree to which each is prepared to accept policy considerations as relevant in the law-making and law-applying processes. At the risk of oversimplification, the views of these jurists may be summarized as follows.

Kelsen posits that international law functions in a hierarchical manner, analogous to that of domestic law, according to norms initially sanctioned by formal agreement and custom. Taking a somewhat idealist positivist position (→ Positivism), Kelsen views international law as a system in which political considerations exert little or no influence on the interpretation of normative phenomena or the provisions of → treaties. Calling for scientific objectivity, he sees the position of the expert legal adviser as being that of an enunciator of objective interpretation (→ Interpretation in International Law). For Kelsen, an attempt to justify the non-application of existing law when its application would conflict with some interest which the adviser considers to be in the interest of his State, represents a "political" approach to international law. If the adviser adopts a policy corresponding only to the real or assumed interests of his State and restricted only by its actual power, he does not present a scientific theory of international law but a "political ideology".

McDougal, on the other hand, puts forward a concept of international law which, it has been said, reduces traditional distinctions between international law and international politics. McDougal views international law from a policy-oriented perspective, taking full cognizance of the fact that international law is, to a large extent, non-hierarchical. From this perspective, international law is freed of the traditional constraints of a formal, objective scientific discipline and becomes instead a sophisticated system of horizontal interactions between States and other international actors. The overall goal is to achieve an international law of human dignity (see articles on → Human Rights). It is the relevance of international law in the broader international decision-making process, rather than its strictly normative character, that is stressed. On McDougal's approach, the policy-maker (and the legal adviser) enjoys the possibility of choosing from among various interpretations of international law those which may be seen as most effectively furthering not merely national interests but also the interests of the world community as it strives to develop a law of international human dignity.

Both Kelsen and McDougal have been criticized by Richard Falk, whose own views have not been beyond controversy. While praising Kelsen's internally consistent analysis, Falk criticizes Kelsen on the ground that his approach is based on an inappropriate development of Austin's blue-print of a hierarchial system of domestic law. Falk argues that Kelsen's is an obsolete model of international law which would only be viable if there existed a supranational authority. Falk criticizes McDougal on the ground that McDougal is unrealistically nationalistic and tends to promote acrimonious debate over opposing ideologies. For Falk the question is: How can the relevance of international law to the conduct of international relations be maintained without sacrificing its autonomy altogether? To put it more precisely, Falk goes on to ask: What is the most beneficial compromise between such autonomy and relevance, given the existing character of the international legal order (→ International Legal Community)? Falk himself adopts a position between Kelsen and McDougal. He prefers an approach which is normative in its treatment of the → use of force but which takes into account the exigencies of current international political realities.

Divergences in attitude along national lines among Western jurists have also been said to exist, although their magnitude and significance has not been the subject of widespread agreement. Oscar Schachter, a respected American jurist, writes that the prevailing British attitude is one of rule-oriented positivism, whereas the prevailing American attitude is one which places more emphasis on policy orientation. Elihu Lauterpacht, a British jurist, and Falk, an American, contend, for different reasons, that those divergences which have been perceived to exist are largely ones which deserve little emphasis when compared with the different approaches taken by States with more disparate political leanings.

Less discrepancy currently appears among the views of Soviet bloc jurists although, during the 1950s, a significant controversy arose as to the existence of discrete bourgeois and socialist international laws (→ Socialist Conceptions of International Law). The latter controversy, between E.A. Korovin and G.I. Tunkin, ultimately ended with the adoption of the latter's view that agreement between States, the basis of the system of international legal norms, precluded the validity of the concept of two international laws. Although socialist principles and norms are thought of as a "higher type" of international law, the basis of which is being laid in relations between States of the socialist system and which is going to replace contemporary general international law, the Soviet State, according to Tunkin, never rejected general international law as a whole as the legal basis in relations between States.

Tunkin sees essentially two types of links between foreign policy and international law: as concerns the obligations of States, international law acts as a limitation on foreign policy and diplomacy; as concerns rights, international law acts, on the contrary, as a means of or as support for foreign policy and diplomacy. Tunkin notes that the distinction between these two links is not absolute: rights are limited and each limit imports a duty not to breach that limit.

Commentators from Asia, Africa and Oceana have also, especially in the past two decades, come to the fore in the debate about the role of international law. These jurists have propounded a view of international law tied to the development of a new → international economic order and to the development of an international legal order which takes into account the myriad new voices speaking on the international place at various international fora. Although several commentators from these countries have adopted views leaning towards either Western or Soviet bloc views, many others have taken positions of non-alignment in which questions of international law are decided on an issue-by-issue basis (→ Non-Aligned States).

On each of the three major categories of views outlined above may be superimposed differences attributable to the professional roles and perspectives of the actors. Diplomats and makers of foreign policy have not in the past generally appeared to consider international law important: International law was perceived as convenient for formalizing routine diplomatic practices so as to give free rein to the art of → diplomacy; however, it was infrequently a significant restraint on a nation's freedom to pursue important national interests as seen by diplomats and officials; indeed, if those who conducted foreign policy appeared to give law a significant role, they were likely to be condemned for their "legalistic-moralistic approach" to international problems. On the other hand, writers and students of international law tended to begin their inquiries with international law and to end there: law was law; all of it had to be observed, and there was a need for much more of it.

3. Foreign Policy Decision-Making

More illustrative than discussion of the generalized role of international law in international relations is reference to the sharply contrasting processes in which foreign policy decision-making usually takes place: the bureaucratic decision-making and the crisis decision-making processes. Obviously decision-making generally takes place in one or the other of these environments.

(a) Bureaucratic decision-making

In day-to-day routine interactions between → governments, high officials are rarely involved and international intercourse proceeds along lines which have been established by custom or are prescribed by mutual agreement. These relations often take place between officials with limited legal training since a legal training has often,

perhaps erroneously, been deemed non-essential for the conduct of routine relations. Customs are followed largely because of the benefit of → reciprocity afforded by a commitment to international → comity.

Where questions of international legality arise, however, legal advice must be sought before relations may proceed. Modern nations have developed three major systems for the provision of legal advice in non-crisis situations: (i) the separate cadre of lawyers system (the United States, the United Kingdom, and the Netherlands); (ii) the lawyer diplomat system (Canada, the Federal Republic of Germany and Japan); and (iii) the centralized legal services system (Nigeria and Malaysia).

The degree to which legal advice gained from the relevant national advisory systems is brought to bear on the decision-making process depends on a number of factors, not the least of which are the personalities and situations of the actors involved in the process. Other factors include the view of the nature of international law which is held by the advising person or body, the degree to which the decisions potentially affect the perceived national interest, and the deference with which the country in question holds its reputation as complying with existing international law. Where a country seeks to support the establishment of a new custom or the alteration of an old custom, and is willing to accept the consequences of international protest, this too will bear heavily on the decision-making process.

(b) Crisis decision-making

In crisis situations, decisions must be made quickly: normal or routine advisory patterns may be altered or abandoned. This occurs not only for reasons of expediency but also because the very nature of a crisis situation implies that significant national interests may be at stake (→ Vital Interests). The role which international law plays in such a situation obviously varies, but, at the very least, it may be said that consideration of the principles and norms of international law broadens the perception of the government decision-maker. Perhaps, more subtly, international law may be seen to act in concert with diplomatic and other efforts at reconciliation. As noted by Falk, law in these circumstances provides a technique for narrowing controversial claims, for communicating the precise nature of the demand, for paying maximum respect to community expectations about the right form of action, and for encouraging a rival to respond with arguments rather than with weapons.

In the Suez crisis of 1956, the Anglo-French → intervention was commonly understood to have been a violation of international law (→ Suez Canal). Although the joint American-Soviet condemnation may be explained in political terms, considerations of international law (inconsistency with the → United Nations Charter) figured prominently in the publicly pronounced reasons both for the condemnation and for the withdrawals. In the Cuban missile crisis of 1962, when United States decision-makers chose not to undertake a direct invasion or bombing of Cuban territory, concern for maximum legality and maximum appearance of legality, and fear of political reactions to a violation of the most political norms of international law, helped persuade the United States to adopt its more moderate quarantine (→ Cuban Quarantine). In the Grenada crisis of 1983, the United States offered elaborate legal justifications for its military activities, including references to the Charter of the → Organization of American States, the UN Charter, and legal principles pertaining to the protection of nationals in foreign countries.

4. Conclusions

The influence of international law on relevant inter-State relations is frequently limited but rarely insignificant. Principles and rules of international law increasingly provide the framework and some of the content of governmental positions put forward in multilateral fora and in bilateral diplomatic representations. In an age of complexity and dynamism, the international legal system promotes fixity, regularity and continuity in inter-State relations while at the same time giving formal expression to the creation of new standards and norms of behaviour. Since the end of World War I, its influence in tempering Jellinek's "long periods of wild anarchy" has markedly increased.

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R.ST.J. MACDONALD

FOREIGN RELATIONS POWER

1. Definition

The foreign relations power is the term that has come to be used to describe the constitutional authority of a government to conduct relations with other States and to address the implications and consequences of those relations. The scope of that authority, the organs of government in which it is vested, and any limitations to which it may be subject, may differ from State to State and from time to time. In general, how and by which organs of government this authority is exercised is a matter of → domestic jurisdiction not of international concern, but under → international law, a State is required to maintain its capacity to conduct foreign relations and is responsible for any default in its international obligations that might result from constitutional deficiencies in the foreign relations power of its government (→ Responsibility of States: General Principles).

The capacity to conduct foreign relations is a characteristic of Statehood under international law (→ State), although some States have reduced their relations with other States to a minimum, and sometimes a State delegates the conduct of its foreign relations to other States (e.g. → Liechtenstein). Some States have sought to harmonize their foreign relations law as part of programmes for harmonizing their laws generally (→ Unification and Harmonization of Laws). State constitutions commonly deal explicitly with the foreign relations power, but even where the power is not specifically declared, the government's authority to conduct foreign relations will be deemed to be inherent in Statehood and international → sovereignty.

The foreign relations power comprises both the power to participate as a State in → international relations and to act domestically in ways that have substantial significance for international relations

or have other international consequences. It includes: the power to establish, maintain or determine the character of diplomatic relations with other States (→ Diplomatic Relations, Establishment and Severance); to make → treaties and other international agreements and participate in the creation of → customary international law; to join and participate in international organizations; to make and respond to international claims and to resort to means for resolving disputes about them; to declare and wage → war or to restore and maintain peace, and generally, to determine the State's attitudes and policies toward other States; to carry out the State's international obligations and responsibilities and to pursue the State's rights and privileges under international law; and to take domestic measures, by legislation, by executive or administrative action, or by adjudication, necessary or appropriate to implement or regulate the State's foreign relations.

2. *Place in the Distribution of Governmental Authority*

Although not so described until recently, the foreign relations power of government is as old as → diplomacy, but it acquired discrete identity with the differentiation of functions of government and the growth of constitutionalism prescribing and allocating these functions. Responsibility for foreign relations was commonly accepted to be an executive function, although John Locke characterized it as "federative" but linked to the executive function. Even after the development of parliaments and the growth of parliamentary authority, foreign relations remained largely an executive responsibility.

The foreign relations power developed differently in different countries, as a function of relations between the executive and the legislature. Today, in autarchic or oligarchic governments the foreign relations power is integral to governmental authority generally. In parliamentary systems, too, the foreign relations power is usually in the same hands as other governmental authority, those of the prime minister and cabinet. However, in States that have a presidential system or that are otherwise committed to "separation of powers" or "checks and balances", the allocation of foreign relations power has particular significance. In such States the foreign relations power is generally part of the executive power. In still other States the power is "mixed" and in some respects the allocation is uncertain.

Thus, in the United States, for example, the Constitution expressly gives the President the power to appoint ambassadors and authority to receive those of other States, as well as the power to make treaties. Indeed, some have found in the constitutional provision that "the Executive power shall be vested in the President" (U.S. Const., Art. II, Sec. 1) a grant to the President of all foreign relations power, subject only to derogations, limitations or modifications expressly provided. The President is also the "sole organ of the nation in its external relations, and its sole representative with foreign nations" (John Marshall). At the same time, the power to regulate commerce with foreign States and the power to declare war are vested in Congress. And Congress has authority to impose taxes to provide for the common defence and the general welfare and thus it is Congress that determines whether to provide economic or military assistance to other States.

The distribution of the foreign relations power in the United States is not, however, wholly "separated" or definitively allocated. While the conduct of foreign relations is vested in the President, he requires the consent of the Senate to the appointment of ambassadors or other diplomatic officers, and the consent of the Senate (with two-thirds of the Senate concurring) to the making of any treaty. (Alternatively, it is accepted, the President can make international agreements with the approval of both houses of Congress.) Some international agreements can be made by the President on his sole authority, but there is no authoritative guidance as to which agreements the President can make without the consent of the Senate or the approval of Congress (→ Executive Agreements). The same subject, moreover, can be regulated by treaty or by legislation, and the effect of a treaty is sometimes approximated by legislation conditioned on → reciprocity. In the United States, power to declare war, or otherwise to decide for war, is delegated to Congress, and presumably Congress can also declare an end to war; but the President (with the consent of the Senate) may make peace by treaty (→ Peace Treaties). And in his capacity as commander-in-chief he may conclude an

→ armistice which often amounts to or becomes a treaty of peace. The allocation to the President of the authority and power of the commander-in-chief, while the power to decide for war or peace lies in Congress, has also led to uncertainties, as Presidents have claimed (and Congress has sometimes denied them) power to deploy armed forces for foreign policy purposes short of war. See particularly the War Powers Resolution enacted by Congress in 1973 (50 U.S. Code 1541–1548 (1973)), in which Congress declared that the Constitution limits Presidential authority to engage U.S. forces in hostilities and sought to regulate Presidential involvement in hostilities.

The foreign relations power often depends on other powers. Even where the foreign relations power is essentially executive, it usually depends on parliamentary implementation by legislation or appropriation of funds. In some parliamentary systems, for example the United Kingdom, international agreements have no character as domestic law and are not given internal effect by the executive or by the judiciary until Parliament legislates to carry out the international undertaking. In the United States, international agreements are law of the land if they are "self-executing" in character and are intended to become effective without legislative implementation (→ Self-Executing Treaty Provisions). (For the place of international agreements in municipal law, see → International Law and Municipal Law; cf. → Sei Fujii v. California.) Even where the foreign relations power is essentially executive, the legislature cannot avoid impinging on foreign relations if only because laws of general applicability often apply to transnational matters or to domestic matters that affect relations with other States, for example, the application of laws to foreign nationals (or foreign governments) engaged in local activities (→ Aliens; → Aliens, Property). The role of the two political branches is further intertwined if, as in the United States, the President has a significant role in the legislative process by virtue of his power to veto legislation.

Courts, too, have a part in the foreign relations power. In States generally, courts exercise their ordinary jurisdiction in foreign relations matters as in others, deciding cases involving foreign nationals and even foreign States. They interpret international agreements as well as legislation relating to foreign or transnational matters. Usually they have authority to determine and apply the principles of international law, or the provisions of international agreements, to cases before them, though different systems differ as to the deference or weight due to the Executive Branch in such matters. In some States the courts have authority to give advisory opinions. Courts also often develop and apply principles of → comity in respect of foreign States. They may also have authority to develop and apply special "judge-made" law, such as the principles of → private international law, including those governing the conflict of laws. In the United States, courts have developed doctrines such as the → act of State doctrine, that courts will not sit in judgment on the acts of a foreign sovereign in its own territory (→ Sabbatino Case, but cf. "the Hickenlooper Amendment", 22 U.S. Code § 2370 (e)(2) (1966 Supp.)). A similar doctrine, with some differences, has been applied by courts in Australia, Canada, France, the Federal Republic of Germany, Italy, Japan, the United Kingdom and other States, and by the → Court of Justice of the European Communities.

Where courts have power to review the constitutionality of acts of the executive or legislative branches, courts may also review such political acts relating to foreign relations. In the United States, for example, in principle courts may declare a treaty provision unconstitutional and not enforceable in the United States; they may also invalidate executive measures or acts of Congress relating to foreign relations. But the courts have been reluctant to interfere unduly with foreign affairs and they have developed a doctrine that they will not resolve certain "political questions", including a number relating to foreign relations.

In general, the constitution of a State does not forbid the government to violate the State's international obligations; the constitution usually permits the government to denounce a treaty or violate some provision of a treaty or some principle of international law. Therefore, if either of the political branches performs an act within the scope of its constitutional authority that constitutes a breach of a treaty or of a principle of international law, it is not *ipso facto* a violation of the constitution and it will not be invalidated by the courts. Some constitutions, however, provide

that international obligations shall supersede domestic law, and municipal courts shall give effect to such obligations even in the face of subsequent national legislation.

3. *Responsibility of Central Government*

The foreign relations power is generally vested in the central government and is denied to constituent governmental units. In some → federal States, however, a certain role or voice in foreign relations may be lodged in constituent units. In the United States, for example, the states are constitutionally forbidden to maintain diplomatic relations with foreign States, to make treaties or to wage war (unless invaded or in imminent danger). A state may not unduly burden commerce with foreign States, or intrude on the foreign relations or contravene the foreign policy of the United States. But a state may make some agreements or compacts with foreign States if Congress has consented. Even without express Congressional consent a state may make agreements that do not diminish the political authority or engage the political responsibility of the United States, such as agreements for local cooperation in border areas or for cultural cooperation with counterparts in other nations (→ Cultural Agreements; → Cultural and Intellectual Cooperation; cf. → Transfrontier Cooperation between Local or Regional Authorities). In Canada, too, the provinces, although they may not make international agreements with foreign States, may enter into limited arrangements with constituent units of other States. In Switzerland, cantons may make limited agreements with foreign States on local matters. In the Federal Republic of Germany, the *Länder* may make agreements with foreign governments, with the consent of the federal government, on matters that are within the legislative authority of the *Länder*.

The federal character of the United States imposes few limitations on the conduct of foreign relations by the central government. The federal government may deal by treaty with matters that in the absence of treaty might be reserved to the states, though a treaty may not destroy or modify state governments or alienate state territory without its consent. The federal government may take measures necessary and proper to carry out its international obligations, including legislation that in the absence of treaty would be beyond the federal legislative power (Missouri v. Holland, 252 U.S. 416 (1920)). In Canada, on the other hand, legislation by the provinces is required on a subject that is within the legislative provincial authority under the Constitution.

In general the central government may leave some implementation of its international obligations to constituent units but it remains responsible internationally. Some federal States have sought to modify their international obligations under international agreements by a "federal state clause" that would excuse the State from responsibility in respect of matters that are deemed to be within the legislative jurisdiction of the constituent units, but such clauses have been increasingly resisted (→ Federal Clause, Colonial Clause). See, e.g., the express provision in Art. 50 of the International Covenant on Civil and Political Rights that the "provisions of the Covenant shall extend to all parts of federal States without any limitations or exceptions" (→ Human Rights Covenants).

Different distributions of authority between central and constituent authorities in respect of the foreign relations power have prevailed in various imperial or commonwealth arrangements, for example, those of Great Britain (→ British Commonwealth). In the Soviet Union, the foreign relations power is exercised by the central government but at least some of the constituent republics have their own foreign relations power, maintain separate diplomatic relations with some other governments, and are even members of the → United Nations (→ Soviet Republics in International Law).

4. *Relation to International Law*

In general, how a State determines or allocates the foreign relations power of its government is a municipal constitutional matter, not of international concern. But a State is responsible under international law to assure that its international obligations are respected and carried out. The State is responsible if it has failed to give to its government the authority to carry out its international obligations, or if the allocation of authority is inefficient and leads to violations of international obligations. A State is responsible also if its constitutional system imposes limitations on the

government that prevent it from carrying out international obligations. Thus, it is no defence under international law for a State's failure to carry out an international obligation that the obligation is contrary to a provision in its constitution or that the political branches have been enjoined by the courts not to carry it out. In respect of an international agreement in particular, it is not a defence to a claim for breach of the agreement that it was concluded by unconstitutional procedures or that it is substantively unconstitutional, except where the unconstitutionality is so manifest that the other party may properly be charged with knowledge of the fact (See → Vienna Convention on the Law of Treaties, Art. 46(1); → Treaties, Validity). In general, the constitutional jurisprudence of a State is likely to be sufficiently complex that it would be difficult to conclude that although the government of that State in effect claimed authority to make the treaty, inconsistency with its constitution was so manifest that the other party to the Convention can be denied the benefits of the treaty.

The character, scope and limits of the foreign relations power raise significant issues for political theory and constitutional jurisprudence, implicating particularly the authenticity of commitment to popular sovereignty and democracy. Where autarchy or oligarchy prevails, whether constitutionally or in extra-constitutional emergency, the foreign relations power blends into power generally and is subject to no additional restraints. Even in authentic democracy with popular government, the foreign relations power tends to be less subject than are other governmental powers to control and limitation, whether by parliament, public opinion, or by constitutional courts. The issues of foreign relations, even when they do not lead to hostilities, raise passions of patriotism and nationalism, and encourage large delegation if not abdication by legislature and people. Inevitably, perhaps inherently, foreign relations power accrues and accretes to the executive, and the best laid constitutional plans and prescriptions have apparently not succeeded in effectively checking that growth. But periodically political societies react to non-responsible growth and seek constitutional curbs or procedures that will enhance the likelihood of balanced judgment and wider perspectives on national interests in foreign relations.

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FREE CITIES

1. Notion

Free cities may be defined as State-like political and territorial entities and → subjects of international law which, although independent in principle, do not dispose of the full capacity to act according to general international law but are restricted in this respect by a basic treaty. This degree of → internationalization depends wholly on the individual settlement. A characteristic legal feature of free cities is that States and/or international organizations are charged with the → guarantee of their existence and the control of their activities. Politically, the creation of free cities has always been the outcome of a compromise between competing territorial claims of the interested States which, by the settlement, avoid placing the area in question under the exclusive → territorial sovereignty of one of the rival States. This also draws a clear distinction between free cities on the one hand and, on the other hand, free zones or → free ports which have no political existence of their own but are areas belonging to a certain State which, however, has agreed to an international statute concerning these areas.

2. Historical Evolution

The roots of the notion go back to the times of the Holy Roman Empire where the term free cities denoted towns like Augsburg, Basel, Worms and Cologne which had succeeded in attaining independence from the domination of a prince or

bishop and had established a kind of republican government, while still remaining part of the Empire. For different reasons, most of the free cities subsequently lost their independence and were incorporated into the several German states. When, as a result of the → Vienna Congress (1815), the German Confederation was founded, only four free cities (Bremen, Frankfurt am Main, Hamburg and Lübeck) had survived and became members of the Confederation.

The mixture of independence and attachment which, over the course of time, has characterized free cities probably was the reason for the choice of this institution when, in 1815, Austria, Prussia and Russia, in order to solve the Polish question, entered into a treaty founding the Free City of Cracow. Art. 1 of the treaty, later incorporated into the Final Act of the Congress, stipulated: "La ville de Cracovie avec son territoire sera envisagée à perpétuité comme cité libre, indépendante et strictement neutre, sous la protection des trois hautes parties contractantes" (Martens NR, Vol. 2, p. 251). The Free City of Cracow existed until 1846 when it was annexed by Austria with the consent of the two other State parties (→ Annexation).

After World War I, the creation of another free city reflected a territorial compromise. According to Art. 102 of the → Versailles Peace Treaty (1919) (CTS, Vol. 225, p. 188) the Principal Allied and Associated Powers established the town of → Danzig as a free city and placed it under the protection of the → League of Nations. Similarly, the peace treaty with Italy after World War II provided for the creation of the Free Territory of → Trieste (UNTS, Vol. 49, p. 3, Arts. 21 and 22; Art. 4, Annexes VI to X; → Peace Treaties of 1947). In this case the → United Nations Security Council should have played a decisive role, but it was not able to agree on the appointment of a governor and the régime was never established. Consequently, the military occupation of the territory lasted until 1954 when a memorandum of understanding was signed in London by Italy, Yugoslavia, the United Kingdom and the United States, containing the agreement on the factual partition of the territory between Italy and Yugoslavia (UNTS, Vol. 235, p. 99). Only the treaty of Osimo (1975; Gazzetta Ufficiale della Repubblica 1977, No. 77, Supp., p. 3; in French) between the two countries juridically brought to an end the status of the free territory and the official involvement of the Security Council.

Thus, no free city in the sense dealt with here exists today. A proposal of the Soviet Union (1958) to solve the → Berlin question by the conversion of West Berlin into an independent political unit, a free city, did not elicit favourable reactions by the three Western Allies and the Federal Republic of Germany. Still, this proposal shows that the political concept of free cities may still be put on the conference table when territorial problems are at issue.

3. Legal Régime and Status

A free city is the result of a political action of States which undertake to create the new entity by a treaty which is meant to be the basic element of the city's legal position. As the free city cannot participate in its own establishment, this treaty has a totally different meaning from treaties by which States agree to unite and to form a new entity.

The treaty establishing a free city does not, it is true, impede the creation of a subject of international law, but it puts organic limitations on its legal capacities. This particularly concerns the conduct of foreign affairs (→ Danzig and ILO (Advisory Opinion)), but also the constitutional autonomy. Thus, the three Powers drafted the constitution for the Free City of Cracow in 1815, and imposed several amendments later on. The constitution of the Free City of Danzig was drawn up by the Danzig Legislative Assembly in agreement with the High Commissioner appointed by the Council of the League of Nations. The constitution was placed under the guarantee of the League which had to assent to all amendments. Annex VI to the Treaty of Peace with Italy of 1947 contained similar provisions with regard to the constitution of the Free Territory of Trieste, expressly limiting the capacity of the Territory's parliament to act according to the rules of the statute for the Territory.

For understandable reasons, the basic treaties or the constitutions of free cities usually provide for the → neutralization and → demilitarization of the area or, at least, subject any military use to the approval of the guarantor. Likewise, the Soviet proposal in 1958 aimed at the demilitarization of West Berlin.

The way the internationalization of free cities is implemented shows a significant development from Cracow to Trieste. While in the Cracow example the three most interested States themselves played the role as guarantors of the existence and the régime of the free city, this task devolved later upon the international organization charged with the maintenance of international peace and security, i.e. the League of Nations in the Danzig case or the → United Nations in the Trieste case. Moreover, these two cases indicate an interesting legal progress corresponding to the change from the League of Nations to the United Nations. Concerning Danzig, the international organization was charged principally with the role of an arbiter between the conflicting rights and interests; however, concerning Trieste, the UN Security Council was authorized to become more involved in the administration of the Territory itself. A last step in this direction would have been accomplished by the realization of the United Nations' proposal (UN GA Res. 181(II) of November 29, 1947) on the status of → Jerusalem which purported to put the area under the direct administration of the → United Nations Trusteeship Council leaving aside, however, the concept of a free city because of the lack of a separate international personality of the area.

In all cases, the free cities did not enjoy a long life. Moreover, the régime of the Free Territory of Trieste never became operative and was brought to an end on a consensual basis by the partition of the territory.

4. Evaluation

The reasons for the breakdown of all settlements providing for free cities result from the deficiencies inherent in the political concept itself. A first defect is the situation which provokes the idea to establish a free city. A territory subject to intense dispute will always be at stake; the rival States will only provisionally renounce their claims awaiting the opportunity to carry them through. This causes a lasting instability of the régime. A second shortcoming lies in the free city's territory always being artificially separated from the surrounding area, rendering impossible or at least impeding the creation of a flourishing economy. Perhaps the heaviest liability of the free city concept is the lack of national consciousness of the population concerned. It feels itself part of one of the competing States and therefore supports the ambitions of that State, thus adding only another uncertainty to an already unstable situation. This sociological fact corresponds with the crucial point of a modern legal assessment.

The establishment of free cities has never been in accordance with the principle of → self-determination of peoples. There is no doubt that today, now that this principle has evolved into a legally binding norm, the disrespect of self-determination represents not only a legal obstacle for the creation of a free city, but also a political reason for the failure of this concept. This holds true even more so in times when the dispute solving capacity of the → Great Powers has evidently diminished. Nor is the organizational structure of the world community yet developed enough to permit the United Nations to replace the States in the solution of their territorial disputes.

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FRENCH TERRITORIES, DECOLONIZATION *see* Decolonization: French Territories

GERMANY, LEGAL STATUS AFTER WORLD WAR II

1. General Remarks

The legal status of Germany after the unconditional surrender of the German army on May 8, 1945, is characterized by: (i) the occupation of Germany by the four main Powers (→ Germany, Occupation after World War II), assumption of the supreme authority in Germany by the Four Powers, separation of Germany into four different zones of occupation, assignment of Germany's eastern territories to the administration of Poland and the Soviet Union, special administration of → Berlin, and agreement between the Four Powers to reserve the final delimitation of Ger-

many's → boundaries and other necessary regulations to a → peace treaty; (ii) the formation in 1949 of two German States, the Federal Republic of Germany and the German Democratic Republic, and the restitution in 1955 of German sovereignty in both German States, except for those rights and responsibilities retained by the Allied Powers in those States; (iii) a series of treaties of both German States with Western and Eastern States concerning the normalization of relations notwithstanding the fact that a peace treaty is still pending (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)), the membership of both German States in the → United Nations, and the conclusion in 1972 of the treaty governing the basis of relations between the two German States; (iv) the Quadripartite Agreement on Berlin of September 3, 1971 (UNTS, Vol. 880, p. 116).

From a legal point of view, the status of Germany is still rather controversial. Many issues are related to the questions: whether Germany (the German Reich) continues to exist as a → State (i.e. a legal personality) and if so what its rights, responsibilities and duties are; whether a → German nationality, implying a → nationality of Germany as a whole can still be upheld and what the relationship between that nationality and the nationalities of both German States is; whether the relationship between the two German States is of an international nature or is at least partially intranational; whether the frontiers of Germany may still be regarded as provisional, their final delimitation being reserved to a peace treaty; and whether the Allied Powers have a responsibility to take the necessary steps to grant the right of → self-determination to the people of Germany as a whole so as to enable them to express by vote their opinion on the reunification of Germany. Germany is one of the → divided States (see → Korea and, formerly, → Vietnam) which are separated by different political régimes (socialist-communist in the East; democratic-capitalist in the West). The fact that this separation entails incorporation in the hegemonic structures in the East as well as in the West and international control of Germany as a whole by the Four Powers has so far represented an effective obstacle to the expression of self-determination by the German people as a whole. As long as this situation persists, there is not only no realistic hope for a reunification of Germany, but no possibility of a final settlement of the unsolved legal questions related to the status of Germany either. For these questions it is still significant that a peace treaty between Germany and the Four Powers is lacking and that Germany as a whole is still subject to the Four Powers' control and responsibility.

2. The Continued Existence of the German State after 1945

Neither the declaration of unconditional surrender by the German army on May 8, 1945 nor the military occupation of Germany and its division into different zones has resulted in Germany's ceasing to exist as a State. The German Reich has continued to exist despite the fact that after 1945 it was organized only on a local level and not able to act on a central level. The situation of a → *debellatio*, i.e. a complete extinction of any State order, did not occur (→ States, Extinction). The opinion of Kelsen that Germany ceased to exist as State on May 8, 1945, in some ways a consequence of his identifying State with legal order, is not convincing. The four Allied Powers did not establish an allied → condominium on *terra nullius* in Germany. They lacked the relevant legal intent either for a *debellatio* or for an → annexation. Despite the fact that the French position after 1945 reveals some sympathy for the view that Germany as a State is defunct, a position which most of the eastern European States were also inclined to share, the overwhelming majority of States and State practice after 1945 have proceeded on the assumption that Germany as a State has continued to exist.

In 1945 all three requirements of Statehood, i.e. State authority, a national people and a national territory, were present in Germany. The State authority of the German Reich was not completely defunct but continued on a local level as German State authority applying German law under the military occupation. German State authority was reorganized at the Länder (state) level immediately after the occupation of Germany. It is generally recognized that even the impossibility of exercising State authority during a period of occupation does not entail an immediate extinction of the State (→ Occupation, Belligerent). The con-

tinued existence of Austria after 1938 and of Poland after 1939 are recognized examples of this opinion.

The Allied Powers did not annex Germany. The declaration of unconditional surrender of May 8, 1945 regulated the termination of military action and did not affect the existence of Germany. In the Preamble to the Berlin Declaration of June 5, 1945, the four Allied Governments "assume[d] supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany" (UNTS, Vol. 68, p. 189). This declaration was interpreted as establishing a kind of trusteeship in respect of the continued existence of German State authority. In the same declaration the four allied governments declared that the frontiers of Germany or any part of it and the legal status of Germany or that of any area of Germany would be fixed later. The Potsdam Protocol of August 2, 1945 (BFSP, Vol. 145, p. 852; → Potsdam Agreements on Germany (1945)) provided for the establishment of a central German administration in the fields of finance, transport, traffic, industry and trade, but not for a central German government. Germany was divided into four zones of occupation and the area of Berlin (London Protocol of September 12, 1944, UNTS, Vol. 227, p. 279; with France on July 26, 1945, UNTS, Vol. 227, p. 297), and the control mechanism was regulated in an agreement of November 14, 1944 (UNTS, Vol. 236, p. 359, into force on February 6, 1945). Section VI of the Potsdam Protocol provided for a future territorial change-over of the city of Königsberg and the adjacent territory to the Soviet Union and Sec. IX provided for preliminary administration of the eastern part of Germany by Poland. In both cases the final delimitation of the frontiers and the final regulation of the territorial questions were reserved to a later peace treaty.

The extent to which the Allies regulated and executed occupation authority on behalf of German State authority exceeded the traditional powers of military occupation as defined in Art. 43 of the Hague Regulations on Land Warfare annexed to Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land (BFSP, Vol. 100, p. 338; → Land Warfare). According to Art. 43, military occupation only allows the exercise of a certain amount of State power on behalf of the occupied State in so far as this State is itself unable to exercise such power and to establish order. It has been argued that through the Berlin Declaration of June 5, 1945, the Four Powers also exercised German State authority and not only the powers of military occupation. Since no annexation of Germany was intended, the nature of military power exercised in Germany was quite unusual and of a *sui generis* character. Each occupying power independently exercised all the necessary powers on the central level in its zone; the exercise of this power was from the start clearly divided among the Four Powers. The Allied Control Council of the military commanders in the four zones was not a central government in the sense that the respective commanders in the zones were subject to the Council's orders, but rather was designed to coordinate all measures in the four zones and to provide for uniform legislation. The Kontrollratsgesetze (Statutes of the Control Council) were agreed uniform acts of legislation, but were valid in the individual zones only on the specific authority of the respective military commander. At the time these statutes came into effect, German State authority existed at the Länder and local level under German law, which to a great extent continued to be applied under the allied legislation.

After the unconditional surrender, the German people continued to exist as such despite the fact that many Germans had to leave the eastern parts of Germany (i.e. East Prussia and Pomerania, as regulated in Sec. XIII of the Potsdam Protocol). Their legal status was regulated by the German Reichs- und Staatsangehörigkeitsgesetz of 1913 (German Reichsgesetzblatt, p. 583) and they did not lose their German nationality. Third States also recognized the existence of a German nationality and of a German people in 1945 and later. The Allies did not question the continued existence of a German nationality either. In the case → R. v. Bottrill, ex parte Küchenmeister (1946) (2 All E.R. 434) the Court of Appeal in 1946 came to the conclusion that Germany still existed as a State and that the German claimant

Küchenmeister was still an enemy alien.

Furthermore, from a legal point of view, the measures of the four Allied Powers did not divide the German population. The agreement on the power vested in the Control Council applied to Germany as a whole. In the Potsdam Protocol (Sec. III(A)(9)) central German administrative authorities are mentioned and, according to Sec. III(B)(14), Germany "[d]uring the period of occupation ... shall be treated as a single economic unit". The territory of the German Reich did not in 1945 become the territory of the individual occupying powers, since these latter declared that they did not intend annexation. Therefore the territory of the German Reich did not become the territory of a condominium of the Allied Powers. The territory of the German Reich was subject to an *occupatio bellica* and was not finally separated, not even parts of it, from Germany which continued to exist as a State. Nevertheless, according to the will of the Allied Powers all territorial acquisitions of Germany during the year 1938 and the following years were regarded as null and void. In the London Protocol on the Zones of Occupation of September 12, 1944, Germany is seen within the frontiers of December 31, 1937. The annexation of Austria and the incorporation of the Sudetenland, the Memelland and Alsace-Lorraine, etc., were considered illegal. From the German territory of 1937, some parts of East Prussia (sec. VI of the Potsdam Protocol) and the other areas east of the → Oder-Neisse line (sec. IX(B) of the Potsdam Protocol) were excluded from the Soviet zone of occupation. Northern East Prussia was transferred to the Soviet Union, and Great Britain and the United States undertook to support this transfer on the occasion of a final peace treaty. The area east of the Oder-Neisse line was assigned to the administration of Poland pending the final delimitation of the western frontier line of Poland at a peace treaty conference.

The United States, Great Britain and the Federal Republic of Germany have always considered the agreement concerning the administration of Poland as provisional and only related to the exercise of territorial power (*Gebietshoheit*) and not to → territorial sovereignty.

Reparations from Germany were regulated in Part IV of the Potsdam Protocol of August 2, 1945. Reparation claims of the Soviet Union were met by removals from the zone of Germany occupied by the Soviet Union and from appropriate German external assets. The Soviet Union undertook to settle the reparation claims of Poland from its own share of reparations. The reparation claims of the United States, the United Kingdom and "other countries entitled to reparations" were met from the Western zones and from appropriate German external assets. The United States and the United Kingdom renounced their claims to reparation with respect to shares of German enterprises which were located in the Eastern zone of occupation, while the Soviet Government renounced its claims to all reparations in respect of shares of German enterprises located in the Western zones of occupied Germany. Regarding the amount of equipment which had been removed from East Germany, the Soviet Union and Poland waived formally in a declaration of August 1953 in relation to "Germany" any further reparations (cf. Decision of July 7, 1975, of the German Federal Constitutional Court, Vol. 40, p. 141, at 169). With the three Western Powers the Federal Republic had already come to an agreement on February 27, 1953, on a moratorium of all reparation claims in the London Agreement on German External Debts (UNTS, Vol. 333, p. 3). This regulation was confirmed in the Convention on the Settlement of Matters arising out of the War and the Occupation of 1952/1954, Part VI, Art. 1, section 1: "The problems of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter. The Three Powers undertake that they will at no time assert any reparation against the current production of the Federal Republic".

3. *The Establishment of the Two German States and the Restitution of Sovereignty*

The German Reich continued to exist as a State after 1945 under a kind of trusteeship of the four Allied Powers. It did not lose its legal personality. Its rights and duties as a State were unimpaired. The Four Powers in the Allied Control Council acted as a kind of government for "Germany as a whole", a legal construction which only recently was recognized by the Court of Appeal in London referring to a certificate by the Secretary of State

under the State Immunity Act of 1978 (Statutes in Force, Official Revised Edition (rev. to December 31, 1978 – State Immunities Act 1978) International Relations: 1 – Chapter 33). The Foreign Secretary certified that "Germany is a State for the purposes of ... the State Immunity Act 1978, and that the persons to be regarded ... as the Government of Germany include the members of the Allied Kommandatura of Berlin, including the British Military Commandant ..." (Reg. v. Secretary of State for Foreign Affairs – Ex parte Günther Trawnik and Louise Reimelt, The Times, February 21, 1986, p. 4; see W. Heidelmeyer, Immunität und Rechtsschutz gegen Akte der Besatzungshoheit in Berlin, ZaöRV, Vol. 46 (1986) p. 519, at p. 530). Whether an obligation to take the necessary measures for a reunification of Germany is part of the trusteeship of the Four Powers is controversial.

The Four Powers were not able after 1945 to solve the problem of the organization of Germany as a whole. The tensions between the Western Powers and the Soviet Union, the emerging hegemonic structures and the drawing of the Iron Curtain were elements which separated not only the Eastern and Western hemispheres, but more precisely West and East Germany and the western and eastern parts of Berlin. After the failure of the London Conference of the Ministers of Foreign Affairs (November 25 to December 15, 1947) the Soviet Union no longer participated in the activities of the Control Council. After a differing and uncoordinated currency reform in both parts of Berlin and Germany and the → blockade of the land routes to West Berlin in 1948, it appeared that a consensus on the reorganization of a central German government could not be reached among the four Allied Powers. A conference of the prime ministers of all the German Länder in the four zones of occupation did not succeed in building such a consensus either.

As a result of this development, the Federal Republic of Germany (Basic Law, i.e. Grundgesetz, of May 24, 1949) and the German Democratic Republic (GDR), (Constitution of May 30, 1949) were formed. Initially both entities failed to constitute sovereign States, not only because their creation was subject to the approval of the Allied Powers, but because both entities were subject to the continued *occupatio bellica*. In particular, whether "East-Germany" had an independent government and whether the GDR had to be considered as a state was a rather disputed question until the end of the sixties. The House of Lords (Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. and others, [1966] 2 All. E.R. 536) considered the GDR still in 1966 as a dependent or subordinate organization of the Soviet Union without the quality of a state (→ Zeiss Cases).

In respect of the Federal Republic even prior to the entry into force of its constitution, the statute of occupation was promulgated on May 12, 1949 (in force since September 21, 1949) by the Military Governors and Commanders in Chief of the Western zones (H.v. Siegler (ed.), Dokumentation zur Deutschlandfrage, Vol. 1 (1961) p. 858). This statute was issued in order to ensure the accomplishment of the basic purposes of the occupation and defined the powers reserved by the occupiers. The statute of occupation was promulgated, according to its preamble, "in the exercise of the supreme authority which is retained by the governments of France, the United States and the United Kingdom". Nevertheless, it is emphasized that during the period for which continued occupation is required, the three allied governments desire and intend that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation: "The Federal State and the participating Länder shall have, subject only to the limitations in this Instrument, full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions." From the text of the statute of occupation, it was clear that an independent central German authority did not exist. This is one of the reasons why the Basic Law was itself considered provisional. Since neither the Federal Republic nor the GDR were sovereign States in 1949, the question of the continued existence of Germany as a State remained unsettled. In international treaties of that time between the GDR and other socialist States, the government of the GDR is addressed as provisional.

Only after the treaty concerning the relations between the Federal Republic and the three Western Powers of May 26, 1952 (in force since May 5, 1955; → Bonn and Paris Agreements on Germany (1952 and 1954)) did the Federal Republic regain the full powers of a sovereign State

in internal and external matters. The statute of occupation was repealed and the Allied High Commission was dissolved. Nevertheless, the sovereignty of the Federal Republic had some restrictions from the very beginning, according to Art. 2 of the treaty. The three Western Powers retained their rights and responsibilities with respect to Berlin and to Germany as a whole in so far as the reunification of Germany, a peace settlement and the right to station military troops in Germany were concerned. In Art. 7 of the treaty, the parties agreed on principles of a common foreign policy aimed at the achievement by peaceful means of a reunified Germany with a liberal and democratic constitution comparable to that of the Federal Republic and its integration into the → European Economic Community (EEC). Furthermore, the final delimitation of German frontiers was suspended until the conclusion of a freely agreed upon peace treaty regulation for Germany as a whole. The three Powers agreed to consult the Federal Republic in all matters relating to the exercise of their rights in respect of Germany as a whole (Art. 7, sec. 4) and Berlin (Art. 6, sec. 1).

To the extent that the three Western Powers have retained their rights and responsibilities, they still exercise supreme authority over Germany. To this extent, the Federal Republic does not have full authority and is restricted in its sovereignty. This restriction on the international capacity to act is acceptable to the Federal Republic because the three Western Powers have entered into obligations as to the conduct of their foreign policy (Art. 7). Nevertheless, the retained rights and responsibilities, the emphasis on the Four Powers' responsibility in the so-called Eastern Treaties, and the Quadripartite Agreement on Berlin of 1971 have generated concern that the rights and responsibilities of occupation might be transformed into a perpetuation of international control over Germany.

The relationship between the GDR and the Soviet Union and the other three Allied Powers is also characterized by a submission to the Four Powers rights and responsibilities for Germany as a whole and a restriction of sovereignty in relation to the Soviet Union. The latter legal restriction is not as obvious as in the case of the Federal Republic, while the factual restrictions are obvious. In its declaration of March 23, 1954, the Soviet Union retained all the functions which are related to security and which derive from its obligations under the Four Power agreements. The wording of the declaration is comparable to that found in Art. 2 of the treaty between the Federal Republic and the three Western Powers. It is repeated with a reference to agreements which concern Germany as a whole in the preamble of the treaty between the Soviet Union and the GDR of September 20, 1955 (UNTS, Vol. 226, p. 201). The GDR is free in its decisions on questions of internal and external policy, including relations with the Federal Republic and the development of relations to other States. Nevertheless, it is not only a legal but also a political fact that the Soviet Union has retained full occupation powers in respect of Germany as a whole. This situation is not altered by the Treaty on friendship, cooperation and mutual assistance between the Soviet Union and the GDR of October 7, 1975 (German Democractic Republic, Gesetzblatt 1975 II, p. 238).

Occupying military staff and troops remained on German territory in both the Federal Republic and the GDR even after the declaration and resuming of sovereignty by both States. The legal foundation for the stationing of the military troops of the Soviet Union in the GDR ("Group of soviet armed forces in Germany") and the troops of the United States, France and the United Kingdom in the Federal Republic (Art. 4 of the above mentioned treaty of May 26, 1952/May 5, 1955 differentiates between the armed forces of the Three Powers in the Federal Republic and in Germany), is found both in the *occupatio bellica* relating to Germany as a whole and in the incorporation of both States in collective defence systems: the Federal Republic in the → North Atlantic Treaty Organization and the GDR in the → Warsaw Treaty Organization.

Since 1955 all Soviet attempts to bring to an end the Western allied rights and responsibilities, especially in relation to Berlin (see the Soviet Note of November 27, 1958), have failed. As these efforts did not succeed, the Four Powers agreed in the preamble and the text of the Quadripartite Agreement on Berlin of September 3, 1971, that their rights and responsibilities arising out of the occupation of Germany continued to exist. Confirmation is found in a declaration of November 9, 1972 which the Four Powers addressed to the

members of the United Nations on the occasion of the admission of both German States to the United Nations. In addition, both German States stressed, in an exchange of letters of December 21, 1972 (ILM, Vol. 12 (1973) p. 16) in relation to Art. 9 of the Treaty on the Basis of Relations (German Bundesgesetzblatt, 1973 II, p. 423). that the rights and responsibilities of the Four Powers and the related quadripartite agreements, decisions and practices would not be affected by this treaty.

Similar legal reservations have been made by the Allies in relation to the Moscow Treaty (ILM, Vol. 4 (1970) p. 1026) and the Warsaw Treaty (UNTS, Vol. 830 (1972) p. 327). Both treaties contain a so-called reserve clause. For example, Art. 4 of the Moscow Treaty between the Federal Republic and the Soviet Union leaves unchanged the bilateral and multilateral treaties and agreements previously entered into by the two States. The Soviet Union stated that the question of the Four Powers' rights was not affected by the treaty which the Soviet Union and the Federal Republic of Germany proposed to conclude. A similar statement was made by the three Western Powers. Therefore, there can be no doubt that the continued existence of the rights and responsibilities of the Four Powers arising from the *occupatio bellica* was stressed and strengthened by the conclusion of the so-called Eastern Treaties and the Quadripartite Agreement on Berlin, despite the dispute on the content and extent of these rights.

The continued existence of the Four Powers' rights and responsibilities has two implications. Since these rights include competence for the final territorial arrangement concerning Germany as a whole and since this final arrangement has been reserved to a peace treaty, no such final regulation has been made either in the agreement on Berlin or in the so-called Eastern treaties. The Four Powers have not achieved a final settlement on Germany as a whole and its frontiers. The non-finality of all the legal changes made in relation to Germany as a whole is also one of the main reasons why the process of legal division in Germany has not yet come to an end. For the same reason the process of → secession of the German Democratic Republic cannot be considered final.

This legal situation is the basis for such other legal consequences as the continued existence of a German nationality embracing all German nationals according to the Reichs- und Staatsangehörigkeitsgesetz of 1913, the varying definitions of the terms "foreign" or "internal" in the two German legal orders, and the diplomatic protection of German nationals residing in or coming from the GDR by organs of the Federal Republic.

4. The Legal Relations between the Federal Republic of Germany and the German Democratic Republic

The legal relations between the two German States are dependent upon (a) the relationship between each of the States and Germany as a whole and (b) the extent of the respective State's competence to define its bilateral relations.

The continued existence of the German Reich as a State is controversial. The GDR in its Constitution of 1949 initially assumed that it was identical with the German Reich. Some years later, in 1952, the GDR changed its opinion and declared that the German Reich had ceased to exist because of Germany's → dismemberment. The position of the Federal Republic was not very clear either. According to one view the creation of the Federal Republic did not constitute the creation of a new West German State, but only an organization of State power in a part of Germany. This position could be interpreted as belonging to a theory of identification of the Federal Republic with the continued existence of the German Reich. However, statements were made after 1969 by the Government of the Federal Republic which could be interpreted in contrast as constituting a kind of "roof theory". The roof theory (*Dachtheorie* or *Teilordnungslehre*) proceeds from the assumption that both German States are mere legal entities which exist within the continuing legal person of the German Reich. Since the arguments for the continued existence of the German Reich are still valid, and since the process of division in Germany is not final, in particular because of the continued presence of the Allied Powers and the non-finality of any territorial regulation, both theories of continued existence – the identification theory implying secession of the GDR and the roof theory implying the incorpo-

ration of both new entities under the roof of the German Reich – are still legally relevant.

The Federal Constitutional Court in 1973 stated that the German Reich continues to exist within the boundaries of 1937 and that the two German States are parts of Germany as a whole and not foreign countries with respect to each other. The relations between the Federal Republic, which is held to be "partially identical" with the German Reich and the GDR are considered to be of a "special" nature.

The relations between the Federal Republic of Germany and the GDR were regulated in the Treaty on the Basis of Relations between both countries of December 21, 1972. According to Art. 1 of the Treaty, both countries agree to develop normal relations as good neighbours in accordance with the principle of equality. They are bound to observe the principles which are enshrined in the → United Nations Charter, especially those with respect to the sovereign equality of all States, independence, territorial integrity, self-determination, → human rights and non-discrimination. In Art. 3 both States underline the inviolability of the existing frontiers between them, now and in the future, and they agree to respect the territorial integrity of each other (→ Territorial Integrity and Political Independence). In Art. 4 they conclude that neither State can represent the other on an international level nor can it act in the name of the other. In Art. 6 they stress the principle that the sovereign rights of each State are confined to its own territory. Mutual respect is expressed for each State's independence and sovereignty in internal and external matters. Both States agree to exchange permanent representatives rather than ambassadors to avoid a clear classification of their relations as diplomatic ones. They are prepared to conclude necessary subsequent treaties. The → preamble contains an important clause which indicates the profund dissent on the legal status of Germany and conflicting interpretations; according to para. 5 the Treaty was concluded "proceeding from the historical facts and without prejudice to the different views ... on fundamental questions including the national question". In Art. 9 both States agree that the present treaty shall not affect the bilateral and multilateral international treaties and agreements already concluded by or related to them.

In connection with this Treaty there exists a "letter on German unity" which specifies that the Federal Republic by signing the Treaty has not renounced the pursuit of a policy of peaceful reunification, i.e. reunification without the threat or use of force (Bulletin der Bundesregierung Nr. 109, August 17, 1970, p. 1094). The letter introduces the term "the German people" into the context of the Treaty. This formulation confirms the belief in the Federal Republic in the continued existence of a single German nation and, with respect to the Treaty, incorporates the reservation that the Federal Republic does not deny the existence of the German nation as holder of the right of self-determination. The letter clearly indicates that for the Federal Republic the national question is inseparably linked to the legal concept of the continued existence of Germany as a whole and the German people as one nation. In this respect the letter is a manifestation of the dispute contained in the preamble.

Attached to the Treaty is an exchange of letters concerning family reunion, improved conditions of travel and non-commercial exchange of payments, new frontier check-points and better working conditions for journalists.

After the conclusion of this Treaty it became impossible to deny, either objectively or on the part of the Federal Republic alone, that the GDR is a State and a legal subject according to international law. This consequence had until this point been controversial as a result of the legal and actual dependence of the GDR on the Soviet Union. Nevertheless the Chancellor of the Federal Republic, Willy Brandt, declared on October 28, 1969, "that there would be no international → recognition of the GDR by the Federal Republic. Despite the existence of two States in Germany, they do not constitute foreign States with respect to each other. Their relations are of a special nature". Even in 1969, the actual meaning of the Federal Republic's refusal to recognize the GDR internationally was rather unclear. Did this merely imply that the Federal Republic gave up the so-called Hallstein doctrine and hence allowed third States to recognize the GDR as a subject under international law, or was it designed to confirm a special inner-German relationship, similar to the *inter se* relations of the → British Commonwealth (→ Inter se Doctrine)? Or did the refusal only imply the acceptability of a

political but not a legal recognition? The German Federal Constitutional Court did not solve this legal problem by referring to a kind of *de facto* instead of *de jure* recognition in its decision on the Treaty on the Basis of Relations (German Bundesverfassungsgericht, Decision of July 31, 1973, BVerfGE 36,1).

From a legal point of view it can be concluded that the Federal Republic recognized the GDR at the international level as a State in the same way as the Federal Republic is itself a State under public international law. Both States, the Federal Republic and the GDR, are States subject to the continuing allied rights and responsibilities and the still pending final regulations concerning Germany as a whole and the territory of the German Reich. Recognition took place on the basis of a still incomplete separation or dismemberment. From this it follows that special relations exist between the two German States. A modified recognition in the light of the special nature of the legal situation in Germany is also supported by the clause indicating disagreement in the preamble of the Treaty on the Basis of Relations. Although the process of separation or dismemberment is not yet complete, international law is largely applicable to relations between the two German States, at least in most areas. Both States are bound by the UN Charter and by other multilateral treaties. Both are affected by the continued existence of a German State as a whole (i.e. the German Reich), which complicates the development of their legal relations. The two German States are in a period of transition which may still last for a long while and which, because of the exercise of the rights and responsibilities of the Allied Powers, does not clearly disclose when exactly the separation or dismemberment will be complete and when the legal personality of the German Reich will cease.

Since the Federal Republic is not a new West German State, it should not be considered as the successor to the German Reich, but should be viewed instead as being (partially) identical with it. In some way also the GDR "belongs to" Germany, as do the eastern parts of Germany. Therefore the relations between the Federal Republic and the GDR are not only of an international law nature, but a mixture of State law (internal law) and of international law is applied among them. It is possible to conceive the relations and the continued existence of Germany as a whole either under a "roof" theory or under a theory of legal identity. Both theories proceed from the assumption of the continued existence of the German Reich. The theory of identity, which views the process of secession by the GDR as incomplete, has merit because the Federal Republic undertook to bear the burden of the German Reich's debts and also claimed to be the bearer of its property. This State practice of the Federal Republic has been recognized by third States, an additional fact which supports the theory of identity. This theory does not impair the rights of or the equality between the two German States because it does not deny legal status to the GDR, which considers itself as the successor to the defunct German Reich.

5. The Right of Self-Determination and the German Nation

The fact that both German States are part of a German nation must be considered as part of the basis of their legal relationship. The right of self-determination is related to the German "nation" or people. This nation should not be seen as having been divided into two separate nations, although the GDR has developed a theory of two nations, one socialist and one bourgeois. This theory does not prove the national division. The unity of the nation as far as its objective existence is concerned is still a relevant legal factor in establishing it as holder of the right to self-determination. Its legal position can be regarded as secured by the Allies' rights and responsibilities for Germany as a whole.

As long as the two German States have not attained full sovereignty and are not entitled to shape their own destiny in matters of law in relation to Germany as a whole, free from the occupiers' interference, there will also be a barrier to the complete extinction of the nation. The possibility remains for the two German States with the consent of the Four Powers to agree on a complete separation and a waiver of reunification. A legally relevant weakening of the concept of a single German nation as holder of the right to self-determination through a shift in national identity and transformation of the political consciousness of major parts of the population can probably not be discussed seriously for many decades.

The right to exercise self-determination, which

is a right of the German nation *erga omnes*, and hence a right which also exists in relation to the Four Powers, exists independently of legal theories on the status of Germany. Thus, it also exists if one proceeds from the assumption that the German Reich ceased to exist and that the Federal Republic and the GDR must be considered as its successor States. The Wall in Berlin and the Iron Curtain in Germany, which should be considered in connection with the East-German *Schießbefehl* (order to fire on any person attempting to flee across the border), are relevant legal factors hindering the East German population from expressing its free will as to the legal system under which it would prefer to live.

6. *The Obligation to Reunify Germany*

The preamble of the Basic Law of the Federal Republic contains a clause according to which the entire German people is called upon to achieve in free self-determination the unity and freedom of Germany. The Federal Constitutional Court has interpreted this provision in the preamble as creating a legal obligation for all State organs to seek with all their means the reunification of Germany (Judgment of July 31, 1973, BVerfGE 36,1). However the Court's decision opened a wide field for political discretion in the choice of means deemed necessary for achieving this goal. Thus, the State organs of the Federal Republic are not allowed to waive the political objective of reunification. Nevertheless, nearly all kinds of political measures are admissible, for example the creation of a confederation of the two German States (→ Confederations and Other Unions of States). The Federal Government must not contribute to the creation of legal titles susceptible of preventing reunification, for instance by making reunification dependent on the approval of third States. Moreover, major elements of the still-existing legal structures of Germany as a whole, such as German nationality, cannot be discarded.

The claim for reunification cannot be regarded as an interference in the internal affairs of the GDR or the Allied Powers. The letter on German unity clarifies this fact. The Federal Constitutional Court has stated in this regard: "'Other parts of Germany' have, meanwhile, found their Statehood in the German Democratic Republic. Being organised in this way, they can express their will for reunification with the Federal Republic only in a form which is admissible according to their own constitution" (BVerfGE 36, 1, at p. 29). This sentence refers only to Art. 23 of the Basic Law which allows for the adherence of "other parts of Germany" to the Federal Republic, but which does not state that the expression of self-determination is only admissible in the way provided for by the constitution of the GDR.

7. *German Nationality*

As long as the legal relationship between the two German States is characterized by the non-finality of the separation process (i.e. the non-dismemberment of the German Reich or the secession of the GDR), the Federal Republic may still proceed from the assumption that the inhabitants of the GDR also have → German nationality in the sense of the Reichs- und Staatsangehörigkeitsgesetz of 1913. They have not lost their German nationality, which is identical with the nationality of the Federal Republic. On the other hand, they are at the same time also nationals of the GDR; in other words, they possess two nationalities. The completion of the secession of the GDR would result in the Federal Republic being obliged to "recognize" the nationality of the GDR in the sense that it could not claim the nationals of the other German State as its own nationals. Even if international law leaves it to States to regulate their own nationality law, there are some limitations to such regulation. A State can only regulate a person's nationality when it has some form of relationship with that person. A relationship between the Federal Republic and all German nationals still exists. The Federal Republic has exercised diplomatic protection for all Germans in foreign countries based on the assumption of a single still-existing German nationality. The Federal Republic has regarded the conclusion of certain consular agreements between the GDR and third States which recognize the GDR nationality as an infringement of its own claimed right to protect all German nationals abroad who wish its protection.

Nevertheless, following the conclusion of the Treaty on the Basis of Relations, the Federal Republic could no longer pretend that the GDR was a State without its own nationality and not entitled to exercise → diplomatic protection on

behalf of its own nationals. Therefore, the Federal Republic's right to exercise diplomatic protection is not exclusive. The State Department of the United States declared as early as 1962 that consuls of the Federal Republic were not allowed to act on behalf of German nationals living in East Germany. The GDR regulated its own nationality in a law of February 20, 1967 (Gesetzblatt of the GDR 1967 I p. 3) which provides that Germans living in foreign countries may be registered as nationals of the GDR by a competent State organ of the GDR. Without the respective intent of the persons concerned the nationality of the GDR is not attributable to them.

8. The Two German States are not "Foreign States" in Their Mutual Relations

The assertion that the two German States are not foreign States in the context of their mutual relations (see Declaration of the Federal Government of 1969) has given rise to a controversy with the respect to Art. 6, sec. 1 of the Treaty on the Basis of Relations which upholds the concept of territorial integrity by providing that the → jurisdiction of each State shall be restricted to its own State territory (→ Territorial Sovereignty). Apparently the two States' "non-foreign" quality is thereby deemed to mean a relationship similar to that which is associated with the *inter se* notion found in the British Commonwealth (→ Inter se Doctrine). International law only restricts the power of States to enact legislation with extraterritorial effects in a limited sense (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). Such legislation and measures require a legally relevant internal relationship. A preferential treatment of the GDR by the Federal Republic would not be contrary to international law. The Federal Constitutional Court has held in two decisions (the Grundlagenvertrags-Urteil and the Brückmann-Beschluß, German Bundesverfassungsgericht, Decisions of July 31, 1973, BVerfGE 36,1, and March 27, 1974, BVerfGE 37, 57, respectively) that the GDR must not be regarded and treated as a foreign country in relation to the Federal Republic. These decisions allow for the interpretation that the GDR cannot be treated as a foreign country in so far as this is compatible with international law. The same is true in relation to the so-called eastern areas of the German Reich. According to the Federal Constitutional Court the Warsaw Treaty does not imply recognition of territorial changes in respect of these areas.

A particular feature of the non-foreign treatment of the GDR is its position in relation to the → European Communities. According to No. 1 of the Additional Protocol to Art. 7 of the Treaty on the Basis of Relations, inner-German commercial exchange is to be regulated as a kind of internal market. The inclusion of the GDR in the internal commercial market system of the Federal Republic has been accepted in a Protocol to the Treaty establishing the European Communities and also in relation to the → General Agreement on Tariffs and Trade. In the EEC Protocol the contracting States, considering the present situation, which is a result of the division of Germany, have agreed that the application of the EEC Treaty does not require any changes to be made in the commercial relations between the Federal Republic and the German areas outside the field of application of the Basic Law. This situation has not changed. The GDR itself considers the internal market regulation as one of the special elements of the relations between the two German States.

Despite the "non-foreign" character of relations between the two German States, their frontier is regulated by international law. It cannot be regarded as a frontier which is merely subject to domestic law analogous to frontiers between states within a federal system, though this has been the opinion of the Federal Constitutional Court. The frontier between the two German States is characterized by both national and international elements. It has always represented an international → demarcation line as drawn by the Four Powers and therefore a line in respect of which the prohibition of force applies under international law (→ Use of Force). This was especially true after both States became members of the United Nations. On the other hand, the opinion that the frontier shows elements of an internal frontier is justified in so far as the disintegration process of the German Reich is not yet complete. However, it cannot be concluded that the prohibition of the use of force or the prohibition of → intervention are limited in their application as a result of this legal qualification. On the other hand, measures

that do not imply the use of force, for example → propaganda promoting the exercise of the right of self-determination with respect to reunification are not prohibited.

9. The Eastern Territories of the German Reich

The eastern territories of the German Reich were excluded from the system of the four zones of occupation. According to Part IX, sec. b of the Potsdam Protocol, the

> "former German territories east of a line running from the Baltic Sea immediately west of Swinemünde, and thence along the Oder River to the confluence of the western Neisse River, and along the western Neisse to the Czechoslovak frontier, including that portion of East Prussia not placed under the administration of the Union of Soviet Socialist Republics in accordance with the understanding reached at this conference and including the area of the former Free City of Danzig, shall be under the administration of the Polish State, and for such purposes should not be considered as part of the Soviet zone of occupation in Germany".

Furthermore, that section of the western frontier of the Soviet Union which is adjacent to the Baltic Sea should pass from a point on the eastern shore of the Bay of Danzig to the east, north of Braunsberg-Goldap, to the meeting point of the frontiers of Lithuania, the Polish Republic and East Prussia. The ultimate transfer to the Soviet Union of the city of Königsberg and the area adjacent to it (Art. VI of the Potsdam Protocol), as well as the final determination of Poland's western frontier, were to await the determination of territorial questions in a final peace settlement. The legal status of those territories of the German Reich under foreign administration (i.e. the territories beyond the Oder and Neisse), involving the exercise of territorial jurisdiction but not sovereignty, has not been changed by the Moscow-Warsaw treaties. The Federal Constitutional Court has held that neither treaty indicates that the Federal Republic wanted to or could decide on the territorial status of parts of Germany. The content of the agreement is only that the Federal Republic will not raise any objections against the exercise of territorial jurisdiction by the Soviet Union and Poland as long as these treaties are in force.

The Federal Republic has declared that it can conclude these treaties only in its own name and, thus, cannot bind a unified Germany under them. The reservation of final territorial delimitation to a peace treaty was recognized in these treaties. Since their conclusion the Federal Republic cannot claim that the effective exercise of Polish or Soviet jurisdiction over the eastern territories is illegal, but she has not given her consent to a final determination of the status of these territories. Therefore, no legal effects have been agreed to in relation to the nationality of the German inhabitants and their property in these areas. The treaties of Warsaw and Moscow do not preclude the possibility of calling into question the final territorial line during future negotiations on a peace treaty. Whether this is politically feasible or even desirable is quite another question. Other authors, especially from Poland, have argued that the reservation of a final territorial determination to a peace treaty has not had the effect of preventing a final delimitation and that the Potsdam Protocol already has this character with respect to the eastern frontiers of the German Reich.

10. Berlin

An issue related to the status of Germany is the special status of → Berlin. The Quadripartite Agreement on Berlin of September 3, 1971 confirmed the rights and responsibilities of the Four Powers in relation to Berlin. The Soviet Union therefore cannot as in the past (see the ultimatum of 1958) deny the rights of the three Western Powers deriving from the military occupation of Berlin. Berlin is an occupied territory of the German Reich in relation to which the occupation power is exercised. *De jure* this power has probably been more extensively exercised by the three Western Powers in relation to West Berlin than by the Soviet Union in relation to East Berlin, which has been designated the "capital of the GDR" against the protests of the three Western Powers. *De facto*, the situation is probably quite the opposite. The Four Powers' rights and responsibilities outweigh, with varying intensity, the constitutional claims of both German States to complete incorporation of both parts of Berlin into their respective State orders. While East Berlin has been qualified by the GDR, with the consent of the Soviet Union, as the capital and an

integral part of the GDR, the Four Powers came to the conclusion in the Quadripartite Agreement of September 3, 1971 that the Western sectors "continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it" (Part II, sec. B).

This regulation must be considered in connection with the stand-still agreement on status elements found in Part I, sec. 4 of the Quadripartite Agreement: "The four Governments agree that, irrespective of the differences in legal views, the situation which has developed in the area, and as it is defined in this Agreement as well as in the other agreements referred to in this Agreement, shall not be changed unilaterally." In light of this clause, the interpretation of Part II, sec. B is even more important. A dispute exists over what was meant by saying the ties between the Western sectors of Berlin and the Federal Republic of Germany will be maintained and developed (Quadripartite Agreement, Part II, sec. B) and that these sectors continue not to be a constituent part of the Federal Republic. No agreement was reached on the institutional incorporation of West Berlin into the Federal Republic of Germany and the three authentic texts differ in this respect. The development of ties, however, can only be interpreted in a sense that does not only include communications but also institutional relations. Therefore, it is in a certain sense possible to speak of West Berlin as a Land of the Federal Republic, although this does not mean that it has the same legal position as any other Land of the Federal Republic.

11. Legal Relevance of the "Enemy Clauses" of the UN Charter

An important question of the status of Germany after World War II is whether the so-called enemy clauses (Art. 107 in relation with Art. 53 of the Charter of the United Nations) are still applicable to Germany after both German States became members of the United Nations in 1972 (→ Enemy States Clause in the United Nations Charter). On November 9, 1972, the Four Powers declared that the accession of both German States to the United Nations should in no way affect the rights and responsibilities of the Four Powers and the relevant agreements, decisions and practices (ILM, Vol. 12 (1973), p. 217). This declaration is not a formal reservation of rights under the enemy clauses, but it is not excluded to interpret the declaration in this way. According to Art. 107 nothing in the Charter of the United Nations "shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action". Art. 53 permits enforcement action under regional arrangements only with the authorization of the Security Council, but provides an exception for "measures against any enemy state ... provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state." The question remains whether there is still any international competence of the Four Powers to intervene by the use of force unilaterally or collectively in Germany. The legal basis for such a competence has not been created by the enemy clause, but has been rather reserved by them, if such a competence existed already in 1945. The only legal basis for such a competence might be seen in the continued existence of legal elements of *occupatio bellica* of Germany and of reserved rights and responsibilities of the Four Powers in relation to both German States. The Soviet Union (Aide Mémoire of July 5, 1968) has stressed that the provisions of the UN Charter on enforcement actions in the case of the renewal of aggressive policy remain fully and completely relevant for the Federal Republic of Germany. In this respect the Federal Republic of Germany cannot claim either to have the same position as all the other European States (from: Politik des Gewaltverzichts, eine Dokumentation der deutschen und sowjetischen Erklärungen zum Gewaltverzicht, 1949 – Juli 1968, Presse- und Informationsamt der Bundesregierung, 1968, pp. 36, 45). On the other hand the Department of State of the United States assured the Federal Republic on September 17, 1968 that the Government of the United States "wishes to assure the Federal Republic of Germany that it is its considered view that (1) neither Article 107 nor Article 53 nor the two Articles together give the Soviet Union or

other Warsaw Pact members any right to intervene by force unilaterally in the Federal Republic of Germany; (2) if, despite this, the Soviet Union or other Warsaw Pact members should intervene by force unilaterally in the Federal Republic of Germany, that act would lead to an immediate Allied response in the form of self-defence measures pursuant to the North Atlantic Treaty; (3) there can be no question of the validity of the North Atlantic Treaty under the United Nations Charter" (AJIL, Vol. 63 (1969) p. 121). Since the Soviet Union has confirmed the validity of the prohibition of the use of force under the UN Charter in relation to the Federal Republic of Germany in the Moscow Treaty of 1970 and the Three Western Powers had already declared in 1954 that they would respect Art. 2 of the UN Charter pertaining to the prohibition of the use of force in respect of the Federal Republic (Bulletin der Bundesregierung 1954, p. 1066) and had stressed in a letter of 1952 that the rights and responsibilities reserved by them did not change contractual obligations in relation to the Federal Republic (Anlage 3 zu BT-Drucksache II, 3500, p. 4 f.), it is clear that there does not exist any right to intervene in the Federal Republic of Germany. On the other hand the possibility of a collective Four Powers competence is not explicitly excluded by these declarations. It is generally considered that the enemy clauses have become obsolete in relation to both German States since these have become full members of the United Nations (Bundesgesetzblatt 1973 II, p. 430; GBl. DDR 1973 II, p. 145). Another argument is that the relationship between the two German States and the Four Powers has been regulated on a contractual basis (see Frowein, Die Rechtslage Deutschlands und der Status Berlins, in: Handbuch des Verfassungsrechts (1983) p. 42). Furthermore, the Three Powers conceded in Art. 7, sec. 4, of the Treaty on the Relations between the Federal Republic of Germany and the Three Powers that they will consult the Federal Republic in the exercise of their reserved rights and responsibilities. It is obvious that a competence to intervene by force is not compatible with this contractual obligation.

12. Concluding Remarks

The legal questions concerning the status of Germany after 1945 and the development of the relations between the two German States are linked to the political agreement among the Four Powers to preserve peace by fixing the *status quo* in this area of Europe by drawing a dividing line between the two different socio-political systems. The legal status of Germany is still in transition and composed of many elements which derive from the unsettled consequences of the Second World War. The prohibition of the use of force in international relations and the denial of the exercise of the right of self-determination to the entire German people after 1945 preclude the argument that the *de facto* situation which developed after the Second World War must be treated as legally final or permanent. Moreover, such a result was achieved neither by the so-called "Eastern Treaties" nor by the Helsinki Act on Security and Cooperation in Europe (→ Helsinki Conference and Final Act on Security and Cooperation in Europe). A final peace settlement is still pending. Although the relationship between the two German States has been strengthened, they are far from maintaining good neighbourly relations. The Treaty on the Basis of Relations has still left the "German question" open.

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GEORG RESS

GOVERNMENT

1. Notion

In its broadest sense government, in addition to population and territory, is one of the essential elements which qualify a → State as a → subject of international law. It is the active element, the organizational machinery which enables the State to enter into → international relations, exercise its rights and fulfil its duties (→ States, Fundamental Rights and Duties). As legal entities "States can act only by and through their agents and representatives" (→ German Settlers in Poland (Advisory Opinion), PCIJ, Series B, No. 6 (1923) p. 1, at p. 22), i.e. their organs. The scope of government varies with the organizational structure of the individual State; it comprises all State organs regardless of their function (legislative, executive, judicial) or level (central, regional, local) and regardless of the subject-matter they deal with (domestic/foreign, civil/military affairs).

In a narrower sense government denotes the top executive organs of the State, viz. the Head of State and the cabinet. The Head of State can be an individual (monarch, president, dictator) or a body aggregate (council).

In the strict sense of the term government means the cabinet or council of ministers. It consists of the Head of Government (prime minister, chancellor), who can be the Head of State as well, and of various other members (minister for foreign affairs, etc.).

2. Historical Evolution of Legal Rules

In classical international law, especially in the time of absolute monarchy, the Head of State was considered to be the embodiment of → sovereignty and the omnipotent representative of the State (*jus repraesentationis omnimodae*). The international relations of the State were concentrated upon him; other organs, such as ministers or diplomats, derived their competences from him. Legally relevant activities of the Head of State which were performed in his official (not personal) capacity were regarded as → acts of State with the consequence that, for example, → treaties concluded between sovereigns were also valid in the case of succession.

With the development of more complex forms of government, especially the principles of separation of powers and of democratic control, the functions of the Head of State became less exclusive, not only in domestic affairs but also in international relations. Although still considered in a formal sense to be the chief organ and representative of the State, the Head of State must share his external functions with the Government in the strict sense, especially with the Head of Government and the minister for foreign affairs who have become in a material sense the more

important State organs in international relations. In addition, the Head of State is commonly subject to the control of the government in the strict sense, and, together with the latter, to the control of parliamentary and judicial organs.

The conduct of international relations has thus changed its character from an individual to a collective process of government. This is illustrated, e.g. by the representation of States in international organizations. According to Art. 7(2)(a), of the → Vienna Convention on the Law of Treaties (ILM, Vol. 8 (1969) p. 679), not only Heads of State, but also Heads of Government and ministers for foreign affairs are considered as representing their State "for the purpose of performing all acts relating to the conclusion of treaties". In international organizations, States are commonly represented by members of their government in the strict sense or even by deputies of their parliamentary assemblies.

States and their respective governments are no longer, if they ever were, impermeable units, "black boxes", but rather structured complexities whose different facets may not be ignored in international law. The effects of this diversification of government organization, and their limits on the representation of States in international relations, are major issues of contemporary international law (→ Representatives of States in International Relations).

3. Current Legal Situation

Two main aspects characterize the present situation of government in international law: the position of government in relation to → international law and municipal law, and the legal criteria required of government.

(a) Position of government in relation to international law and municipal law

Government can only function through its organs. These organs and their competences must be determined for the purposes of the legal order in which they exist and act. For domestic matters decisions are reserved to the municipal law of the individual State; for foreign matters international law is of relevance. Although the proportion of municipal and international determination varies according to the particular circumstances, legal practice permits the following general conclusions:

(i) International law refers to existing government organs, i.e. it does not create organs itself but uses the organs set up autonomously by the States for its own purposes. This interaction of international and municipal law leads to a "functional duplication" (*dédoublement fonctionnel*, G. Scelle) of government organs by adding international tasks to their already existing national responsibilities, not to an "organizational duplication".

(ii) International law refers to effective government organs, i.e. to authorities which are really in control of the State (→ Effectiveness). This follows from the principle that it is the actual constitutional situation of a State which determines its participation in international relations, not the formal (paper) constitution, if the two deviate from each other. Thus, in a one-party State the position of Head of State or of Government may actually be held by the leader of the party, while the formal office-holder is merely a figure-head.

(iii) International law refers to competent government organs, either in general or in particular. According to the first alternative, international law leaves it up to the individual State to determine the competent organs in the specific case, for example, by conferring rights and duties on the "government" as such. According to the second alternative, international law restricts the individual State by determining the competent organs itself, such as the Head of State, the Head of Government or other office-holders. Examples from the law of treaties and from representation in international organizations have already been mentioned. Similarly, the Head of State, the minister for foreign affairs or the minister of defence have been regarded as competent to bind their State by → unilateral acts (cf. the statements and declarations of the Norwegian Minister for Foreign Affairs in the → Eastern Greenland Case, or of the French President and of the French Minister of Defence in the → Nuclear Tests Cases). According to municipal law such organs have, in general, the (external) competence to act for their State by expressing its will with binding effect in relation to other subjects of international law or within an international organization. However, because of the more complex organization of the contemporary State, they often need, at the same time, the (internal) authorization by other organs for their external activities. In cases where

this internal authorization is lacking, the question arises whether the external declaration is nevertheless binding, i.e. whether international law refers only to the formal competence of expressing the will of the State externally or also to the material competence of determining the will internally. Deficiencies not relating to competence, such as infringements upon material principles of municipal law, do not affect the validity of the declaration. The same is generally true for deficiencies relating to internal authorization, but not without exception. As a rule, certain government organs are considered, according to Art. 7(2)(a) of the 1969 Vienna Convention on the Law of Treaties, to be competent to conclude treaties "in virtue of their functions and without having to produce full powers" (→ Full Powers). Consequently, according to Art. 46 (cf. also Art. 27) of the Vienna Convention, "a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent". However, according to the same provision, this does not include situations in which that violation "was manifest and concerned a rule of its (the State's) internal law of fundamental importance". This correlation of rule and exception can be regarded as a well-balanced compromise between the principle that the organization of States, in internal as well as in external matters, belongs to their → domestic jurisdiction and the necessity for some reliable uniformity in the international representation of States. Therefore, it would seem to be applicable not only to treaty making, but also to unilateral acts and to acts of representation in international organizations.

(b) Legal criteria required of government

The criteria which an authority must satisfy in order to qualify as a government for the purposes of international law are frequently discussed in connection, and sometimes in confusion, with the → recognition of governments and States. Valid conclusions can only be reached by keeping these two notions separate and looking at the rationale underlying the notion of government in international law. Government, as the active element of the State, must be able to act effectively for its State in relation to other States and subjects of international law, i.e. to assert the rights and fulfil the duties for the population and the territory represented. Consequently, government must meet the following criteria: (i) Effectiveness, i.e. the authority must be in actual control of the population and the territory or at least a substantial part of these other two elements of the State. (ii) Stability, i.e. the authority must have a reasonable chance of remaining in power. (iii) Independence, i.e. the authority must be separate from other governments and subordinate only to international law.

Further criteria, such as the (legal or revolutionary) origin of government, the acceptance of government by the population, or the ability and willingness of government to fulfil the international obligations of the State are not, or at least not distinct, requirements for the existence of government in international law. They may, however, help to remove doubts as to the presence of the other indispensable criteria whose verification in State practice, especially after a revolutionary change of government, sometimes raises substantial difficulties.

4. Special Legal Problems

Particular questions of government arise in the following contexts of international law: recognition and representation of government, types of government, and activities of government.

(a) Recognition and representation of government

As the criteria of government in international law are controversial and sometimes difficult to ascertain, it is open to question whether a formal act of verification is required in addition. The answer depends largely on the definition of recognition and the legal consequences attached to it. In general, an authority meeting the indispensable criteria of effectiveness, stability and independence, although not expressly recognized, does possess certain international rights, especially to enjoy respect of its territorial integrity pursuant to the principle of → non-intervention, while lacking other rights, particularly those of optional cooperation, such as treaty making or diplomatic exchange.

Representation of government in an international organization belongs to the first of these two

categories. It is a right which follows from membership in the organization and must be conceded to the government acting for the member State. Difficulties may arise in legal practice when rival authorities claim to be the government of the same member State, as has happened in the → United Nations on several occasions (e.g. in relation to China, Congo, Hungary, Iraq, Kampuchea or Yemen). In general, the organs of the United Nations tend to follow the principle of effectiveness of government which corresponds to common practice and also best serves the objective of universality pursued by the organization. However, this rule has occasionally been obscured or even neglected as a result of additional considerations, particularly those concerning the legitimacy of a government (e.g. in relation to South Africa).

(b) Types of government

International law differentiates, as to prerequisites and consequences, between different types of government: (i) A *de jure* government is a government whose origin or existence is in conformity with the constitutional law of the State represented and whose legality is uncontested in international law. (ii) A *de facto* government is a government whose origin and existence is contrary to the constitutional law of the State concerned and whose legality is challenged in international law. It is of a local nature when it controls only part of the population and territory of the State, and of a general nature when it has reached complete control, especially after removing the *de jure* government. In retrospect, it can be regarded as an interim government if it is defeated, and as a provisional government if it becomes the new *de jure* government. (iii) A → military government is the authority by which an occupying power exercises control over a foreign State (→ Occupation, Belligerent). Parallel to the military, although limited in its functions, may exist the *de jure* government of the occupied State, or a *de facto* government established as a result of the occupation and perhaps with the support of the occupying power, but they will be recognized by international law only if they fulfil the indispensable criteria of a separate government, viz. effectiveness, stability and independence; otherwise they are merely instruments of the occupying power. (iv) A → government-in-exile is a government which has been forced to leave the territory of its State due to enemy occupation or → civil war and which claims governmental powers with the consent of the State of residence and possibly other States, as long as there exists a genuine chance to return. An atypical variation is the so-called "provisional government" which is formed in a foreign State in order to take over the functions of government in the State of its members as soon as circumstances allow (e.g. at the end of an → armed conflict).

(c) Activities of government

Certain activities and their consequences, although ultimately attributed to the State, have special relevance to government: (i) Inter-governmental → executive agreements which are international treaties but, because of their technical or otherwise less important character, can be concluded between governments or governmental departments without authorization or approval by the Head of State or the legislature. (ii) Acts of government which can be regarded as acts of State or sovereign acts, if government is understood in its broadest sense. (iii) Immunities and privileges of government which are granted to the Head of State and other members of government in foreign States and which exempt them from criminal and civil jurisdiction and protect them in special ways against libel, slander and other offences (→ Jurisdiction of States; → Diplomatic Agents and Missions, Privileges and Immunities).

5. Evaluation

Not surprisingly, government, as the active element of State, entails some major legal problems due to the variety of its definitions and organs, to a separation of its external competence and internal authorization, and to conflicts between its effectiveness and legitimacy. These basic problems lead to particular difficulties in various contexts of international law, such as recognition in State relations or representation in international organizations, differentiation of various types of government or treatment of different organs of government and their acts. Due to the constant development of international relations it can hardly be expected that these difficulties will ever be resolved completely. Nevertheless, partial im-

provements seem possible and are evidenced by State practice.

It would be helpful, for example, if efforts to define government organs and their competences more clearly in the area of treaty making were extended to other areas of international law, such as unilateral acts, responsibilities or immunities and privileges (→ Responsibility of States: General Principles; → State Immunity). The internationalization of government for the purposes of stability and reliability in international relations will, however, always be limited due to the general principle that government organization is essentially within the domestic jurisdiction of the individual States.

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SIEGFRIED MAGIERA

GOVERNMENT-IN-EXILE

1. Notion

A government-in-exile consists of an individual or a group of individuals residing in a foreign State who: (i) claims supreme authority over either a → State in the sense of international law which is still under the control of another national or foreign authority or a State to be created on the territory of another State in anticipation of coming political events, (ii) is recognized as such at least by the State in which it resides (→ Recognition), notwithstanding its lack of effective control over its home State and, (iii) is organized to perform and actually performs some → acts of State on behalf of the home State or the State to be created.

A government-in-exile may consist of an individual or a group of individuals according to the constitutional framework of the State whose supreme authority it claims. The residence on foreign territory of governments-in-exile distinguishes them from local → *de facto* régimes or insurgents, both of which act on their own territory, if only a small part of it. Therefore, the government of → Taiwan, for example, was never the government-in-exile of China, even at the time when it was recognized by numerous States as the legitimate government of the whole of China and held a permanent seat in the → United Nations Security Council, because the island of Formosa was part of the original territory of China.

The above definition tries to cover the two main types of governments-in-exile, i.e. those acting on behalf of existing States and those acting in anticipation of the foundation of a new State. Some authors prefer to apply the term only to entities related to existing States. In State practice, however, both versions are used.

Other authors suggest a distinction between legitimate and non-legitimate governments-in-exile according to the last constitution in force in the State in question. Some hold the opinion that only those persons who have actually been part of the last government in office may be recognized as the government-in-exile. Indeed, there seems to be some support for this position, as during World War II the British Government recognized the Czechoslovak National Committee formed under Benes, the predecessor of Hacha, the last President of the Republic, only as the "Provisional Czechoslovak Government". The British Government was also careful to avoid referring to the French National Committee under General de Gaulle as the government of France. But in substance there were no differences at all as to the treatment of the Czech government-in-exile, and only minor differences as to the treatment of the French National Committee and General de Gaulle, when compared to the relations of Britain with the other governments-in-exile on British soil. Eventually the interactions between de Gaulle and the British Government amounted to a *de facto* recognition of the National Committee as the provisional government of France. Nevertheless, the quest for differentiation should not be taken too far unless there is convincing evidence that

such differentiation reflects *opinio juris* rather than political reasoning (→ Customary International Law).

The recognition of an individual or a group of individuals as a government-in-exile, at least by the State of residence, is of paramount importance for rendering such an entity at least some international status. Otherwise the individuals concerned remain mere → aliens according to the law of the State of residence. Recognition is an indispensable prerequisite both for legitimate and non-legitimate governments-in-exile because recognition affects the capacity of the government-in-exile to act on behalf of the State or territory in question in spite of its lack of effective control and not its legality.

In the absence of applicable rules of general international law the extent of competences of a government-in-exile depends totally on the will of the supreme authorities of the State of residence as holder of the → territorial sovereignty. The act of recognition or later interactions with the government-in-exile must regulate the numerous problems that arise out of the fact that two or more governments perform duties on the same territory with only one of them possessing territorial sovereignty. The following wide range of legal questions has to be dealt with in this regard: diplomatic immunity of the members of the government-in-exile and its staff (→ Diplomatic Agents and Missions, Privileges and Immunities); the right of delegation; jurisdiction over nationals of the government-in-exile on the territory of the State of residence (→ Nationality); the legal position of the armed forces of the government-in-exile, if any, and so forth. Doubts may be raised at this point as to whether in this regard → international organizations are at all in a position to recognize governments-in-exile without a State of residence as they lack the necessary territory for carrying out the functions of an exiled government.

Governments-in-exile should be clearly distinguished from national → liberation movements in general and other organizations acting on foreign territory against the ruling government or régime of their home State without performing any acts of State over their co-nationals or having any other official competences. A minimum constitutive requirement for governments-in-exile may be the competence to carry out negotiations on the international plane on behalf of the State or territory in question. It is, however, almost impossible to set out clear-cut criteria for governments-in-exile, as the relevant decisions concerning the attribution of competence lie exclusively with the governments of the recognizing States.

2. *State Practice*

(a) *Before World War II*

The most prominent example for the longevity of a government-in-exile, in its most basic form, is the traditional recognition of the Sovereign Order of Malta as a → subject of international law by some States (→ Malta, Order of). The order lost its → sovereignty over Malta in 1798.

The history of the government-in-exile in the modern sense of the term as outlined above began, however, with World War I. Interestingly enough, the first governments-in-exile on record involve States not yet existing. On September 3, 1918, the Czechoslovak National Council was recognized by the governments of the United States, Great Britain, France and Italy as a belligerent *de facto* régime. At that time the territory of Czechoslovakia was still under the sovereignty of Austria-Hungary. From December 1917 onwards, Czech contingents were formed within the French, Italian and British armies according to agreements entered into with the Czech National Council. On October 14, 1918, a provisional Czechoslovak Government was formed under Benes in Paris and recognized by France one day later, and by Italy on October 24.

In a different yet comparable position was the Polish National Committee. Founded on August 15, 1917 with headquarters in Paris, the Committee was recognized as an official Polish organization by France, Great Britain, Italy and the United States. The National Committee had diplomatic relations with these governments and was even accorded some consular competences. Earlier, on June 4, 1917, the President of the French Republic had already authorized by decree the foundation of an autonomous Polish army under French supervision. Following the conclusion of an agreement with the National Committee on September 9, 1918 the Polish army was given a Polish Commander-in-Chief, to be nominated by the National Committee with French assent. The

position of the Polish National Committee and the governments recognizing it became, however, very delicate with the emergence of a serious rival in the quest for supreme power in General Pilsudski, who had ceased to hold power in Warsaw on November 16, 1918. The ensuing problems were finally solved through the mutual consent of the parties involved.

There were doubts raised as to whether the Czech and the Polish national committees should be considered governments-in-exile. According to the notion of government-in-exile, as set out above, these entities seem to have had just that minimum of official competence necessary in order to qualify. International legal doctrine after World War I discussed these two cases rather as a problem of recognition of nations, a topic which sounds very familiar in view of the discussion in the 1970s and 1980s of the legal implications of recognizing a national liberation movement as the sole representative of a certain people.

The most prominent case of a government-in-exile after World War I was that headed by Haile Selassie, the former Emperor of Abyssinia (now Ethiopia), following the Italian invasion of October 14, 1935. After Italy had accomplished the occupation of the Abyssinian Empire, Great Britain, among other States, accepted *de facto* Italian rule, yet still considered Haile Selassie, who had escaped to London, to be the legitimate sovereign, while not granting him any legal privileges. Haile Selassie was not recognized as representing a government-in-exile until Italy entered World War II (see, in this connection, → Haile Selassie v. Cable & Wireless Ltd).

At the end of the → Spanish Civil War the Spanish Republican Government fled to France and finally, on the invitation of the Mexican Government, transferred its seat to Mexico City, where the exiled members of the *Cortes* were even given the opportunity to elect a new President of the Republic.

(b) World War II

The culmination in the history of the government-in-exile occurred in Great Britain during World War II. The British Under Secretary of State Butler, during a House of Commons debate, rightly referred to London of that time as a "miniature Europe". The British capital harboured no less than eight governments of States mostly overrun by Hitler Germany, including that of Haile Selassie as well as the French authorities under General de Gaulle. The European governments also belonging to this group were those of Belgium, Greece, Luxembourg, Norway, Poland and Yugoslavia. The governments of these countries were legitimate governments in the sense that they were identical with, or direct offsprings of, the last government in office in their respective capitals. Some States even had time enough to issue laws or decrees to provide the necessary constitutional basis for their governments to act abroad (e.g. Norway and Luxembourg). Czechoslovakia was a special case, as indicated above. Her government therefore was referred to as a provisionary government-in-exile.

The European governments-in-exile were given the widest possible range of competences ever recorded for governments-in-exile. They had the right of legation, i.e. the right to send and to receive diplomatic missions. They were allowed to issue decrees for the conscription of their nationals residing outside their home territories and maintained their own armies with limited personal jurisdiction in order to continue the fight against the common enemy. The European governments-in-exile were of course considered to have full treaty-making power. They all signed the Declaration of the United Nations of 1942 (→ United Nations) and entered into numerous agreements with Great Britain, the United States, the Soviet Union and with each other. The European governments-in-exile developed a considerable legislative practice on a variety of subjects concerning their nationals and their property located outside the occupied territory and to a certain extent even in the occupied homeland. These legislative acts were even published in the official gazettes of the respective countries issued for this purpose in London. Great Britain, the State of residence of all these governments-in-exile, had to adjust her legal system to the exceptional circumstances created by the presence of so many foreign governments on her territory through a number of legislative acts of her own. British and United States courts in general recognized and applied the legislation of the governments-in-exile (→ Recognition of Foreign Legislative and Administrative Acts). Questions of → *ordre public*

were brushed aside by referring to the United Nations common cause "which of course is in the line with the British and American policy". Nevertheless, Great Britain carefully upheld the principle that the *imperium* must yield to the *dominium*. The wide privileges granted to the governments-in-exile were unmistakeably not permitted to violate the territorial sovereignty of Great Britain. Above all, the governments-in-exile were not granted immediate executive power to enforce their laws and decrees. For that purpose they had to address British courts and authorities.

(c) Recent developments

The high standard of sophisticated coordination between governments-in-exile and the government of the State of residence marked both the culmination and the end of the government-in-exile as an institution of international relations. It has practically vanished from the international scene. Not even the communist take-over in eastern Europe has led to its renaissance. All the recent cases in which heads of States or governments have been forced into exile due to internal or external pressure show a clear tendency by the State of residence involved not only to deny the exiles any official privileges but to prevent them from engaging in political activities. International organizations or States which recognize and support national liberation movements as sole representatives of certain peoples or territories do not go as far as recognizing their executive organs as governments-in-exile. Nor does the overt support for rebels fighting against the government of another State lead to the establishment of a government-in-exile.

An entity which comes near to serving as a recent example of a government-in-exile is the Coalition Government of Democratic Kampuchea under the presidency of Prince Norodom Sihanouk. This strange coalition of the Khmer Rouge, the Khmer Peoples National Liberation Movement and the Movement for the National Liberation of Kampuchea is recognized by a number of Western States as the sole representative of Kampuchea in contrast to the government in Phnom Penh under Heng Samrin, which is considered a mere puppet of the Vietnamese occupation forces.

A changing majority in the → United Nations General Assembly endorses this position and accepts the delegate of the Coalition Government of Democratic Kampuchea as a legitimate representative, notwithstanding the Coalition's lack of effective control over Kampuchea, which clearly rests with the government of the People's Republic in Phnom Penh and the Vietnamese occupation forces (UN GA Res. 41/7 of October 21, 1986). Further elements indicating that the Sihanouk Government has a status comparable to that of the governments-in-exile described above are not evident. It seems that the Coalition's three factions operate with great independence and separate support.

3. Governments-in-Exile and International Law

(a) Compatibility with international law

The compatibility of governments-in-exile with international law is closely linked to the law on recognition of governments. As long as governments are free to recognize and enter into relations with other governments according to their own political and moral standards, there is in principle room for governments-in-exile. Therefore, the government-in-exile is very often dealt with from the perspective of the classical moral doctrines on the recognition of governments, such as the Estrada, Tobar and → Stimson doctrines. On the other hand, the government-in-exile as an institution of international law must be reconciled with other basic principles such as respect of territorial sovereignty, effectiveness and the prohibition of → intervention in the domestic affairs of other States.

Some authors try to evade the various problems by limiting the legality of governments-in-exile to governments expelled from their territory by foreign belligerent occupation as long as there is considerable resistence to such occupation either by national or allied forces.

Although the vast majority of cases of governments-in-exile has occurred in the course of belligerent occupation, there is no evidence of a norm of customary law, according to which such governments are illegal in times of peace.

In a field in which politics dominate to such a high degree over legal reasoning, the test for norms of customary international law limiting the freedom of action of States should be particularly

strict. It seems, therefore, that the existence of a government-in-exile should also be possible in times of peace, as long as its recognition does not entail a direct intervention in the domestic affairs of the State concerned. The → estoppel principle precludes, however, the recognition of both a government-in-exile and its rival in the capital.

The difficult task of reconciling the recognition of governments-in-exile with the principle of → effectiveness must be left to the recognizing governments. It is the latter which must bear possible disadvantages resulting from a lack of effective control of the government-in-exile over the territory concerned. From a doctrinal point of view, the solution lies in the fact that the government-in-exile is merely a provisional institution, eventually becoming the real government or fading away. The Sovereign Order of Malta is a curious exception to the rule.

(b) A law of governments-in-exile?

As already pointed out, the competence of a government-in-exile to act on the international plane depends entirely on the will of the recognizing States, whereby the State of residence plays a special role. The evidence at hand does not prove the existence of a body of norms that could be referred to as a "law of governments-in-exile". Rules in this area are left to agreement between the government-in-exile and the governments concerned within the limits of general international law.

4. Conclusion

International relations as well as social relations in general show a certain demand for devices which bridge the gap between the initiation and completion of social processes, or simply provide the affected parties with the time necessary to accommodate to sudden changes in societal structures. The government-in-exile is such a device amongst others such as "soft law". Its declining frequency seems to be due to its partial replacement by national liberation movements recognized as representatives of certain peoples or territories.

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MANFRED ROTTER

GUGENHEIM v. ETAT DU VIETNAM

The decision of the French Court of Cassation of December 19, 1961 in the Gugenheim case (Clunet, Vol. 89 (1962) pp. 432–437) is an important step towards defining the somewhat elusive notion of an act *jure imperii* in the law of → State immunity.

Gugenheim had brought an action against Vietnam which was based on a contract to supply cigarettes to the Vietnamese army. The Court of Appeal of Paris had granted immunity to Vietnam (Clunet, Vol. 84 (1957) p. 408); notwithstanding a contradicting interpretative opinion of the French Government, the Court had affirmed the sovereign status of Vietnam referring to the dealings between the two Governments (→ Sovereignty). On appeal to the Court of Cassation, the plaintiff contended that a foreign → State could not claim immunity from jurisdiction for acts under private law which any individual could perform just as well, such as the conclusion of the contract at issue. This argument was in line with earlier French jurisprudence, to the extent that immunity had previously been denied even for acts resulting from the administration of a public service on the grounds that the foreign State had acted according to the rules of the private law of contract without the reservation of exceptional rights. The Court of Cassation, however, rejected the plaintiff's argument and confirmed the judgment of the court below. It was held that the contract of supply in question was meant to cover the needs of the Vietnamese defence services and that, therefore, Vietnam had

performed an act in the exercise of its State functions ("dans l'exercice de ses fonctions étatiques de gestion publique").

The concept adopted by the Court of Cassation of classifying acts for the purposes of State immunity by the object of the transaction at issue and not according to the private or the public law of the forum has met with criticism as well as with assent in French legal doctrine. The approach of the Court of Cassation keeps intricacies of private or public national law – such as the notion of *contrat administratif* – out of questions of sovereign immunity. In this case, perhaps, the claim of immunity stood on rather weak ground because the purchase of cigarettes did not immediately benefit specific functions of the public administration. With respect to the supply of goods to military services, the difficulty in drawing the line between acts covered by immunity and non-sovereign activities is illustrated by conflicting American and Italian decisions in similar cases (see, e.g. Kingdom of Roumania v. Guaranty Trust Co. of New York, 250 F.341 (2d Cir. 1918); Storelli v. Governo della Repubblica francese, RivDirInt, Ser. III, Vol. 4 (1925) p. 236; Governo Rumeno v. Trutta, Giurisprudenza Italiana, Vol. 78 (1926) Part I(1) col. 774).

The more recent French jurisprudence applies a dual standard for qualifying acts as performed *jure imperii*: they must be an "act of public authority" or be "accomplished in the interest of a public service" (→ Société Levant Express Transport v. Chemins de fer du gouvernement iranien; Zavicha Blagojevic c. Banque du Japon, Clunet, Vol. 103 (1976) 687). This concept is not fully in line with the current tendency in State practice towards a more restrictive, objective test which refers to the nature of the act rather than to its purpose. According to this trend, contracts for the supply of goods fall generally into the category of commercial transactions not covered by immunity, at least as long as the goods are not, by their very nature, related to sovereign functions.

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MATTHIAS HERDEGEN

HAILE SELASSIE v. CABLE & WIRELESS LTD.

Emperor Haile Selassie of Ethiopia in 1934 concluded, through his agent, the Director-General of Posts, Telegraphs, and Telephones, a contract with Cable & Wireless Ltd. for the establishment and operation of a radio telegraphic service between Great Britain and Ethiopia. During the autumn of 1935, hostilities broke out between Ethiopia and Italy which led to the occupation of Ethiopia by Italian forces by the end of 1936 (→ Occupation, Belligerent). In May 1936, Haile Selassie left his country and took refuge in Great Britain. In the same month the King of Italy declared himself Emperor of Ethiopia.

In January 1937 Haile Selassie brought an action before the High Court of England claiming £10,600 from the defendants, who admitted that in accordance with the terms of the contract they owed the sum and that the claim belonged to the public property of the Emperor of Ethiopia. The defendants referred to an exchange of letters of February 2 and April 14, 1937 with the Italian Embassy in London to the effect that the Italian Government claimed the sum but refused to submit to the jurisdiction of English courts to have the title to the sum determined. They argued that the action impleaded a foreign sovereign while the defendants themselves were unable to interplead in respect of the King of Italy, in view of his sovereign immunity. They moved for dismissal of the action because the claim either had been suspended or had passed to the King of Italy, since a letter by the British Foreign Office to the Court had stated that His Majesty's Government, while still recognizing the plaintiff as *de jure* Emperor of Ethiopia, recognized the Italian Government as the → *de facto* government of virtually the whole of Ethiopia.

The decisions in this case deal with questions of sovereign immunity with regard to possible inter-

pleading (→ State Immunity), with the effects of *de facto* and *de jure* → recognition of foreign States on → State succession in public property located outside the territory in question. They also reflect the practice of English courts to respect foreign policy decisions of the British Government (see → Acts of State).

By decision of March 23, 1938 the High Court ((1938) Ch. 545) dismissed the action for lack of jurisdiction; to give effect to the plaintiff's arguments would have meant to decide indirectly against the claim put forward on behalf of a foreign sovereign.

The Court of Appeal (Decision of June 30, 1938; (1938) Ch. 839) reversed the decision. The fact that the King of Italy could not be brought before the Court could not deprive the plaintiff of his right to have his claim adjudicated. While it was true that British courts were not competent to entertain an action which directly or indirectly interpleaded a foreign State, this rule did not cover cases where property which was not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent was in the possession of a third party, and the plaintiff claimed it from that third party, the issue being whether or not the property belonged to the plaintiff or to the foreign sovereign. In the present case, the property in question was neither in the possession nor under the control of the foreign sovereign. Thus the action was remitted to the High Court.

The High Court (Decision of July 27, 1938; (1939) Ch. 182; (1938) All E.R. 677) held in favour of Haile Selassie. It based its decision on letters by the Foreign Office to the parties to the effect that the British Government still recognized him as *de jure* Emperor of Ethiopia and had not *de jure* recognized the Italian → annexation of Ethiopia, although since December of 1936 it had recognized the Italian Government as the *de facto* government of virtually the whole of Ethiopia. Up to then, English judicial authorities had recognized acts of a *de facto* government only in relation to persons or property located within the territory under control of the *de facto* government. By its occupation of Ethiopia Italy had not succeeded to the public property of the Emperor of Ethiopia which was situated in England, as it was in the case at issue before the Court.

The defendants again appealed. While this second appeal was pending, the Foreign Office on November 30, 1938 certified to the defendants' solicitors that "1. His Majesty's Government no longer recognizes his Majesty Haile Selassie as *de jure* Emperor of Ethiopia; 2. [it] now recognizes the King of Italy as *de jure* Emperor of Ethiopia." Thereupon the Court of Appeal dismissed the action (Decision of December 6, 1938; (1939) Ch. 182). The *de jure* recognition of the King of Italy as the Emperor of Ethiopia had the effect "that in the courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent", and that the "right of succession is to be dated back at any rate to the date when the recognition of the King of Italy as the *de facto* Sovereign of Abyssinia took place. That was in December 1936". The Court of Appeal left open the question of whether the decision of the High Court under the former circumstances was right or not (see also Bank of Ethiopia v. National Bank of Egypt and Liguori, (1937) Ch. 513).

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HELMUT STEINBERGER

HARMONIZATION OF LAWS *see* Unification and Harmonization of Laws

HELSINKI CONFERENCE AND FINAL ACT ON SECURITY AND COOPERATION IN EUROPE

A. Historical Background: 1. Proposals for a European Security Conference. 2. The CSCE Preparatory Conference. 3. The Geneva Drafting Phase and the Signature in Helsinki. – B. Structure and Nature of the

Final Act: 1. Structure of the Final Act: The Four Baskets. 2. Legal Nature of the Final Act. – C. Content of the Final Act: 1. The Helsinki Declaration: (a) Principle I: sovereign equality, respect for the rights inherent in sovereignty. (b) Principle II: refraining from the threat or use of force. (c) Principle III: inviolability of frontiers. (d) Principle IV: territorial integrity of States. (e) Principle V: peaceful settlement of disputes. (f) Principle VI: non-intervention in internal affairs. (g) Principle VII: respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. (h) Principle VIII: equal rights and self-determination of peoples. (i) Principle IX: cooperation among States. (j) Principle X: fulfilment in good faith of obligations under international law. 2. Confidence Building Measures. 3. The Second Basket. 4. The Mediterranean Document. 5. The Third Basket. 6. The Fourth Basket. – D. Subsequent Developments.

A. Historical Background

1. Proposals for a European Security Conference

On August 1, 1975 all the European States (with the exception of Albania), together with Canada and the United States signed in Helsinki the Final Act of the Conference on Security and Cooperation in Europe (CSCE, ILM, Vol. 14, p. 1292). The idea of a European security conference was proposed for the first time by the Soviet Union at the Berlin Quadripartite Conference of February 10, 1954. During the following years, the Soviet Union and the other Eastern European States reiterated this proposal on several occasions. In particular, in July 1966, the Political Consultative Committee of the → Warsaw Treaty Organization adopted in Bucharest a document entitled "Declaration on Strengthening Peace and Security in Europe". This Declaration called for an all-European conference, excluding any non-European State such as the United States, on security, peace, and cooperation between States, regardless of their political, economic or social systems. The aims of the proposed conference were the recognition of the stability of post-war frontiers (→ Peace Settlements after World War II), the definitive acknowledgment of the existence of the German Democratic Republic (→ Germany, Legal Status after World War II; → Potsdam Agreements on Germany (1945); → Yalta Conference (1945)), the exclusion of the Federal Republic of Germany from access to nuclear armaments, the intensification of economic and scientific cooperation, the development of some measures of military *détente*, and the dissolution of both European military → alliances (the → North Atlantic Treaty Organization (NATO) and the Warsaw Treaty Organization) to substitute for them a new all-European security system (→ Collective Security). The Bucharest Declaration's ultimate goal of weakening American influence in Europe was quite evident, as emphasized by its reference to United States foreign policy as a direct threat to the peace, security and → vital interests of European peoples.

In March 1969, at its meeting in Budapest, the Political Consultative Committee of the Warsaw Pact launched another "appeal" for a European security conference, basically reiterating the Bucharest Declaration. On May 5, 1969 the Finnish Government delivered to every European State, as well as to the United States and Canada, a → note supporting the idea of a European conference and offering Helsinki as the meeting place. Two months after a new Warsaw Pact communiqué, released at the Prague meeting of October 1969, the NATO Council officially responded for the first time to the Eastern proposals by a → declaration which accepted the idea of a European conference on condition that the United States and Canada would be admitted to participate. At the subsequent NATO ministerial session of May 1970 in Rome, the Western countries confirmed their growing support for a European conference, emphasizing as essential topics humanitarian issues such as free movement of persons, ideas and information, and military issues such as balanced force reductions and confidence-building measures. One month later, in Budapest, the members of the Warsaw Treaty Organization, acknowledging the favourable Western response, added to the original proposal the idea that the prospective conference should establish a permanent all-European organization for security and cooperation. Although the Western countries could not agree on the establishment of such an organization because, *inter alia*, it would have meant the exclusion of the United States, East-West exchanges on the subject progressed during the following months. They were facilitated by the signature, on September 3, 1971, of the Quadripartite Agreement on Berlin (UNTS, Vol. 880, p. 116).

Finally, notwithstanding the contrast between Eastern and Western views on the sense of the expression "security and cooperation", multilateral preparatory talks for the CSCE began in Helsinki on November 22, 1972.

2. The CSCE Preparatory Conference

After a lengthy diplomatic effort, delegates from 32 States met in Helsinki to settle several questions concerning the prospective CSCE. In the first place, it was decided when and where to hold the Conference, and which States were to be invited. Secondly, the participating States reached an agreement on the rules of procedure to be followed by the Conference. Lastly, and chiefly, the States agreed on the framework and contents of the CSCE, distributing the subjects among four "baskets". In particular they determined which "principles" should be formulated at the Conference. The Preparatory Conference closed on June 8, 1973, with the adoption of a 27 page document entitled "Final Recommendations of the Helsinki Consultations", unofficially called the "blue book".

3. The Geneva Drafting Phase and the Signature in Helsinki

The CSCE itself developed through three stages. In the first stage, the ministers of foreign affairs of the 35 participating States met in Helsinki, on July 3 to 7, 1973, where they approved the Final Recommendations. The second stage took place in Geneva, where the delegations, composed of high officials and experts, worked from September 1973 to July 1975. Here the Final Act of the CSCE was drafted after tiring → negotiations. The third stage consisted of the ceremonial signature in Helsinki, on August 1, 1975, of the Final Act by 35 heads of State or government (including the representative of the → Holy See).

B. Structure and Nature of the Final Act

1. Structure of the Final Act: The Four Baskets

The Final Act is a long and comprehensive document divided into five parts, four of which are traditionally referred to as "baskets". Basket I, entitled "Questions Relating to Security in Europe", includes a "Declaration on Principles Guiding Relations between Participating States", some additional paragraphs concerning the implementation of a couple of the principles embodied in the Declaration, and a document on confidence-building measures and certain aspects of security and disarmament. Basket II is entitled "Co-operation in the Field of Economics, of Science and Technology and of the Environment". Basket III, entitled "Co-operation in Humanitarian and Other Fields", deals with humanitarian topics such as reunification of families across borders, circulation of and access to information, cultural cooperation and the like. The fourth basket concerns the "Follow-Up to the Conference", whereas the fifth part (actually inserted between the second and the third basket, and generally viewed as the least important) deals with "Security and Co-operation in the Mediterranean".

2. Legal Nature of the Final Act

The Final Act of the CSCE is not an international treaty (→ Treaties; → Treaties, Multilateral), even though it is a document drafted in treaty-like language and signed at the highest level by 35 States. There is no element in the text itself, in the preparatory works, in the circumstances of its adoption or in the subsequent practice of States supporting the view that the final Act is a legally binding international treaty. On the contrary, there are several elements showing the definite intention of the participating States not to regard the Final Act as a treaty. First of all, one of the last paragraphs of the Final Act itself specifies that this instrument "is not eligible for registration under Article 102 of the Charter of the United Nations" (→ Treaties, Registration and Publication). This so-called "disclaimer" of legal value is more explicitly repeated in a letter addressed by the Finnish Government, along with the text of the Final Act, to the → United Nations Secretary-General wherein it is stated that the Final Act is not to be registered with the UN Secretariat "as would be the case were it a matter of a treaty or international agreement". In the second place, there are several statements to the same effect made on and off the record, either by heads of State or government at Helsinki or by delegates during the Geneva drafting phase. Further oft-quoted elements are the term "Final Act", the

word "guiding" instead of "governing", referring to the ten principles of Basket I, the "soft" language used throughout the document, in particular the use of "will" instead of the normative "shall", and the lack of any indication as to the instrument's ratification and entry into force (→ Treaties, Conclusion and Entry into Force).

The fact that the signatory States do not regard the Final Act as a legally binding treaty does not imply that they do not intend to abide by its provisions. In the last paragraph of the Final Act the participating States, "mindful of the high political significance which they attach to the results of the Conference", declare "their determination to act in accordance with the provisions contained in the above texts". Even if the Final Act can have only a hortatory value at the legal level, it constitutes a moral and political commitment binding at the political level and involving the signatories' reliability and → good faith (see → Gentlemen's Agreement; → Non-Binding Agreements). Therefore, although a violation of the Final Act would not be *per se* a legally wrongful act entailing a State's responsibility under → international law (→ Responsibility of States: General Principles), States may have to pay a certain political price if they ignore it. Since in → international relations, arguably, political deterrents are often no less influential than legal ones, the Helsinki Act might succeed in conditioning the signatory States' behaviour.

The political nature of the so-called Helsinki Accord does not exclude, however, important legal implications of the document. In the first place, the lack of legal force of the Act obviously does not affect those enunciations which reiterate or interpret existing international rules and obligations. In fact, many provisions of the Final Act, especially those contained in the Declaration of Basket I, reproduce rules or principles of general international law or of the → United Nations Charter. These provisions of the Final Act are legally binding on the strength of such underlying rules or principles, regardless of their repetition in a legally non-binding instrument. Then, a provision of the Act supporting a given interpretation of a written or unwritten norm of international law constitutes an authoritative, if not "authentic", endorsement of such interpretation (→ Interpretation in International Law). Furthermore, a Final Act provision not reproducing an existing rule of international law can contribute to the subsequent formation or development of a new norm of general international law of similar content. This outcome would be an effect not of the Final Act *per se*, but of the process through which States, under the influence of the Final Act, may fashion new rules or principles of international law (→ Customary International Law).

C. Content of the Final Act

1. The Helsinki Declaration

The Declaration on Principles Guiding Relations between Participating States, embodied in Basket I, is a decalogue covering nearly every issue of international relations, and commonly known as the Helsinki Declaration. It deals with paramount issues such as sovereign equality (→ Sovereignty; → States, Sovereign Equality) and territorial integrity of States (→ Territorial Integrity and Political Independence; → Territorial Sovereignty), → use of force, → intervention (→ Non-Intervention, Principle of), inviolability of frontiers (→ Boundaries), → peaceful settlement of disputes, → human rights, → self-determination, cooperation among States, and good faith compliance with international law.

The Declaration can be considered the highlight of the whole Act, even though it has no greater status than any other part of the CSCE final document. In the preambles of Baskets II and III there is a reference to the Declaration that seems to confer to this document some kind of logical priority over the remainder of the Act; however, from a formal point of view, there cannot be any distinction. Clearly, the Final Act is an organic whole, its various parts or elements being interdependent. This interrelation of the Final Act's provisions is expressly singled out in the Declaration, whose final clauses provide that "all the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others". Therefore, no principle has a special status or can be regarded as being more important than any other. The ten principles of the Helsinki Declaration originate from the UN Charter and, more directly, from the

seven principles of the → Friendly Relations Resolution, adopted in 1970 by the → United Nations General Assembly. In fact, the → preamble of the Declaration reveals the participating States' intent to interpret and apply the ten principles in full conformity with the Charter and the Friendly Relations Resolution. Moreover, the preamble makes clear that the participating States, in dealing with each other, should respect and put into practice the principles "irrespective of their political, economic or social systems as well as their size, geographical location or level of economic development". This means, *inter alia*, that there should not be special norms or doctrines, inconsistent with the principles, applying only to the interrelations among States with similar political systems.

(a) Principle I: sovereign equality, respect for the rights inherent in sovereignty

Certainly no State disagrees with the gist of this principle, which restates and develops Art. 2(1) of the UN Charter. The principle actually consists of two different notions: sovereignty and legal equality. Sovereignty, which should be considered as a fact rather than as a legal attribute, encompasses the right of every State freely to choose its domestic and foreign policies, including the right to belong or not to belong to international organizations or alliances and the right to be neutral (→ Neutrality, Concept and General Rules). Legal equality means that, like individuals before domestic law, all States are equal before the law; accordingly, no State can be discriminated against by using different standards in evaluating its conduct. The formulation of this principle also contains a clause on the admissibility of peaceful change of frontiers, which should be read in connection with principle III on inviolability of frontiers.

(b) Principle II: refraining from the threat or use of force

The first sentence of the first paragraph of this principle faithfully restates Art. 2(4) of the UN Charter. This reflects the concern of most delegations not to deviate from that formulation, the bulk of which, according to many authors, has by now become a rule of general international law. The second sentence emphasizes the prohibition by stressing that no "consideration" (the proposed stronger term "pretext" was not acceptable to some States) may be invoked to contravene the principle. This specification, however, does not affect those cases in which the use of force is admissible under international law, such as the resort to lawful measures of → self-defence (→ Collective Self-Defence; → Self-Help; → Self-Preservation). The second paragraph unambiguously bans indirect use of force and armed → reprisals. Moreover, it condemns any form of pressure which can somehow result in a limitation of another State's sovereignty. The third paragraph underscores the obvious link between this principle and the principle of peaceful settlement of disputes. It can also be noted that the term "force" should probably be interpreted in a wider sense than just armed force, so as to encompass any serious form of political or → economic coercion.

Under the heading "Matters Related to Giving Effect to Certain of the Above Principles", annexed to the Declaration, Basket I sets forth some additional provisions concerning this principle. These provisions originate from an ambitious Rumanian proposal, aimed at strenghtening the principle and transcending, somehow, the European military and political alignments. Both the Soviet Union and, for different reasons and to varying degrees, the Western delegations contributed to softening the original proposal. As a result, the provisions in question do not add much to the formulation of principle II itself.

(c) Principle III: inviolability of frontiers

According to the formulation of this principle, which in the Friendly Relations Resolution was considered as an integral part of the prohibition of force, the participating States regard all frontiers as "inviolable", and will refrain from "assaulting" any frontier and from "seizing" or "usurping" any part of another State's territory. The Soviet Union regarded the establishment of this principle as its foremost objective at the CSCE. In fact, the Soviet Union sought recognition (in a place of a peace treaty with Germany) of the immutability of the post-war territorial and political order, particularly with regard to the two German States. By contrast, the Western objective was to avoid any language which might preclude the prospect of

peaceful change of frontiers, especially with respect to German reunification or → European Communities' evolution towards a political union. The outcome of the negotiation was obviously an ambiguous compromise formulation. As a result, Eastern commentators generally regard this principle as clearly prohibiting even peaceful policies aimed at revising frontiers, whereas most Western commentators view it as a mere corollary of principle II, thus encompassing only violent territorial changes. Indeed, given the interdependence of all principles, an accurate construction of this principle cannot ignore the already mentioned clause on peaceful change of frontiers inserted in principle I.

(d) Principle IV: territorial integrity of States

Much of what has been said with regard to the previous principle could be repeated here. The Soviet Union wished to insert principle IV in the Declaration as a further acknowledgment of the territorial → *status quo* in Europe. The Western delegations, on the other hand, wanted to link this principle to existing international law and, in particular, to the prohibition of the threat or use of force. The outcome is quite vague. "Territorial integrity" is not defined in the final formulation, but all delegations understood that "territory" would include the → territorial sea and national air space (→ Air, Sovereignty over the). In this regard, the language "any action" of the second paragraph might extend the prohibition to such non-violent actions as, for example, transnational pollution or accidental violations of air space. The last paragraph, condemning military occupation and forcible acquisitions of territory, ambitiously states that "no such occupation or acquisition will be recognized as legal" (→ Recognition).

(e) Principle V: peaceful settlement of disputes

Although no State seems to question the desirability in the abstract of such a principle, States have very different views on its practical content. For instance, while some States favour the adoption of procedures of binding settlement, other States deem any kind of third-party settlement to be incompatible with sovereignty. As a result, the formulation of this principle has not improved the existing framework of Art. 2(3) and Chapter VI of the UN Charter. Possibly, the Helsinki text is even less effective than the loose formulation contained in the Friendly Relations Resolution.

Remarkably, the Swiss delegation introduced at the CSCE a comprehensive draft convention on binding settlement of legal and political disputes. Notwithstanding some lengthy debates in a special working group, also charged with the examination of the above-mentioned Rumanian proposal on the use of force, no actual progress was made. The outcome was a general statement, annexed to the Declaration, on the usefulness of peaceful settlement of disputes, along with a commitment to pursue negotiations on this issue within the framework of the "Follow-up to the Conference". However, the subsequent meetings of experts on peaceful settlement (Montreux 1978, Athens 1984) have yielded no result.

(f) Principle VI: non-intervention in internal affairs

The drafting on this controversial principle caused intense debates between the Western and the Eastern delegations. The Western States, as well as a number of → non-aligned States, aimed at banning any coercive intervention in the affairs pertaining exclusively to the → domestic jurisdiction of another State. The Eastern States sought a formulation by which any kind of query aimed at scrutinizing or censuring another State's behaviour, particularly with regard to human rights, would constitute unlawful interference. According to the formulation eventually enshrined in the first paragraph, States "must refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations". This definition is complemented and specified by para. 2, dealing with → aggression or threat thereof, para. 3, covering political and economic coercion, as well as military measures short of aggression, and para. 4, dealing with indirect aggression. The CSCE condemnation of intervention is therefore based on the following elements: First, there must be an act of military, political or economic coercion aimed at tampering with the domestic or foreign affairs of another State. Then, in case of economic or political coercion (military measures are wrongful without further qualifications), the act must concern a matter falling within the

domestic jurisdiction of another State, i.e. areas where such State is not bound by international obligations towards the intervening State. However, an interference with regard to matters not falling within the domestic jurisdiction of the other State may be likewise improper unless it is aimed at bringing about compliance with such international obligations. Finally, the clause "regardless of their mutual relations" makes clear that no special relationship between two or more States could render lawful an act of prohibited interference.

(g) Principle VII: respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

The inclusion of this principle in the Declaration is the result of a successful Western effort to emphasize that security and *détente* can depend on States' respect for and promotion of human rights. The first paragraph of this formulation binds the participating States to honour, without discriminations of any kind, the fundamental freedoms of thought, conscience, religion and belief. The second paragraph stresses that all human rights and freedoms, whose "effective exercise" is to be "promoted" and "encouraged", derive from the "inherent dignity of the human person"; accordingly, they are not privileges extended by a government or conditioned on a society's structure. The third paragraph, originating from a proposal by the Holy See, ensures the right of every individual to profess and practice, alone or in association with others, any religion or belief. The fourth paragraph, deriving from a Yugoslav proposal, commits the participating States to protect → minorities, regarded both as communities and as individuals. The fifth and sixth paragraphs emphasize the necessary link between respect for human rights and improvement of international *détente* and cooperation. The seventh paragraph affirms "the right of the individual to know and act upon his rights and duties". Therefore, the participating governments have pledged to inform their peoples of their rights and freedoms and to grant effective legal remedies for any violation of such rights and freedoms. Finally, the eighth paragraph is aimed at coordinating the CSCE formulation on human rights and other international instruments, such as the UN Charter, the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)) and the two → human rights covenants.

(h) Principle VIII: equal rights and self-determination of peoples

The original purpose of this principle, as set forth in the UN Charter, was essentially to allow all peoples freely to express their genuine political choices against any form of foreign domination or internal oppression. During the post-war period, due to the urgent requirements of → decolonization, the principle of self-determination was taken in UN practice to mean merely "external" self-determination and was, thus, applied almost exclusively to the peoples under colonial, racist or foreign domination. Perhaps the 1970 Friendly Relations Resolution denoted a shift in the interpretation and application of this principle, including in its formulation some provisions which could not be restricted only to peoples under colonial, racist or foreign rule. In any event, the CSCE formulation undoubtedly affirms a universal concept of self-determination, upholding the right of all peoples to choose, adapt or change their internal and external political status whenever they wish. The text is clear in this sense. Moreover, the narrow notion of self-determination would not make much sense in Europe, where one could hardly find forms of colonial or racist domination.

The first paragraph enunciates the principle of self-determination in general terms and, mentioning the rules on territorial integrity of States, reiterates the traditional safeguard clause against → secession. However, this is not a limitation on the right of peoples to self-determination; it rather restrains States from supporting secessionist movements abroad. The second paragraph stresses that "all peoples" have "always" the right, "when and as they wish", to pursue self-determination "in full freedom". Accordingly, even peoples living in their own independent country, i.e. peoples having already achieved "external" self-determination, have a permanent right to retain or change their political, social or economic régime in order to achieve "internal" self-determination free from internal oppression or external interference. The third paragraph emphasizes the importance of respect for and promotion of self-determination in

order to develop friendly relations and cooperation among the participating States.

(i) Principle IX: cooperation among States

The formulation of this principle reflects the different goals of the participating States. The Western delegations regarded the principle of cooperation as a means to liberalize human contacts across borders and to promote the role that individuals can play in the achievement of *détente* and mutual understanding. Most Eastern delegations thought of cooperation merely in terms of peace and security between States. Some non-aligned delegations considered this principle mainly in terms of economic development and access to technology. The text blends such different conceptions of cooperation through a balanced compromise.

(j) Principle X: fulfilment in good faith of obligations under international law

The tautological formulation of this principle does not add much to its title. It basically reiterates that States must comply in good faith with all their obligations deriving from both written and unwritten international law. The participating States also reaffirm their political commitment to abide by the Final Act, pledging to "pay due regard to" and to "implement" its provisions. Finally, the text restates Art. 103 of the UN Charter, emphasizing the primacy of Charter obligations over any other treaty obligation.

2. Confidence Building Measures

Under the title "Document on Confidence-Building Measures and Certain Aspects of Security and Disarmament", the second part of Basket I deals with the military aspects of security and cooperation in Europe. The Western and the Eastern approach to this subject were quite different. In order to strengthen confidence between blocs, the Western delegations pursued a detailed codification of measures designed to be unambiguous, non-discriminatory, i.e. equally benefiting every participating State, and practically enforceable. The Eastern delegations (except Rumania) could accept only a loose formulation of very limited measures. After lengthy and difficult negotiations the participating States agreed on the following approach to confidence-building measures: They are to be carried out on a purely voluntary basis; they are not aimed at impairing States' freedom in the military field; their purpose is not to get technical information on States' military activities; and finally, they have nothing to do with → disarmament and → arms control, nor do they call for any kind of → verification. The agreed measures entail prior notification of military manoeuvres or movements and exchange of observers at such manoeuvres.

3. The Second Basket

The second Basket of the Final Act, entitled "Co-operation in the field of Economics, of Science and Technology and of the Environment", deals with the variety of issues indicated in its title. Some of these issues have been bilaterally or multilaterally discussed for years, with limited results, particularly within the UN Economic Commission for Europe (→ Regional Commissions of the United Nations). The long text of Basket II, divided into six parts, is a fair attempt to improve and stabilize, in the fields at issue, cooperation between States with different social and economic systems. The negotiations had to take into account, besides the obvious East-West contrast, the position of countries interested in stressing the level of economic development rather than the type of social or economic system.

The most controversial part of Basket II, legally and politically, deals with commercial exchanges. The foremost objective of the Eastern countries was to obtain the recognition of a generalized right to most-favoured-nation treatment (→ Most-Favoured-Nation Clause). Accordingly, the Eastern delegations, except those already enjoying such treatment as members of the → General Agreement on Tariffs and Trade (1947; GATT), pursued the insertion of a provision establishing that most-favoured-nation treatment is the basic and inherent principle of any trade relationship. The market-economy countries, on the other hand, considered most-favoured-nation treatment only as a voluntary concession, which could not be recognized as a generally binding trade principle. Such countries also emphasized the importance of effective → reciprocity, both in extending most-favoured-nation treatment and in stipulating trade agreements. Furthermore, they pursued the inser-

tion of a safeguard clause which could be applied in particular to relations with non-market economies. The final text on commercial exchanges reflects in large measure Western concerns, including, for instance, only a very loose reference to most-favoured-nation treatment and a detailed safeguard clause derived from Art. XIX of GATT. Other trade-related provisions deal with business contacts and facilities, economic and commercial information, marketing, and settlement of trade disputes through → arbitration.

The remainder of Basket II covers industrial cooperation, scientific and technological cooperation in several fields such as energy, physics, new technologies, meteorology, oceanography, geology, medicine and the like, environmental cooperation in fields such as air and water pollution, sea and land utilization, natural resources, etc. (→ Environment, International Protection), and other less developed areas of cooperation such as promotion of → tourism, development of transport, economic aspects of migrant labour, and training of personnel.

4. The Mediterranean Document

Between Baskets II and III, the Final Act includes a short document entitled "Questions Relating to Security and Co-operation in the Mediterranean". The inclusion of this subject in the CSCE was especially advocated by Italy and Malta. With this document the European States recognize the importance of their relationship with the non-participating Mediterranean States and declare their intention to develop good-neighbourly relations and mutual confidence with such States. In any event, the Mediterranean document contains only general provisions and very "soft" commitments not calling for any immediate action.

5. The Third Basket

The third Basket of the Final Act, entitled "Co-operation in Humanitarian and Other Fields", deals in considerable detail with human rights issues such as free movement of individuals, ideas and information (→ Information and Communication, Freedom of). The text includes a general preamble to the whole Basket and four sections entitled "Human Contacts", "Information", "Co-operation and Exchanges in the Field of Culture", and "Co-operation and Exchanges in the Field of Education", each section with a mini-preamble of its own.

Since Western and Socialist countries maintain different doctrines on human rights, the text of Basket III seems to reflect a compromise between opposing doctrines. In accordance with their view, the Eastern European delegations sought to insert in Basket III a general clause ensuring that contacts, information and exchanges would be based on complete respect for national laws and customs. They could not obtain such a clause within Basket III; however, its general preamble states that "co-operation should take place in full respect for the principles" set forth in the Declaration of Basket I. Therefore, the undertakings of Basket III are somewhat limited by any restrictive clause contained in the Declaration, such as the recognition in the first paragraph of principle I and in the second paragraph of principle X that each State has the sovereign "right to determine its laws and regulations". In addition, there are some restrictive clauses in Basket III itself, in the mini-preamble on human contacts, such as the references to "mutually acceptable conditions", to "measures which they consider appropriate", and to future agreements. On the other hand, the reference to the Declaration contained in the general preamble of Basket III applies also to principles VII (human rights) and VIII (self-determination). Accordingly, the provisions of Basket III should be read in the light of these two principles, in such manner as to constitute, together with them, an organic body of human rights standards. In particular, those specific and detailed provisions of Basket III which indicate concrete actions, concerns or objectives should be deemed mere specifications of principles VII and VIII, as if they were embodied in the formulations of such principles. The clear undertakings set forth in the latter thus reduce the scope of the restrictive clauses of Basket III.

As to the actual contents of Basket III, the section on human contacts includes provisions intended to favour contacts, regular meetings and even reunification on the basis of family ties, marriages between citizens of different States, personal or professional travelling, tourism, meetings among young people and sport. The section on information aims at increasing the flow of free

information across border, including printed, filmed or broadcast information, and at improving working conditions for journalists. Finally, the sections on cultural and educational exchange aim at increasing contacts and mutual understanding in such fields.

6. The Fourth Basket

The last part of the Helsinki Final Act, entitled "Follow-up to the Conference", establishes a continuing CSCE "process", with a view to bringing about and verifying compliance with the political obligations assumed by the participating States. The idea underlying the CSCE follow-up is that of "unilateral, bilateral and multilateral efforts to continue the multilateral process initiated by the Conference" (fourth paragraph) in order "to implement the provisions of the Final Act" and "to give full effect to its results" (third paragraph). No permanent structure of any kind is set up. Basket IV only provides for a loose framework, consisting of *ad hoc* conferences and meetings of experts during which progress and implementation can be reviewed. Some States attempted to obtain a more institutionalized structure, but most Western States maintained a suspicious attitude towards any kind of permanent pan-European machinery. In the course of the negotiations, moreover, the Soviet Union gradually shifted her attitude on this issue. After having initially supported the idea of a permanent organization, the Soviet delegation ended up being quite reluctant to accept even very mild forms of institutionalization. As a result, the participating States only established that the first follow-up conference, officially defined as a "meeting of representatives of the participating States", was to be held in Belgrade in 1977 with a prior preparatory meeting in the same place to fix dates, duration, agenda and other modalities of the conference. Any decision about further follow-up meetings was left to the Belgrade conference.

D. Subsequent Developments

The CSCE follow-up process began in Belgrade, where the representatives of the participating States met from October 1977 to March 1978. The Belgrade review conference did not yield any substantial result. The ideological, political and economic differences once more came to light, especially with regard to the implementation of the human rights provisions. The participating States adopted a concluding document in which they merely stated "the importance they attach to *détente*" and their resolve "to implement fully, unilaterally, bilaterally and multilaterally, all the provisions of the Final Act" (ILM, Vol. 17 (1978) p. 414). They also "recognized that the exchange of views constitutes in itself a valuable contribution towards the achievement of the aims set by the CSCE, although different views were expressed as to the degree of implementation of the Final Act reached so far". The only true decision taken at Belgrade was to continue the CSCE process by holding another review conference in Madrid in 1980 and some short meetings of experts (Montreux in 1978 on peaceful settlement of disputes, Bonn in 1978 to prepare the Hamburg Scientific Forum of 1980, and Valletta in 1979 on the Mediterranean).

The second CSCE follow-up conference was held in Madrid from November 1980 to September 1983, with several interruptions. The Madrid meeting was no more successful than the previous one. All five parts of the Final Act were discussed to verify any improvement in implementation. Once again the human rights provisions became a political battleground between West and East. In particular, the intense discussions confirmed the thorough disagreement over the meaning of the principle of non-intervention and its relationship to human rights principles. In any event, the concluding document of the Madrid meeting reaffirmed the participating States' commitment not to give up the CSCE process (ILM, Vol. 22 (1983) p. 1398). It was agreed that the third review conference would be held in Vienna commencing on November 4, 1986 with a preparatory meeting two months earlier. Then some meetings of experts were convened: at Athens in 1984 on peaceful settlement of disputes, where the participating States did not reach any consensus; Venice in 1984 on the Mediterranen; Ottawa in 1985 on human rights and fundamental freedoms, which resulted in a complete failure; Budapest in 1985 on culture; and Bern in 1986 on human contacts. Moreover, the participating States agreed to hold in Stockholm a Conference on Confidence and Security-Building Measures and Disarmament in Europe with some sessions at

ministerial level, beginning in January 1984. The Stockholm Conference successfully ended in September 1986 with an agreement under which, in particular, significant military activities must be notified in advance. Furthermore, each State may conduct a certain number of snap inspections on another State's territory if compliance with the agreement is in doubt.

In July 1985 the ministers of foreign affairs of all the participating States gathered in Helsinki to celebrate the tenth anniversary of the signature of the CSCE Final Act, reaffirming once more the importance of such instrument.

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HOLY PLACES

1. General Definition

Holy places or sacred places are geographically determined localities to which one or more religious communities attribute extraordinary religious significance or consider as subjects of divine consecration. Holy places may consist of man-made structures (churches, temples, graves, etc.) or natural objects (trees, groves, hills, rivers, etc.). The entry to or touching of holy places may be connected to rights or duties of the members of the communities concerned or to restrictions and sanctions for non-members. Within the area of a holy place the competence of the local secular authority may be restricted. Holy places may be of juridical importance within the protecting State as well as between States.

2. Holy Places and State Authority

(a) Autonomy

Religious consecration occasionally leads to the emergence of an autonomous legal status of a holy place. Even under the rule of decidedly secular governments, the respect of the secular authority toward the special status of holy places and the rights associated with them is to be seen for example in India and China.

(b) Asylum

The history of the law of → asylum is closely tied to the existence of holy places. Even according to the rules of primitive peoples or of early civilizations, taking refuge in certain holy places meant, at least temporarily, the end of the persecution of the → refugee by secular authorities or by parties to a blood feud. Especially in Europe and around the Mediterranean Sea the relation between holy places and the right of asylum was developed (e.g. the holy groves and other holy places of the Germans and the Celts, the temple asylum in ancient Greece and Egypt, cities of asylum in old Israel, and the church asylum of medieval Christianity) and preserved partially until modern times (e.g. in the practice of many governments not to touch the inside of churches or, in Asia, temples; the character of the Mosque of Omar in → Jerusalem as a place of asylum).

(c) Freedom of religion

As a rule, within the boundaries of holy places there is freedom of religious expression and practice independent of the secular law existing

outside those boundaries. Such freedom is actually an element of the definition of a holy place itself and in this sense means freedom from seizure by secular authorities. It does not necessarily exclude restrictions introduced by rules of the religious community concerned, which, for example, benefit certain privileged community members like priests (e.g. with respect to temples of the old Mesopotamian civilizations, the inner part of the Apollian sanctuary in Delphi, the inner chamber of the Temple of Solomon in Jerusalem) or the members in general through the simple exclusion of non-members of the community (e.g. with respect to the Ka'aba in Mecca).

(d) Freedom of access

As far as holy places (e.g. places of pilgrimage) are, according to the rules of the interested religious community, open to particular persons or to the community members in general for the purpose of cult and religious practices, States often guarantee and secure free access, including entry to the State territory by foreign pilgrims and travel to the holy place.

(e) Property

Holy places are not subject to secular property rights and may therefore not be expropriated in the secular sense as long as their special legal status is acknowledged by the secular government. Though the use of a holy place by a religious community mostly exhibits the attributes of full property rights, e.g. in the form of the exclusive right of disposal, the term "right of usufruct" is often preferred, for example in relation to the holy places in Jerusalem, which are partially subject to use by certain Latin or Orthodox orders.

(f) Status of foreigners

The special legal status of holy places and their rights arising in relation to them often implies a change in the legal status of foreigners in the protecting State to the benefit of foreign visitors to the holy place concerned, especially to the benefit of pilgrims. The change may consist in privileges with regard to visas, enforced on the basis of domestic law itself or international agreements (→ Aliens).

(g) Limits of the special legal status of holy places

The abuse of holy places by using them for purposes other than religious ones may lead to the forfeiture of the protectional effects of the special legal status. Particularly under modern → sovereignty conceptions the special legal status of holy places is subject to the reservation of the secular → *ordre public*. This is especially the case if the holy place is used as a base for activities aimed at disturbing or destroying the public order and security of the protecting State, as occurred for example with the Golden Temple of Amritsar, which was attacked by regular troops of the federal government of India in 1984.

3. The International Role of Holy Places

The fact that at all times many religious communities have inhabited the territories of more than one State created a requirement for rules of general international law or treaty law with various objectives and contents.

In ancient Greece an agreement between the city-States in 421 B.C. guaranteed the autonomy of the citizens and of the area of the Apollian temple in Delphi. On the other hand, as a common law rule, the clergy of Delphi, in addition to the Oracle, served as an arbitration board for the settlement of disputes between the Greek city-States (→ History of the Law of Nations). The rule of peace-keeping during the famous games in honour of Zeus around the Zeus sanctuary in Olympia may be considered as common law as well. Last relicts of a special status that Rome bore as Holy City figured as a small part of the → concordat between Italy under Mussolini and the Vatican in 1929 (→ Lateran Treaty (1929)); the concordat of 1984, which replaced the one of 1929, has given up the notion of "Holy City". The traditional autonomous status of Mecca under Islamic law may be considered as based on a sort of common law which is still valid. Secular government (formerly the Sheriff of Mecca, appointed by the Ottoman sultan, today the King of Saudi Arabia) has no power over the sanctuary but regards itself as its servant without any right of disposal over the territory in question. Even extraordinary measures to ensure the security of the place are legally not possible without the consent of the religious authorities.

The remainders of international rules in regard to holy places today generally relate to freedom of religion and the free access of pilgrims. The State of origin guarantees the free exit of the pilgrims, and the State protecting the holy place guarantees the free entry to the State territory and the access to the holy place. These rules are demonstrated in the practice of Islamic countries whereby permission is granted for pilgrims to Mecca to leave the country (Turkey, for example) on the one hand and to pass through other countries and enter Saudi Arabia on the other. Another example is the practice of Pakistan to facilitate the visits of Indian Sikhs to Nanhana Sahib in Lahore. One of the few examples based on treaty law is the privileged access of Indian Lamaist, Hindu and Buddhist pilgrims to Tibetan territory in order to visit Kang Rimpoche (Kailas) and Mavam (Tso Manasarowar) granted under the trade agreement made between India and the People's Republic of China on April 28, 1954 (UNTS, Vol. 299, p. 57). Reciprocally, the agreement provides privileged access to Tibetan pilgrims of Lamaist and Buddhist faith to India in order to visit Banares, Sarnath, Gaya and Sanchi. Also guaranteed is the free access of pilgrims to Lhasa, "in accordance with custom" (Art. III).

4. Holy Places in Palestine

The holy places which are subjects of international legal science mostly include just those in Palestine, especially Jerusalem. A → United Nations' list of thirty such places is given for example by Elihu Lauterpacht (Jerusalem and the Holy Places (1968) p. 5). Though the issue of holy places should be distinguished legally from the status of Jerusalem and from the → Palestine question, the issue plays an important political role in this context (→ Israel and the Arab States; → Israel: Status, Territory and Occupied Territories). At least since the conquest of Jerusalem by the Khalif Omar in 637, the holy places in the city have been subject to the international interests of the three monotheist world religions and the cause and object of the wars known as the crusades, as well as of international agreements, for example the Frankish protectorate. Additional problems have been produced by the fact that there has never been a homogeneous Christian policy in order to exclude the negative effects of confessional frictions.

A certain stabilization in the status of the holy places in Jerusalem followed the seizure of power in Jerusalem by the Ottoman Turks under Selim I in 1517. Though the holy places are now under Israeli jurisdiction, the → *status quo* still valid today has its origin in an agreement (capitulation) between Louis XV of France and the Ottoman Sultan Mahmoud I in 1740, in which the free access of all Catholic pilgrims and the existing rights of the Latin orders to use the buildings of the holy places were guaranteed. A short time later, in 1757, similar guarantees were granted by Osman II, in a firman of 1757 (see also the Turkish-Russian agreement of Kücük Kaynarci in 1774; treaty of Berlin of 1878, → Berlin Congress (1878)). With the end of the Ottoman rule in 1917 and the acceptance of the → mandate of the → League of Nations by Great Britain, no essential change in the status of the holy places was to be observed. Their status has, moreover, not been affected by the Arab or the Israeli authorities after World War II. The efforts within the framework of the United Nations to respond to the Palestine question and to work out the internationalization of Jerusalem, which could have brought an actual definition of the status of the holy places, have been without any result.

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CHRISTIAN RUMPF

HOLY SEE

1. Notion and Terminology

The term "Holy See" is used to refer to the supreme organ of the Catholic Church (including all its rites), i.e. the bishop of Rome, commonly called the Pope, together with those offices of the Roman Curia through which he governs the universal Church. The term "Vatican", sometimes also used here, should be restricted to the Vatican City State which, while also ruled by the Pope, is essentially distinct from the Holy See.

Through the Holy See, the Catholic Church is present and acts on the international scene. Yet the question raised in legal writing of whether the Church or the Holy See is in fact the → subject of international law concerned is immaterial, since the supreme power within the Church is concentrated in the Holy See and freely exercised by it, limited only by divine (positive and natural) law.

The international legal personality of the Holy See is based on the fact that the internal legal order of the Church is not derived from any → State or other subject of → international law, and is therefore sovereign. With regard to the religious mission of the Church, directed to the supranational welfare of man, the → sovereignty of the Church is sometimes called "spiritual", as distinct from the "temporal" sovereignty of the State. The Church differs from the State, however, not only because of its different purposes but also in not possessing a territory of its own as a constituent element. This does not prevent the Pope from exercising sovereign power over a particular territory and thereby becoming a temporal prince also.

The differences between Church and State have led certain authors to call the former a subject of international law *sui generis*. This is correct only if it is to imply no more than that the State is the typical subject of international law and not the only proper one; for, as was stated by the → International Court of Justice (ICJ) in the case of → Reparation for Injuries Suffered in Service of UN (Advisory Opinion): "[t]he subjects of any legal system are not necessarily identical in their nature or the extent of their rights" (ICJ Reports 1949, p. 174, at p. 178). Therefore, in a certain sense any category of subjects of international law is *sui generis*.

The theory about the international legal personality of the Church, derived from the traditional doctrine of Church-State relationship, is supplemented today by another theory from the sphere of → human rights. According to it, the "freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief in teaching, practice, worship and observance", recognized in Art. 18 of the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)) and protected by Art. 9 of the → European Convention on Human Rights of 1950 and Art. 18 of the Covenant on Civil and Political Rights of 1966 (→ Human Rights Covenants), includes at least indirectly the independence of the Church from the State, since otherwise religious freedom, both individual and collective, would come to nought. Moreover, since the Church has a world-wide mission, it must necessarily have international standing. This coincides again with what was said by the ICJ in the Reparation for Injuries Case (op. cit., p. 178), namely that the nature of the subjects of law in any legal system "depends upon the needs of the community".

2. Historical Development

The success of the Church, during the first centuries of its existence, in asserting itself against a hostile State, forcing the latter to recognize it as an independent factor of public life, the disintegration of the Western Roman Empire, and the formation of various States of Germanic tribes on its former territory, all this contributed to the emergence of the international legal personality of the Holy See in practice (see articles on the → History of the Law of Nations). The ecclesiastical power of the Popes was regarded as politically equalling, if not exceeding that of emperors, kings and princes, who therefore entertained relations with the Holy See similar to those between themselves. An early form of papal diplomatic representatives were the *apocrisiarii*, from the fifth to the eighth century regularly appointed to transact the business of the Holy See with the imperial court in Constantinople and, thereafter, with the Carolingian kings and emperors (→ Diplomatic Agents and Missions). Permanent diplomatic representation was then, however, the

exception rather than the rule, and matters which called for → negotiations between the Holy See and another power were normally taken care of by legates or other envoys *ad hoc* (→ Special Missions).

The political independence of the Popes was furthered by their increasing temporal importance in Italy, over part of which they gained jurisdiction, first only in the form of administrative autonomy under the supremacy of the Eastern Roman Empire, but later also as sovereign princes. Famous instruments in the process of enhancing the temporal power of the Holy See were the donations of territory made by the Frankish ruler Pepin III and by Charlemagne in the eighth century; other parts of what were later called the Papal States were ceded to the Holy See by treaty or bequeathed to it.

Although the struggle for supremacy within Christendom, which went on between the papacy and the imperial power from the 11th to the 13th century, ended with a victory of the Popes, the Holy See was never really able to exercise direct political authority over the Holy Roman Empire, let alone other independent Christian kingdoms like France, Spain, England, Poland or Hungary; the transformation of the *corpus universale christianum* from what was at least in theory a political unity into a mere community of sovereign States which defied both papal and imperial authority was already concluded at the close of the Middle Ages. Within this community, the Holy See remained the first and highly revered political entity. The Popes and their representatives continued to take precedence over all temporal princes and their agents, but the Holy See had ceased to exercise any political authority over the States. The reformation and the emergence of Protestant States which refused to recognize the spiritual supremacy of the Pope accentuated this fact.

Within that community of sovereign States, modern forms of → international relations made an early appearance, not infrequently through the practice of the Holy See. Thus, the ecumenical councils of the Middle Ages, where numerous representatives of princes and States were present and which dealt also with temporal matters, e.g. weapons restrictions (→ Weapons, Prohibited), can be regarded as the forerunners of the modern peace congresses and State conferences (→ Conferences and Congresses, International). The Holy See was itself actively engaged in the → peaceful settlement of disputes, especially by → arbitration. Of particular importance however was the emergence of permanent diplomatic missions in which the Holy See played a decisive part. The first Apostolic Nunciature seems to have been set up in Venice about 1500. This practice was quickly followed by various States and became firmly established after the Peace of Westphalia (→ Westphalia, Peace of (1648)).

The Holy See also concluded → treaties with States: partly on temporal matters, in particular with regard to the Papal States; and partly on spiritual matters, especially on the status of the Church in the respective countries. The latter kind of treaties came commonly to be called → concordats.

Increasing secularization and the political and territorial changes in Europe during the 19th century called in question the traditional position of the Holy See and more particularly its temporal power. The Papal States which had still prospered in the 18th century were suppressed by Napoleon I and divided between the new Kingdom of Italy and the French Empire. Though they were restored to the Holy See by the → Vienna Congress in 1815, the Italian Risorgimento, aiming at political unity for Italy, prevented papal rule from consolidating itself and gradually destroyed the temporal power, which came to an end in 1870 when Rome was surrendered to, and annexed by Italy. Yet the Holy See refused to acquiesce in this spoliation, and the so-called Roman question remained a source of constant embarrassment for Italy's domestic and foreign policy.

Thus deprived of its territorial basis, the international legal personality of the Holy See came on trial, but stood the test when States continued to entertain diplomatic relations with the Holy See and to consider concordats as treaties governed by international law. For practical purposes, however, the Holy See sought to regain at least some temporal power as clear evidence for its complete political independence from any State. This was achieved through the → Lateran Treaty of February 11, 1929 (BFSP, Vol. 130, p. 791), by which Italy recognized the territorial sovereignty of the Holy See over the tiny Vatican City State, while

the Holy See renounced its rights to the former Papal States and recognized Rome as the capital of Italy.

3. The Holy See in the Contemporary International Community

At present, the Holy See entertains diplomatic relations with more than 100 States, including numerous non-Catholic and non-Christian countries. Prominent Protestant or atheistic States which have recently established full diplomatic relations with the Holy See or shown their intention to do so are the United Kingdom, the United States and Poland, the first Eastern bloc country.

In bilateral diplomacy, the Holy See's head of mission with the rank of ambassador is called nuncio, where the receiving State grants to the papal representative, in accordance with Art. 16(3) of the → Vienna Convention on Diplomatic Relations of 1961, the traditional privilege of precedence regardless of the date and time of taking up his function; otherwise he has the title of pro-nuncio. The head of a papal special mission of high rank is sometimes called a legate.

The Holy See has always strongly advocated the creation of international institutions for the maintenance of peace and for international cooperation. During both world wars, Popes Benedict XV and Pius XII, respectively, outlined in detail the principles for a peace organization that would be able to fulfil its functions, but neither the → League of Nations nor the → United Nations lived up to these expectations (→ Peace, Proposals for the Preservation of). Yet the Holy See is a founding member of the → International Atomic Energy Agency (IAEA) and has observer status with, *inter alia*, the United Nations, various → United Nations Specialized Agencies, the → Council of Europe and the → Organization of American States. The Holy See entertains normal diplomatic relations with the → European Communities. It was expressly recognized by the IAEA and by the United Nations that it is the Holy See and not the Vatican City State which participates, through permanent representatives, permanent observers, delegates and observer delegates, in the work of these organizations and their systems, including international conferences held under UN auspices. On the other hand, the Vatican City State is in its own right a member of various Specialized Agencies and other intergovernmental organizations for international cooperation, for example the → Universal Postal Union and the → International Telecommunication Union. However, no separate papal diplomatic service exists for the Vatican City State, whose interests are taken care of by the diplomatic representatives of the Holy See.

The interest taken by the Holy See in the work of international organizations is explained by its conviction that institutionalized cooperation in matters of security and development is necessary today in order to establish an international order of peace and justice which for its part is considered the best basis for the exercise of the Holy See's religious mission (→ Peace, Means to Safeguard; → International Law of Cooperation; → International Law of Development). For the same reason, the Holy See has always been ready, in times of international crisis, to offer its → good offices (especially in the course of World Wars I and II) or to act itself as an instance of mediation (→ Conciliation and Mediation) and arbitration. A recent example is the Beagle Channel dispute between Argentina and Chile which was settled by agreement in early 1984 with the mediation of the Holy See (→ Beagle Channel; → Beagle Channel Arbitration). These activities of the Holy See are carried out in accordance with Art. 24 of the Lateran Treaty, which states that the Holy See will keep aloof from the temporal contests of States, unless the parties to a dispute jointly appeal to its peace mission, but reserves its right in any given case to apply its moral and spiritual authority.

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HERIBERT FRANZ KÖCK

HOMELANDS POLICY *see* South African Bantustan Policy

IMMUNITY CASE (GERMAN FEDERAL CONSTITUTIONAL COURT, 1977)

In 1975 a citizen of the Federal Republic of Germany obtained from the Landgericht (the trial court) in Bonn a default judgment against the Republic of the Philippines for the payment of DM 95 231.86 plus interest and costs. The suit had arisen from a rental contract for a house which the Republic of the Philippines had leased for use as offices by its embassy (→ Diplomatic Agents and Missions). On the basis of the judgment, the plaintiff obtained from the Amtsgericht (the local court) an order attaching the claims of the Republic of the Philippines against the garnishee, a German bank in Bonn, for payment of the present and all future balances due to the Republic of the Philippines from existing transactions on the current account. The Republic of the Philippines objected to the order on the ground that the embassy's account was not subject to German → jurisdiction. The Amtsgericht suspended the enforcement proceedings and referred the question to the Bundesverfassungsgericht (the German Federal Constitutional Court). The issue presented was whether enforcement procedures against the current bank account of a foreign embassy maintained for the purposes of covering the official costs and expenses of an embassy were admissible under general rules of public → international law which, by virtue of Art. 25 of the Basic Law of the Federal Republic of Germany, form part of federal law (→ International Law and Municipal Law).

The Bundesverfassungsgericht (Decision of December 13, 1977, BVerfGE 46, 342) held that the following general rule of international law exists: Forced execution of judgments by the forum State under a writ of execution against a foreign State which has been issued in respect of non-sovereign acts (*acta jure gestionis*) of that State, on property of that State which is present or situated in the territory of the forum State, is inadmissible without the consent of the foreign State if, at the time of the initiation of the measure of execution, such property serves sovereign purposes of the foreign State (→ State Immunity; see also BVerfGE 64,1 concerning bank accounts held in the name of a State-owned corporation; cf. → Paul Clerget v. Banque commerciale pour l'Europe du nord et Banque du commerce extérieur du Vietnam). Funds on a general current bank account of the embassy of a foreign State which is maintained in the forum State and the purpose of which is to cover the embassy's costs and expenses must not be subjected to execution by the forum State.

In 1963, the Bundesverfassungsgericht had ruled that under contemporary general international law a State was not obliged to grant a foreign State immunity from jurisdiction in respect of proceedings against that State, relating to its non-sovereign acts (Embassy of Iran case, BVerfGE 16, 27). From this, however, did not follow that general international law also demanded only relative immunity in the case of enforcement measures, now before the Court, since preliminary safeguarding as well as measures of forced execution in general had a much more direct and drastic impact on the exercise of sovereignty by the foreign State than did mere judicial judgments. It was, therefore, necessary to consider separately whether and to what extent general rules of international law precluded enforcement measures.

In order to identify general rules of → customary international law (→ Sources of International Law), one had to focus primarily on the acts relevant to international law of those State organs which are responsible, under international law or domestic law, for representing the State in → international relations (→ Representatives of States in International Relations). In addition, such practice may also be ascertained from acts of other State organs, like the legislature or the courts, at least in so far as their actions are of direct relevance to international law because they

may serve, for instance, to fulfil an obligation under it. In the case of decisions by national courts this applied in particular where domestic law permits courts to apply international law directly, as under Art. 25 of the Basic Law of the Federal Republic of Germany.

From a broad collection and comparison of treaties, legislative and judicial practice of various States as well as the teachings of learned authors, the Court concluded that there existed, at present, no custom which was sufficiently general and backed by the *opinio juris sive necessitatis* to constitute a general rule of customary international law to the effect that the State of the forum was principally debarred from the levying of enforcement measures against a foreign State.

While thus not imposing an outright prohibition on execution, general rules of international law, however, imposed material limits on it. There was an established general custom among States, backed by *opinio juris*, whereby the forum State was prohibited under international law from levying execution on property of the foreign State which was present or situated in the forum State and was used for sovereign purposes of the foreign State, except with the latter's consent. According to the established view which had been emerging even before the time of Grotius and Bynkershoek, preliminary safeguarding measures and measures of execution against a foreign State must not, under international law, be levied on property which at the relevant time is being used by its diplomatic mission for the performance of its official functions. The principle of international law *ne impediatur legatio* precluded such measures where they might impair the exercise of diplomatic functions (see also BVerfGE 15, 25 (1962)).

In view of the difficulties involved and because of the potential danger for abuse, general international law protected a wide area for the foreign State and referred to the typical abstract danger but not to the specific threat to the ability of the diplomatic mission to function posed by measures of the receiving State. Claims arising out of a general current bank account which the sending State maintained for the purpose of covering the costs and expenses of its diplomatic mission shared the special protection afforded to diplomatic missions by the rules of international law on the inviolability and immunity of the sending State in this field (→ Diplomatic Agents and Missions, Privileges and Immunities). The purpose of these rules was to safeguard the unimpeded functioning of the diplomatic mission. The use of funds was essential for the performance of these functions; it pertained directly to the continued discharge of the diplomatic functions. This was so notwithstanding the fact that some transactions through such an account might, as regards relations between the sending State and the bank or with third parties, have been effected in the context of legal relationships or forms of activities which might, by the legal nature of the act, be qualified *acta jure gestionis*. Taking another view would in practice amount to an interference, contrary to international law, in matters within the exclusive competence of the sending State.

General international law, on the other hand, did not prohibit requiring the sending State to substantiate by due assurance the fact that a given account was used for the performance of the functions of its diplomatic mission. The Court was aware that such accounts might be used as a shield for financial transactions not directly related to diplomatic functions. In such a case it would be for the competent authorities of the forum State to counter such abuse by diplomatic and other means admissible under international law (compare the decision of the House of Lords in Alcom Ltd. v. Republic of Colombia (1984) 2 All E.R. 6).

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INTER SE DOCTRINE

1. Notion

The *inter se* doctrine, which would appear to have been obsolete (or nearly so) for a considerable period of time in all the different fields to which it applied, asserted that relations between members of the → British Commonwealth were in no circumstances international, and were incapable of giving rise to rights and duties under international law. These relations were treated as being of a *sui generis* character, being largely governed by conventions, and as being founded on the common allegiance owed by British subjects to the Crown, which was thought to be of unitary character. The *inter se* doctrine only applied to relations between self-governing members of the Commonwealth. The relations between the United Kingdom and its colonies prior to their acquisition of Dominion status have never been thought of as international (→ Colonies and Colonial Régime; → United Kingdom of Great Britain and Northern Ireland: Dependent Territories).

The doctrine manifested itself in a number of different forms. It was of special importance in relation to treaty practice (→ Treaties). Furthermore, one of its consequences was the supposed impropriety of submitting inter-Commonwealth disputes to international tribunals (→ International Courts and Tribunals). In addition a number of somewhat controversial conclusions, for example in connection with the nationality of claims, were deduced from the common status of British subject throughout the Commonwealth (→ British Commonwealth, Subjects and Nationality Rules). The *inter se* doctrine was at one time of significance in relation to currency matters and diplomatic representation. However, there appears to have been no period of time when the doctrine was applied consistently in practice to any of the subject-matters to which it related.

2. Historical Evolution

Before the outbreak of World War I, the Dominions and India were not regarded in any sense as being separate international persons (→ Subjects of International Law). These countries had not then acquired any general international capacity to conclude treaties or agreements on their own behalf. The separate admission of the Commonwealth countries to the → League of Nations evidenced their emerging statehood. However, the question remained whether the principle of the indivisibility of the Crown operated so as to make the Crown the only contracting party to an international agreement which was concluded on behalf of two or more self-governing members of the Commonwealth. The principle that the Crown was one and indivisible throughout the Commonwealth was affirmed by the Judicial Committee of the Privy Council in Theodore v. Duncan ((1919) A.C. 696, at p. 106), and in an important Australian case, Amalgamated Society of Engineers v. Adelaide SS Co. Ltd. ((1920) 28 CLR 129, at p. 152). It has now been abandoned.

The *inter se* doctrine found expression in the Report of the Imperial Conference of 1926, which recommended that treaties should generally be in the names of heads of States, and thus "in the name of the King as the symbol of the special relationship between different parts of the Empire". The resolution added that this would render superfluous the inclusion in a treaty of any provision that it "must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King" (British Command Papers, Cmd. 2768, Section V).

The recommendation of the Imperial Confer-

ence adopted the curious position that where a multilateral treaty was intended to create *inter se* obligations, and where in consequence the heads of States form was not appropriate, the treaty was nevertheless not to be treated as creating *inter se* obligations of its own force, but that the obligations were to be undertaken as an administrative measure. The suggestion that the heads of States form should normally be used has been characterized as somewhat naive because it was not in the power of Commonwealth countries to decide the form of agreements with foreign countries (Dale, p. 27).

The importance of the *inter se* doctrine in so far as it affected treaties began to decline during the 1930s, and it now seems to have been entirely abandoned in this area. In 1936, South Africa refused to participate in the London Treaty for the Limitation of Naval Armaments (LNTS, Vol. 184, p. 117), which made provision for the continuance of one collective naval quota for the whole Empire. The refusal was partly based on the ground that she was not a naval power, but also partly that the Crown was no longer unitary. The Imperial Conference of 1937 stated that "each member (of the Commonwealth) takes part in a multilateral treaty as an individual entity, and, in the absence of an express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any other member" (Summary of Proceedings, British Command Papers, Cmd. 5482, p. 27). This statement implied that members of the Commonwealth were capable of assuming rights and being bound by obligations under a treaty.

Few treaties are now concluded in the heads of States form and thus the important safeguard of the *inter se* doctrine relied upon by the 1926 Imperial Conference Report has been abandoned. Furthermore, many recent *inter se* treaties have contained clauses conferring jurisdiction over disputes arising out of the treaty on the → International Court of Justice (ICJ), or some other international body. It is thus clear that such treaties must be regarded as being operative in international law only, and that the *inter se* doctrine has no application to them. Although the United Kingdom used to refuse to register *inter se* treaties under Art. 18 of the Covenant of the League of Nations, it now registers such treaties with the Secretariat under Art. 102 of the → United Nations Charter (→ Treaties, Registration and Publication). It is generally thought that the *inter se* doctrine has no application to treaties at the present time. However, there is nothing to prevent meetings of heads of government from promulgating → declarations or agreements which are not intended to impose obligations under international law and which cannot be properly classified as treaties. The Singapore Declaration of Commonwealth Principles of 1971 (Dale, p. 41) and the Statement on Apartheid in Sport (Gleneagles Agreement) of 1977 (A Yearbook of the Commonwealth 1977 (HMSO) p. 51) are among the instruments which seem to fall within this category (→ Apartheid; → Sport, International Legal Aspects).

When the Commonwealth countries accepted the Optional Clause of Art. 36 of the Statute of the → Permanent Court of International Justice (PCIJ) in 1929 (LNTS, Vol. 6, p. 379), they signed the clause separately. However, all except Ireland (which signed unconditionally), but including India, signed subject to the reservation of a dispute with any member of the League which was a member of the British Commonwealth of Nations. All such disputes were to be settled in such manner as the parties had agreed or would agree. At present, certain of the Commonwealth States which have made declarations accepting the jurisdiction of the ICJ exclude from their acceptance of jurisdiction disputes with members of the Commonwealth. However, the declarations made by a number of States, including Australia and New Zealand, do not contain such an exclusion. The United Kingdom declaration excludes only disputes with members of the Commonwealth with regard to situations or facts existing before January 1, 1969. Up to the present time, only one case has been brought before the Court in which both of the parties were members of the Commonwealth at the time the action was begun (India v. Pakistan, ICJ Reports (1972) p. 46).

At one time, all the Crown's subjects had a common → nationality. The British Nationality and Status of Aliens Act 1914 (4 & 5 Geo. 5, c. 17) enacted a complete code. After Canada had enacted the Canadian Citizenship Act 1946 (10 Geo. 6, c. 15) creating a separate Canadian citizenship, agreement was reached that every

Commonwealth country should enact its own citizenship law determining who were to be its own citizens, but that it was also to declare them as well as the citizens of other Commonwealth countries, to be "British subjects" or "Commonwealth citizens". A common clause thus emerged conferring a common status, and the necessary legislation was passed. Under section 37 of the British Nationality Act (1981, c. 61) every person, who under an enactment for the time being in force in a Commonwealth country is a citizen of that country, has the status of a Commonwealth citizen. This term will replace "British subject" for the future for the purpose of indicating a common status.

At a time when no separate citizenship laws had been enacted in any Dominion, the existence of the common status of British subject led to controversy concerning whether, under Art. 31 of the PCIJ Statute, a Dominion had the right in a proper case to appoint a national *ad hoc* judge, even though there might be a permanent judge from the United Kingdom or another Dominion on the bench. A committee of jurists came to the conclusion that this was impermissible. This view was obviously unsatisfactory to the independent Commonwealth countries. The problem was solved in a manner which was acceptable to them by Art. 3(2) of the ICJ Statute. The *inter se* doctrine no longer has any application to diplomatic and other jurisdictional immunities or to currency matters (see Fawcett and Jennings).

3. Evaluation

The *inter se* doctrine is now of little or no significance in any of the areas in which it formerly applied. The doctrine of the unity of the Crown throughout the Dominions has been abandoned, as was evidenced by the separate Declaration of War of Canada in 1939 and the neutrality of the Irish Free State during World War II. The Coronation Oath has been modified to take account of the divisibility of the Crown. All the Commonwealth countries have now enacted separate citizenship laws, and separate participation in international agreements and organizations is now the rule. The Commonwealth association is now founded on certain fundamental declarations and agreements which do not appear to be governed by international law. They may, however, be regarded as evidence of State practice, and as such assist towards the formation of → customary international law. Thus, for example, the Lusaka Declaration and the Gleneagles Agreement on Apartheid in Sport support the general principle of international law which prohibits racial discrimination (→ Racial and Religious Discrimination).

Although the *inter se* doctrine appears to be virtually moribund, and to raise few if any legal problems, the interesting suggestion has been made that the existence of the common status of British subjects may preclude international claims being made by a Commonwealth State on behalf of citizens allegedly wronged against another member State which is allegedly responsible for the wrongdoing (Jennings, pp. 347–348 and Parry, pp. 114–123). If this argument were correct, the nationality of claims rule would operate so as to prevent the claim from succeeding. Similar considerations might apply where, as is most likely to be the case at present, the common status enjoyed was that of Commonwealth citizenship, such citizens not being treated as → aliens. There might be more reason for contending that a common nationality existed where both countries were monarchies, and a common allegiance was owed to the Crown. It is doubtful, however, whether Commonwealth citizenship can be regarded as a nationality. Despite the doubts expressed by Jennings and Parry, it is thought that the better view must now be that an international court or tribunal seised of the matter would disregard the common status (which might give rise to disparate rights and duties in the countries concerned) and treat the nationality of such a claimant as being solely that of the State which conferred citizenship on him (see → Nottebohm Case).

The *inter se* doctrine in its various forms played an important role when those countries of the Commonwealth which are now recognized as being fully independent were evolving towards separate nationhood. It has little significance at the present time. The Commonwealth has now evolved into a kind of international organization of a unique character, having its own organs, and a constitution which is dependent on three basic instruments, the London Declaration of 1949, which established the monarch as head of the Commonwealth, the Singapore Declaration of

1971, which is a declaration of Commonwealth principles, and the Lusaka Declaration of 1979, which is a declaration of fundamental → human rights condemning racialism. At present, no treaties are concluded in the name of the Commonwealth, but it may have the capacity to enter into such treaties. The Commonwealth has shown itself to be a flexible organization which, despite certain stresses which have occurred recently, would seem to have considerable capacity for political and legal evolution.

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INTERNATIONAL LAW AND MUNICIPAL LAW

A. Introduction

The definition of the relationship between international law and municipal or domestic law is closely connected with the concept of law in general on the one hand (→ Natural Law; → Positivism) and, on the other hand, with the structure of the → international legal community and the foundations and the → sources of international law.

The theoretical problem of whether international law and municipal law are parts of one legal order (monism) or of several legal orders existing independently from each other and needing special provisions in order to be brought into a reciprocal relationship (dualism or pluralism) has been long discussed, often with strong ideological and political overtones. One approach held political faith in a progressive internationalism combined with elements of natural law, while the other strongly emphasized State → sovereignty based on juridical positivism (→ International Law, Doctrine and Schools of Thought in the Twentieth Century). This discussion, which certain authors claim has obscured resolution of actual practical problems, has now lost much of its vigour given the emergence of a more realistic approach. Nevertheless, some elements from the opposing doctrines reappear in the analysis of the present situation and certain authors even feel a need to declare their allegiance to one of the doctrines.

In this article only the problems of general international law are treated. The problems concerning → supranational organizations are covered in the article → European Communities: Community Law and Municipal Law. For some special problems see → International Law and Municipal Law: Conflicts and Their Review by Third States and → International Law in Municipal Law: Law and Decisions of International Organizations and Courts.

B. The Theoretical Issue

1. Dualist Doctrines

(a) Basis

When the theoretical discussion of the legal problem arose at the end of the 19th century, the international relations between a relatively small number of States were still somewhat archaic. The only important multilateral treaties of a normative character were the → Geneva Red Cross Conventions on war victims. An analysis of the legal situation existing between States, undertaken by H. Triepel, led to the conclusions that the rules of international law in force concerned fields of application other than those of internal or municipal law; that the main sources of international law were based exclusively on the express consent of

States; and that the subjects of international law norms were exclusively States. Meanwhile the rules of municipal law concerned the relations between individuals or groups of individuals with the State and with each other.

(b) Appraisal

At that time, this analysis largely corresponded to reality. In the meantime mainly since World War II, fundamental changes have taken place with regard to each of these three problems. The modern development of international law has created a great number of new obligations of States. With the growth of international obligations the subject-matter which is essentially within the → domestic jurisdiction of States has decreased. It is no longer possible clearly to define separate and exclusive fields of application of both categories of legal norms. Examples for an overlapping competence are → private international law or conflict of laws, → nationality, neutrality (→ Neutrality, Concept and General Rules) and the international protection of → human rights. The theory that separate fields of application exist has been largely abandoned even by proponents of a dualist view.

The thesis concerning the sources of international law was problematic even at the time it was formulated. It neglected the fact that → customary international law forms part of international and municipal law with manifold reciprocal influences. The same is true for → general principles of law created by civilized nations. Their existence was at that time at least recognized in → arbitration treaties and by the → Martens' Clause in the Hague Conventions (→ Hague Peace Conferences of 1899 and 1907). In the meantime the law-making process on the international level has been diversified in many regards and it is no longer necessary to have recourse to examples from supranational organizations in order to find sources not based on the express will of States. In view of the attempts made by dualists to define the basis of the sources of international law, it is necessary to return to the problem of whether such a basis can be found in the consciousness of an existing international legal community.

The third argument concerns the doctrine of the → subjects of international law. Even those who deem it premature to say that a transnational law of mankind has replaced the law between States recognize that international organizations have become its normal subjects and that individuals may be made exceptionally not only its addressee but also its subject (→ Individuals in International Law). The thesis that the norms of international law are exclusively addressed to States is no longer realistic.

The weakness of certain arguments put forward in favour of the dualist concept are not sufficient alone to conclude that the whole doctrine is erroneous and antiquated. One further important element has to be taken into account: the reciprocal relevance of both categories for organs applying domestic law on the one hand and for international organs on the other hand.

Dualists frequently base their argumentation on the thesis that international courts exclusively apply sources of international law and view municipal law as having only the quality of a "fact". They can rely on numerous findings of the → Permanent Court of International Justice (PCIJ) and also of its successor, the → International Court of Justice (ICJ), to conclude that municipal law does not belong to the same legal order as international law. Their opponents attribute the relevant formulations of courts to the strong influence of some members adhering to the dualist concept, and have pointed up some elements in the jurisprudence which are incompatible with this theory (Marek; see section C.3(b) *infra*).

It is problematic to draw conclusions from the application of international law by municipal courts and other domestic organs. State organs, including courts, are bound by the provisions of the respective constitutions which vary considerably and may have been formulated under the influence of one doctrine or the other (see section D.1 *infra*).

2. Monist Doctrines

All monist doctrines – and there are many varieties – are based on the theoretical postulate that the "law" has to be understood as a unity and that its validity has to be derived from one common source.

(a) Varieties

Theoretically this postulate is equally fulfilled whether this common source is found either on the national or on the international level. There are indeed monists who declare that the common source for an all-embracing legal order could logically be found either on the international or on the municipal level (Kelsen). The assumption that national law could constitute the common source for international law results in the negation of an international legal order. A multitude of States cannot constitute the basis for one legal order. The theory of the primacy of national law in a monistic system was therefore abandoned long ago. At present only those monistic theories which accept the pre-eminence of international law in one form or the other are of interest.

(b) Radical monism

This doctrine, as originally advocated by Kelsen, followed the idea that the final source of the validity of all law had to be found in a basic rule (*Grundnorm*) of international law; that the legal order of municipal law was derived from international law by way of delegation; that all norms of international law had a status superior to municipal law with the consequence that municipal law which was not in conformity with international law was automatically null and void and finally that the norms of international law were immediately applicable as such in the municipal sphere. This idea of a basic rule as the ultimate source of all law is typical of the philosophy of the Vienna school. The sociological French school of law (e.g. L. Duguit, G. Scelle) preferred to speak of the conscience of the international community as a basis of international law, and this concept has found a wider response among many internationalists.

According to Kelsen, the authority of States to exercise jurisdiction in their territory is delegated from international law. This theory has been criticized mainly with historical arguments which are hardly convincing. Self-governing units within a State, such as ancient cities, exercise delegated powers derived from a much younger State to which they actually belong. In these cases the form and manner in which such delegated power has to be exercised is normally determined together with the delegation. In the relations between international and municipal law this is not the case. International law is in this respect extremely reticent as regards the competence of States to govern their internal affairs.

If the basis for international as well as for municipal law is found in the consciousness of a legal community or in the "idea of law" (E. Kaufmann), the somewhat artificial concept of a delegation of authority to States is not needed. In this connection, justified parallels to → federal States are frequently drawn. The legal community of the same people constitutes the basis for the federal State as well as for the legal order in its single components. In an analogous way, the sum total of national legal communities forms the international community.

According to radical monism, the supremacy of international law is not limited to the international level but equally determines its application on the municipal plane. Legal provisions of the municipal legal order which are inconsistent with international obligations are null and void *ab initio*. The development of a specific rule of international law concerning the manner in which it has to be applied by State organs is not regarded as necessary. The theory of the supremacy of international law within the universal and unique legal order covering all levels is sufficient to constitute a basis for this result. State practice which is not in conformity with this doctrine is regarded to be irrelevant and must be changed.

(c) Moderate monism

A revised theory has taken into account several criticisms based on an analysis of State practice. This moderate monism does not insist on the concept of a delegated power of States, but rather emphasizes the fact that international law determines a margin of action for each State which delimits its liberty of action (Verdross). The doctrine that municipal law inconsistent with international obligations is automatically null and void is revised. The supremacy of international law is nevertheless maintained in the sense that the State is bound by international law when exercising its → jurisdiction (even as legislator) and that a statute which does not conform to international standards may only be applied provisionally by national courts until the State fulfils its duty to

bring it into conformity with its international obligations. In the case of treaty obligations, any party of the relevant convention whose own rights are affected may request a revision of the municipal law by resorting to → peaceful settlement of disputes. Certain modern developments have even created the possibility of bringing the internal legal order into conformity with objective international law (→ European Convention on Human Rights).

This thesis of a "provisional validity" of norms of municipal law which do not correspond to international obligations has been strongly opposed by the adversaries of any form of monism even in its modified form. According to their opinion, a general procedure established by international law would be necessary in order to ensure the conformity between municipal and international law. As long as such procedure is lacking, one could not speak of a validity of international law in the municipal plane without having recourse to the authority of the State in order to form a basis for the application of international law in domestic fora (Rudolf).

3. *Relevance of Doctrines*

(a) Remaining differences

Arguments drawn from State practice have led to a revision of both doctrines. In their ultimate form they are no longer as far from each other as it appeared in former times. Dogmatists used to accuse the authors of such revisions as "pseudo-monists" or "pseudo-dualists" who had abandoned their original concepts. The direct application of international law by State organs is no longer a point of divergency. Such direct application cannot be based on a monistic concept only but rather on some form of dualism. A national legal order can well refer to another legal order and provide for the application of that order's norms without incorporating them into its own legal system.

The main outstanding controversy relates to the influence of international law on national statutes which are not in conformity with international law. Monists, having revised their original theory, now insist on the existence of an international → responsibility of States to bring domestic law into conformity with international law. This responsibility is regarded as clear proof for the primacy of international law.

Dualists lay emphasis on the absence of formal → sanctions. They regard it as decisive that the revocation of such norms remains in the competence of the State. A State's international responsibility does not nullify a statute, and a judgment of an international court may only impose the duty to pay → reparations. The relevance attributed to State responsibility for the relations between international law and municipal law is thus key to this debate.

(b) Relevance of doctrines

The main discussion of the theoretical issue was led by internationalists in Germany, Italy and France. In general, writers from common law countries did not lay the same emphasis on these problems, favouring practical solutions instead. Sir G. Fitzmaurice even stated that "the entire monist-dualist controversy is unreal, artificial and strictly beside the point" (The General Principles of International Law Considered from the Standpoint of the Rule of Law, RdC, Vol. 92 (1957 II) p. 1, at p. 71). He argued that there was no "common field in which the two legal orders under discussion both simultaneously have their field of activity". His appeal has struck a responsive chord even among modern writers outside the sphere of the common law. Instead of maintaining the dogmatic controversy, they consider it more important to contribute to a solid foundation of international law as a legal order (Mosler).

(c) Political ideologies

The controversies between dualists and monists have a political background. In the beginning, the partisans of national sovereignty stood against those of an idealistic internationalism and → pacifism. Legally the controversy was fostered by conservative believers in positivism and adherents of natural law. Strong legalism countered a sociological approach. Today, while there are still some conservative forces which adhere to the doctrine of two separate legal orders, many are ready to grant considerable concessions to the other side, and the same is true for the monists.

The dualist doctrine has found unexpected support. The followers of Marxist ideology, formerly inclined to radical internationalism, later

adhered to the doctrine of State sovereignty and of clearly separate legal orders in an act of → self-preservation against any form of interference by States with other ideologies. The → socialist conceptions of international law adhere in the main to strong dualism and oppose any kind of superiority of international over municipal law. Only one concession is made: Unlike the original concept of dualism, it is admitted that both categories of norms have a common field of application and that in consequence conflicts between them are possible. Such conflicts, however, have to be resolved by the organs of the State in the interest of its own public philosophy.

The situation in other regions of the world is not homogeneous. Numerous Third World countries also adhere to a strong doctrine of State sovereignty in the interest of a consolidation of their young States. This position is not necessarily connected with the adoption of dualism. Their legal and constitutional approach is frequently dominated by the schools of thought predominant in the countries of the former colonial administrators. The new States formerly under French influence are the most evident examples (Sperduti; → New States and International Law; → Decolonization: French Territories).

The situation in the older States varies according to the prevailing schools of thought. Countries under the influence of the common law tend to follow dualist traditions more than the Roman law countries. In many of the latter a strong trend towards some kind of moderate monism is increasing. The example of the approach taken by the Benelux countries is finding followers even in those legal traditions which formerly produced the most fervent advocates of dualism.

C. Influences of Municipal Law on International Law

Municipal law has exercised influences on the international legal order in various ways. The older legal order within States has developed certain legal concepts and institutions which have been widely used as models for the formation of the newer States. A more direct contribution is found in the elaboration within States of general principles of law which are then transplanted into the realm of international law and are regarded as such as its sources. Finally, organs of the international community have to refer to norms of municipal law without transplanting them into their own legal order.

1. Formation of Concepts

The first kind of influence is of an indirect character. Concepts like "property", "tribunal", "nationals", "residents", "societies" or "concessions" have been developed in a great number of countries, with a common understanding of these concepts arising, possibly under the influence of a common legal tradition as created by Roman law or the common law. Such concepts or institutions from the arsenal of municipal law may then be used as models for the formation of rules of international law when treaties are concluded or when a general State practice is introduced which leads to the creation of customary international law. It is not necessary that the authors of this creative act use these concepts or institutions with the same significance or content they may have had in the municipal field.

The situation is somewhat different if customary law already established in the municipal order of a State or in a number of States is afterwards recognized by the international community. The practice developed as well as the existing *opinio necessitatis* might be a constituent element for the emerging rule of international law. This does not preclude, however, the new rule which is valid in the international sphere from having a different content than the rule from which it originated. Its source is the practice of the members of the international community and their conviction which determine its content (Scheuner, p. 168 et seq. with examples; Ferrari Bravo, p. 718).

The last case is similar to the formation of customary international law initiated by bilateral treaties or by treaties between a limited number of States. One of the most striking examples is to be found in the process of the formation of the laws of war and neutrality initiated by a limited number of States internally, later confirmed by some of the older States at the → Hague Peace Conferences in 1899 and 1907, and finally adopted generally by the international community at large as customary law (→ War, Laws of, History; Scheuner, p. 172). Similar developments took place concerning the rights of → aliens, immunities for diplomats, and → prize law.

2. *General Principles of Law*

Art. 38(1)(c) of the ICJ Statute mentions the "general principles of law recognized by civilized nations" side by side with the two main sources of international law. The phrase is certainly incorrect. "Civilized nations" should be replaced by "members of the international community". How they are "recognized" needs further explanation.

A thorough analysis of the different types of general principles has shown that not all of these principles applied in international practice originate from domestic law and have been transplanted by recognition (H. Mosler, International Society, p. 136 et seq.). Some of them may be derived from natural justice being common to all legal orders (such as the principles of → good faith, → estoppel and → proportionality). Others are based on a simple application of logic (such as the rules *lex specialis derogat legi generali*, *lex posterior derogat legi priori*). Finally, there are some important principles "derived from the specific nature of the international community" which are largely regarded as peremptory rules of international law (→ Jus cogens).

According to this analysis a process of transplantation from municipal law into international law would take place only for a number of procedural rules, such as the principle of a fair hearing, *in dubio pro reo*, → denial of justice or exhaustion of domestic remedies (→ Local Remedies, Exhaustion of), and for some substantive principles as → prescription and liability for fault (→ Responsibility of States: Fault and Strict Liability).

Even if the authors of the PCIJ Statute may have had the idea that in all cases of general principles some sort of recognition was necessary, this does not find confirmation in the practice of → international courts and tribunals. The form of → consensus allegedly necessary for this transplantation is at least not institutionalized. On the contrary, the creative role of the international judge in the realization of justice has led to the conclusion that the real basis for the application of such principles is not some form of recognition, but rather the realization of the idea of law by international organs (E. Kaufmann).

It is evident that "(t)he way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready made and fully equipped with a set of rules" (Lord McNair, separate opinion, → South West Africa/Namibia (Advisory Opinions and Judgments), ICJ Reports 1950, p. 148) but that they have to be used only "as an indication of policy and principles". In applying these procedural or substantive rules their adaptation to the specific needs of the international law system is acknowledged.

3. *Application of Municipal Law in International Law*

(a) Forms

There are common factors of a use of certain concepts or institutions of municipal law in the international field as models and of a transplantation of general principles from municipal to international law. In both cases a concept or norm of international law is created and has to be interpreted as such. It is an entirely different process if instruments of international law refer to concepts or norms of municipal law without incorporating them into their own legal order.

Two or more States may, for instance, coordinate their internal laws by creating reciprocal obligations to use or not to use their municipal institutions in a certain manner. Treaties concerning conflict of laws, judicial assistance or the reciprocal recognition of judgments are examples.

Particular concepts of municipal law, such as nationality, may be used in a treaty. A → *compromis* under which States submit a dispute to an international tribunal may authorize it to decide the case on the basis of municipal law (→ Serbian Loans Case). Even without an express reference, the necessity may arise for an international organ to take note of the rules under which a national institution has been organized by a State in its reserved domain.

(b) Status of municipal norms

The status such elements of municipal law have in adjudication under international law is subject to dispute. They are certainly not norms of international law in a technical sense. But are they norms at all, or merely facts?

A statement made by the PCIJ in 1926 in the → German Interests in Polish Upper Silesia Cases

was regarded until recently as answering this question:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" (Series A, No. 7 (1926) at p. 19).

Others found it wrong "to overemphasize the character of national law as matter of fact" (Waldock, at p. 124) or called it "a debatable proposition" (W. Jenks, at p. 552).

A new definition of this relationship, expressed by the ICJ in the → Barcelona Traction Case, is less restrictive:

> "Thus the Court has . . . not only to take cognizance of municipal law *but also to refer to it* [emphasis added] . . . . In referring to such rules, the Court cannot modify, still less deform them" (ICJ Reports (1970) p.3, at p. 37).

The difference between the two statements is clear. Of facts the Court could only take cognizance. If a reference is made to certain sources, this implies that a certain normative character is attributed to them. It may be recalled that in the Serbian Loans Case the PCIJ even stated that the Court under certain conditions "must apply the municipal law".

The → Vienna Convention on the Law of Treaties confirmed a well-established practice of international courts in its Art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (see also → Alabama, The). The text eventually adopted clearly expresses the rule that on the international level international law is supreme and that this supremacy is valid in relation to any provision of internal law, whatever its ranking in the municipal order may be.

If rules of municipal law were pure facts, it would make no sense to state that they cannot be invoked against a legal obligation. Thus Art. 27 can well serve as a basis for the argument that international law attributes a certain legal value to provisions of municipal law applicable under certain conditions on the international level, albeit not with the same force as the rules of international law. It is furthermore assumed in Art. 27 that a rule of municipal law in conflict with international law is not automatically null and void in the domestic sphere. If it is necessary to state that it cannot be invoked, this rule is apparently regarded as valid at least in another sphere.

In the Barcelona Traction Case the recognition of an institution of municipal law, namely of a limited company, was at issue. The Court took its decision in view of the fact that "international law has not established its own rules" for this legal issue. Judge Fitzmaurice even spoke of the municipal system which the Court "sought *to apply* on the international plane" (pp. 71 – 72, emphasis added), while other members of the Court felt inclined to defend the traditional concepts and terminology (Judge Morelli, pp. 233 – 234; Judge Gros, p. 272).

A legal basis for the binding force of interpretations developed by municipal courts can be found in the principle of a reserved domain of domestic jurisdiction (Brownlie, p. 42). It is only logical that in the cases of such reference to municipal law the principle of *jura novit curia* does not apply for the international tribunal.

The problem has been raised whether such reference to municipal law can be presumed when customary rules of international law are applied. Doubts were expressed in this respect (Judge Riphagen, ICJ Reports (1970) p. 338). In the Court's view, it had such a duty whenever "international law has not established its own rules" without requiring a special act of reference and without distinguishing between the application of treaties and customary law.

In the case the Court referred to "rules generally accepted by municipal legal systems", and "not to the municipal law of a particular State" (p. 37). These "rules generally accepted by municipal legal systems" are certainly not identical in nature with the "general principles of law recognized by civilized nations" referred to in Art. 38(1)(c) of the ICJ Statute as a source of international law. The whole discussion of the problem of references to municipal law would not have been necessary if ultimately a source of international law would have to be applied (Perrin).

D. The Application of International Law in Municipal Law

1. *General Aspects*

(a) *The rule*

The principle of → *pacta sunt servanda* covers

not only the rule that treaties are binding upon the parties, but also the obligation to execute them in good faith (Art. 26 of the Vienna Convention on the Law of Treaties). Without any doubt, this principle is applicable to all sources of international law. One can, however, question whether this rule for the relations between States is also applicable to the implementation of international law within the internal legal order of States. Pescatore is of the opinion that this rule imposes on States a certain → minimum standard in this regard. A general duty to bring internal law into conformity with obligations under international law has been affirmed by the PCIJ (→ Exchange of Greek and Turkish Populations (Advisory Opinion)). On the other hand, the method of reaching this result is regarded as falling within the internal jurisdiction of States, which may or may not open their legal order to the application of international rules *in foro domestico* and determine the relationship to municipal law.

(b) Exceptions

In some exceptional cases rules of international law are binding in the municipal sphere without requiring additional activity of the State. These include rules relating to a territory not under the jurisdiction of a State (e.g. the prohibition of → piracy or slave trade on the high seas; → Slavery) and rules regarding the delimitation of national jurisdiction. Some authors also add certain rules based directly on the requirements of natural justice (such as the prohibition of wars of → aggression and of → crimes against humanity). In these exceptional cases not only States but also individuals are regarded as being responsible for the respect of international obligations.

(c) Obligations to legislate

Modern law has developed various forms in relation to an obligation of a State to legislate. Treaties may declare that a certain standard for the minimum protection of individuals under State jurisdiction has to be respected but without determining the manner in which this duty has to be fulfilled. Examples are such provisions in specialized fields (→ Labour Law, International Aspects) or those concerning → human rights. Treaties can go even further and call for legislation of a specific character. Examples are the conventions on → Genocide and on the Elimination of Racial Discrimination (→ Racial and Religious Discrimination). In these cases States undertake the obligation to enact specific legislative measures in order to reach a certain goal. No discretionary power is left to them as to whether such legislation is necessary under the factual circumstances in order to fulfil their international obligations. Finally there are examples of treaty obligations requiring the application of existing domestic law with due respect to certain principles developed in international law. In this way, Art. 67 of the 1949 Geneva Convention IV on war victims provides that courts in occupied territories have to respect general principles of law and the specific principles of *nulla poena sine lege praevia* and the proportionality of penalties (→ Civilian Population, Protection).

(d) Methods applied

States exercise their competence to determine the manner of giving effect to international obligations on the municipal level in various forms. State constitutions are mainly concerned with organizing the cooperation between executive and legislative organs when international norms are created or put into effect internally. The determination of the technical methods hereby used is largely left to the judiciary or sometimes to learned authors.

As to terminology, the concepts of "incorporation", "adoption" and "transformation" are used with altogether varying meanings by different schools of thought. The concept of "incorporation" is often used, as here, for all forms of implementing international obligations in the domestic sphere. No distinction is made whether this is done by the enactment of internal legislation, with or without a reference to an international instrument, or by making this instrument and also norms of customary law applicable in the domestic sphere in another way. One of these ways is "adoption", whereby a treaty or other norm is declared applicable internally without changing its content or character as sources of international law.

"Transformation" is understood here to mean the domestic act (formal law, assent by decision of the legislature or publication in an official gazette), whereby the norm of international law is incorporated into the domestic legal system either as a national statute or with the force of it. The

object of this act is not the international obligation but in the case of treaties the international instrument itself, which thereby changes its character. In common law countries as well as in socialist countries, this term is frequently used in a broader sense to denote any act of incorporation.

These different methods have been developed more or less under the influence of monist or dualist doctrines on the relationship between international and municipal law. It would, however, be misleading to identify these technical methods with the doctrines of a theoretical character. Elements from different doctrines have sometimes exercised an influence on their formation.

A first and less problematic form is the enactment of municipal statutes in order to fulfil an international obligation. If this intention is evident from an express reference in the statute or from the circumstances, a question arises whether national courts, when interpreting the statute, are entitled or even obliged to have recourse to the respective international source.

The doctrine that the international legal order has to be clearly distinguished from the legal order of States has led to the concept that the validity of international law on the municipal plane is always based on the authority of the State and that it is therefore necessary to transform the norms of international law into internal law in order to make them binding on State organs (courts or administrative agencies) or also possibly on individuals.

By this act of "transformation" three changes are effected. The validity of these norms is based on State authority; States as subjects of international law are replaced by the subjects of the internal legal order; and the content of the international norm is changed. By being transformed into a rule of municipal law the rules of international law lose their connection with other rules of their original order. Under a consequent application of this doctrine the transformed rules would have to be interpreted according to the rules valid for the interpretation of other municipal provisions in the respective State. They may substantially differ from the pertinent rules of international law. Thus, the rule of international law has a different content in each municipal order following this doctrine. The goal of unifying the law in different States is not attained (→ Unification and Harmonization of Laws).

It is evident that the act of transformation only covers those provisions which are designed to be applied in the domestic field and are regarded as "self-executing" (→ Self-Executing Treaty Provisions). Sometimes it creates difficulties to draw the line clearly between such provisions and others which contain only obligations on States and have to be fulfilled by them without "transformation". Seen from the view of domestic law, the international norm is divided into elements which gain the character of municipal law and others which remain in the sphere of the international legal order.

In order to adapt this method to the practical needs of the international community as well as to the contemporary practice of municipal courts, it has been reformulated. Domestic standards for the interpretation of international law have been abandoned as inadequate. Furthermore the interpretation of the act of transformation has been revised. The international norm to which the quality of municipal law or the force of such law is attributed does not entirely lose its connection with the international legal order by its transformation. Its character as a source of international law has to be respected in certain regards (Rudolf). Apparently these are concessions to the method of adoption.

The ranking of international law in relation to municipal law is determined together with the act of transformation. International law frequently has the same status as the national act of transformation. If this is a national statute, international law has the same ranking as national statutes with all ensuing consequences. This is not mandatory, however. A State's Constitution or judicial practice can also attribute another ranking to norms of international law.

Some advantages of this method include the establishment of a clear relationship between international law and municipal law; the relative ease with which national courts can work with these norms; a better safeguard for the interests of sovereign States; the avoidance of direct effects on the municipal legal order by possible changes in international law. Recently a new consideration has been added: The act of transformation could extend even to subjects beyond those addressed by the international norm (Bleckmann). This, how-

ever, is not convincing, since the extension of a rule of international law to new subjects is not an exclusive privilege of the transformation method. It can always be realized by internal legislation.

Another method of giving effect to international law within the sphere of municipal law is its "adoption" as such by municipal law and without the effect of a transformation into municipal law. Under this method the norms of international law, whether customary law, treaties or general principles, are declared applicable in the municipal sphere without changing their character as sources of international law, their subjects and their content. Their connection with other norms of international law is maintained; treaties are made applicable in their entirety and without destroying the synallagmatic relationship between transformable and non-transformable elements. A creation of parallel but not identical norms is avoided. Norms with the same content are valid in all States bound by them. A complete unification is reached; the international rules of interpretation have to be applied.

Under this method States remain competent to determine which treaty obligations have to be applied in the internal legal order. They impart the order of application in one of the above-mentioned forms. If the adoption of general rules is provided for by a State's Constitution (as in the United States, France and the Federal Republic of Germany), the problem arises whether new developments of customary law are also covered, particularly those not recognized by the respective State. As long as international law does not determine the hierarchy of its norms on the domestic level, the State cannot be excluded from enacting rules in this regard and thereby preventing national courts from recognizing the supremacy of international law on the basis of "its very nature".

In general, the adoption method brings about a stronger harmony between international and municipal law and corresponds better to practical needs. A strong argument in favour of this method is the fact that its adversaries frequently borrow certain elements from it in order to avoid unreasonable results.

2. *Treaties*

There is a significant trend in modern international law to make its existing rules more evident and also to develop them further by → codification in → treaties. States, in their endeavour to secure the application of international law, have concentrated their efforts primarily on treaties rather than on general rules. Only one example is the Vienna Convention on the Law of Treaties. According to Art. 2(1)(a), only international agreements concluded between States in written form are covered by the Convention. The same is provided by Art. 2 (1) (a) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (A/CONF. 129/15, ILM, Vol. 25 (1986) pp. 543–592). Domestic application is, however, also a problem for treaties concluded in other forms. Under this point of view here a wide concept of "treaties" has to be taken into consideration, including agreements concluded orally. Any form of → executive agreement is not excluded.

(a) Forms of action

The general rule that the implementation of international law on the internal level is within the competence of States is valid for treaties. Some kind of State action is necessary not only for the conclusion and entry into force of treaties but also for their implementation on the municipal level (→ Treaties, Conclusion and Entry into Force). This action, which generally requires the cooperation of various State organs, can be taken separately or together. It may be the prerogative of the executive to conclude treaties, while separate action by the legislature makes them binding for the internal organs, including courts, as in the United Kingdom. In the majority of States a cooperation of the legislature with the executive is already necessary for the conclusion of certain kinds of treaties. In these States the authorization to conclude the treaty can be combined with a decree, addressed to the respective internal organs, to apply the treaty. Such published decree or ordinance is also necessary for agreements concluded without the participation of the legislature. It is evident that a separation of the different acts on the internal level leaves greater flexibility to the organs competent for the conclusion of international instruments. A combination of the different acts of both powers gives a better basis for their

integration into the internal legal order by preventing treaties from being concluded which afterwards cannot be implemented.

(b) Order of application

The authorization to conclude or ratify a treaty and the ordinance of application applying it have their own characteristics. The authorization envisages a future act, namely the acts of the organs competent to represent the State on the international level. The results of their activity are not yet determined. They depend on the position of the partners, which in future may or may not ratify the treaty and bring it into force. Either party may declare reservations which influence the contents of the future treaty (→ Treaties, Reservations). An ordinance on application which gives the instrument the force of law or even the character of a law should by its very nature refer to an established text which is no longer subject to change.

Under these circumstances, it is evident that a combination of the two State acts into one act creates certain problems. The time element is important. Thus the law authorizing the executive to conclude the treaty has to provide for the date on which the application ordinance is to enter into force. A further publication is in any event necessary in order to inform the public of the obligations undertaken. The same is true for international instruments which influence the contents of the treaty (reservations and possible interpretative declarations or protocols). In this way no time is saved by combining the two acts into one. The separation of the two acts, authorization and implementation, makes it possible to introduce greater flexibility into the parliamentary procedure. Parliament can declare its assent tacitly, as in the Netherlands. Such flexibility can, however, be reached only under the adoption method. The transformation method generally requires a formal legislative act.

The subject of the application ordinance under the adoption method is the treaty in its entirety. For its interpretation it can be important that the synallagmatic context with those provisions which are not directly applicable in the internal order be maintained. According to the transformation method in its radical form, the application ordinance embraces only those elements of the treaty which are directly applicable in the municipal sphere. This distinction between transformable and non-transformable elements has negative effects for the interpretation of the treaty. Whether it also enables the national judge to limit arbitrarily the application of the treaty to its "transformable" elements (Pescatore, p. 403) is questionable. The same danger exists under the adoption method, if a provision is regarded as not self-executing (→ Sei Fujii v. California; → Self-Executing Treaty Provisions).

(c) Municipal status of treaties

The rules either developed by courts or codified in State constitutions regarding the ranking of treaties in relation to municipal law are largely influenced by two main elements: the doctrine of the sovereignty of States and the system of the separation of powers. Both tend to formalize the definition of the hierarchy and status of international treaties. In many States the courts have, however, found ways and means of avoiding unfavourable consequences of any schema. They serve the interest of bringing national law into conformity with international obligations resulting from treaties.

One of the techniques to determine the relationship between treaties and domestic law consists in their submission under the hierarchy of domestic norms. This method, introduced in the interest of practicability, enables national judges to work on the basis of the systematic approach to which they are accustomed. However, it ignores the fact that the categories of the national legal hierarchy are not entirely adequate for international instruments and that their application may lead to unsatisfactory consequences when applied schematically. For this reason, some recent constitutions have abandoned this method.

According to the definition of the sources of international law to be applied by the ICJ (ICJ Statute, Art. 38(1)(a)), only one category of "international conventions" exist. The internal order may distinguish between different categories of treaties according to the form in which they are concluded with the cooperation of different organs and also in which they are made applicable internally.

Where the executive is free to conclude certain kinds of treaties without the assent of parliament,

different solutions are possible. Such agreements, duly approved and published by the executive, may internally have the same ranking as other treaties, as in France. It is, however, also possible that the internal hierarchy of a treaty depends on the ranking of the internal instrument by which it is made applicable. An ordinance issued by the executive by way of delegated legislation may attribute the same rank to an agreement as other ordinances possess, as in the Federal Republic of Germany. Only a broad interpretation of the delegating norm may have the effect of putting the ordinance on the same level as a statute (Boehmer).

It is also possible that certain treaties receive a higher ranking internally than other treaties on the basis of an *ad hoc* decision of parliament. This decision can be taken either in order to exclude the enactment of conflicting laws in the future, as in Austria, or to make the treaty compatible with the constitution, as in the Netherlands. Similar intentions led to an exemption of the → Versailles Peace Treaty (1919) from being applied within the limits of the 1919 German Weimar Constitution (see Art. 178(2)).

Such measures, relying mainly on internal constitutional considerations, are taken in order to ensure the internal realization of certain international obligations. They have, however, no effect on the international level and can in no way influence the responsibility of States to fulfil other international obligations implemented on a lower constitutional level in the domestic sphere. This would be incompatible with the principle enshrined in Art. 27 of the Vienna Convention on the Law of Treaties.

(d) Types of classification

There are basically six possibilities for fixing the hierarchy of treaties in the internal legal order.

(i) First of all, in certain countries the treaty as such has no place in the internal legal order. Obligations created by a treaty have to be implemented by the competent municipal legislative organs (e.g. Art. 24 of the Soviet Union's Law of the Procedure for the Conclusion, Execution and Denunciation of International Treaties, September 1, 1978, ILM, Vol. 17 (1978) p. 1115). Only in exceptional cases may the norms of a treaty be applied on the basis of a reference in the Statute (see Uibopuu, p. 682; Blishchenko, p. 822, with examples). In these States courts are not confronted with the problem of deciding upon conflicts between international and municipal law. Eventual conflicts between international obligations and municipal law have to be resolved by the legislative organs.

(ii) In the United Kingdom and most Commonwealth States the recognition of the sovereignty of parliament may require that all statutes prevail, whether they are enacted before or after the treaty came into force. In principle treaties occupy a ranking subsidiary to municipal law.

(iii) In numerous States following the legal traditions of continental Europe and in the United States, treaties have the same status as national statutes, with the effect that as a rule they prevail over pre-existing legislation under the principle of *lex posterior derogat legi priori*. They yield, however, to statutes enacted later. There are nonetheless considerable modifications to this rule.

(iv) A State's constitution may provide for the priority of treaties over national law. In this case it is important which organ is empowered to give effect to this priority. Only the legislature may be entrusted with the task of avoiding conflicts with a previous treaty when enacting new legislation. Courts may be excluded from reviewing the legislative action in this regard or from recognizing the priority themselves. If, in addition, international treaties are authoritatively interpreted by the executive branch, as to a certain extent in France, the judiciary has only limited power to deny effect to a statute enacted in conflict with a treaty. Under these conditions doubt is cast on Sperduti's statement that numerous countries, by adopting the French system have recognized the pre-eminence of treaties (Le principe de la souveraineté, p. 395).

(v) The situation is entirely different if a constitution provides that internal legal dispositions are inapplicable if incompatible with treaties establishing binding norms for all and if the courts have the competence to interpret international treaties (e.g. Netherlands Constitution, Art. 66, as amended in 1956). Under these circumstances the supremacy of international law is respected in the internal domain (Mosler, L'application, p. 687; Pescatore, p. 386). A similar result can be reached

if the legislature leaves the courts the freedom to determine the hierarchy of treaties in relation to internal law and if the courts are ready to recognize the pre-eminence of international treaty law in view of "its very nature" (as in Belgium and Luxembourg, see Pescatore, pp. 364, 382).

(vi) The pre-eminence of treaties in relation to the constitution calls for special constitutional procedures. Thus in the Netherlands, parliament has to assent to treaties which conflict with the constitution, with a majority of votes necessary for constitutional amendments. The situation in Austria, when a treaty is upgraded to the ranking of the constitution, is similar. Such measures are feasible only in countries which allow the attribution of the rank of constitutional law to provisions outside the text of the constitution.

(e) Modifications

An application of the internal hierarchy to the relationship between treaties and domestic norms leads to conflicts between them. Statutes conflicting with pre-existing treaties present the main problems. Courts have developed several methods to avoid such conflicts. Less problematic are treaties conflicting with pre-existing statutes, at least in the countries where a treaty has the force of law, as the statute would be abrogated automatically by a later treaty.

Frequently the treaty rule can be regarded as *lex specialis* and therefore exempt from the *lex posterior* rule. Examples are bilateral → extradition treaties concluded before a national statute on extradition has come into force (Boehmer, p. 70) and → commercial treaties conferring more favourable treatment on the citizens of a specific country than later legislation generally provides (Mosler, L'application, p. 681). This method is also used if all statutes, irrespective of the date of their enactment, have precedence over treaties.

Rules of interpretation according to which a presumption exists that parliament intended to respect international obligations when it later enacted a statute have a wider field of application. Statutes are thus interpreted in a way that no conflict arises. This rule of construction is applicable not only to domestic legislation passed in order to give effect to an international convention but is frequently applied generally to the relations between treaties and later statutes. In view of the wide application of this interpretative rule (Morgenstern, pp. 82 – 86), the opinion has even been expressed (Walz, p. 406) that it has attained the force of customary law. Statutes derogating from a treaty would only have this effect if the intention to do so was expressly mentioned.

A similar idea has also been developed for the interpretation of treaties in order to avoid a conflict with the constitution. The Constitutional Court of the Federal Republic of Germany has maintained that State organs cannot be presumed to accept obligations incompatible with the Basic Law (BVerfGE 4, 168). For this reason a treaty is to be interpreted by municipal organs in a way that no conflict with the Basic Law will exist. This is only possible if, according to the rules of international law for the interpretation of treaties, more than one solution is legitimate and if one of them is compatible with the Basic Law (Bernhardt, p. 186).

Municipal law can also create certain barriers which prevent or limit an application of international law. A national constitution can provide that treaties have to be applied internally only if they are implemented in the same way by the other party (Art. 55 of the French Constitution), thus introducing a rule of → reciprocity. This provision is rather problematic. A substantial impediment for the application of treaties can also result from the judiciary being prevented from reviewing certain acts of the executive branch regarded as → acts of State or *actes de gouvernement*, such as seizures of prize, occupation of foreign territories and other major foreign policy acts (Morgenstern, pp. 73 – 79). This act of State doctrine also plays a certain role in connection with the interpretation of treaties.

(f) Interpretation and other problems

It is a nearly universal rule that treaties have to be interpreted in the municipal field according to principles and norms developed in international law (→ Interpretation in International Law; Arts. 31 to 33 of the Vienna Convention on the Law of Treaties). The view that it would correspond to the logic of the doctrine of "transformation" to apply the same rules as for statutes has nearly disappeared, although this revision has created some difficulties for conscientious followers of the

transformation doctrine. They have had to argue that the rules of interpretation were transformed together with the treaty, or that the act of transformation covered only the order of application, not the treaty itself.

The problem of determining which international standards are applicable is a controversial one. Certainly at least those which already existed at the time the treaty was concluded apply. An application of rules only recognized later would not respect the → consensus of the parties and would also be incompatible with rules of intertemporal law (Verdross/Simma, Universelles Völkerrecht (3rd ed. 1984) para. 782; → International Law, Intertemporal Problems). The ICJ is apparently not of this opinion, but advocates an evolutionary interpretation. "(T)he entire legal system prevailing at the time of the interpretation" has to be respected (South West Africa/Namibia (Advisory Opinion), June 21, 1971, ICJ Reports (1971) p. 16, at p. 31). This should also be valid for domestic courts.

Rules of interpretation contained in the treaty itself have to be observed by municipal organs. If such rules have not been inserted into the treaty itself but rather into a separate executive agreement, the question of the treaty's hierarchy may create difficulties, at least under the transformation method and in countries which internally attribute a lower status to executive agreements. Only if the competence to conclude the executive agreement can be derived from the treaty itself can the difficulty be surmounted.

The competence of municipal organs to interpret treaties is determined by national law. According to Mosler, three groups of solutions are distinguished: (i) States where courts are competent to interpret treaties independently and where information from the executive on relevant facts can be freely evaluated (as in Austria, Federal Republic of Germany, Netherlands, Belgium, Luxembourg, Poland and Switzerland); (ii) States where municipal courts are bound to ask for information regarding facts, which are binding on the court (as in the United Kingdom, Commonwealth States and the United States); and (iii) States where courts are required to ask the executive for information not only on facts but also on law (as in France and some francophone countries). In the last group the obligation relates only to questions of public law, not to private law. The examples of such questions (as existence of a state of → war, peace and → armistice, laws of warfare, territorial changes, immunity of consuls and international organizations, legal position of aliens, extradition) to a large extent present a mixture between matters of law and fact. In consequence the dividing line between the second and third group cannot be sharply drawn.

Even where the general rule is recognized, judges are not immune from the influences of their own school of legal thought or of their accustomed practice when applying the law of their own State. An attempt to distinguish systematically between conscious and unconscious encroachments in their interpretative work has been undertaken, but it is doubtful whether the following factors must be attributed to conscious or unconscious influences: the interpretation of certain concepts in the way national judges are accustomed to from their work with statutes; the application of the rules valid for the interpretation of contracts to treaties and even, with some exceptions, the decision in favour of a liberal or strict construction of international obligations. In this regard a considerable difference exists or existed between American and German courts (Schreuer).

Certainly there are cases where national judges have consciously introduced considerations from their domestic practice in their interpretation of treaties. This is clear when an attempt is made to avoid conflicts with municipal law, especially with the constitution. The same was true for the restrictive interpretation of the Versailles Peace Treaty by German courts after World War I. This was motivated not only by the concept of national sovereignty but also by a desire to reduce the burdens imposed by the unpopular treaty. It is significant, however, that in quite a number of cases the courts in various countries have revised positions taken previously in order to comply with the standards of international law, even absent a profound political reorientation (for particulars, see Schreuer, pp. 283 – 301).

For multilingual treaties the relevant rules of Art. 33 of the Vienna Convention on the Law of Treaties are equally valid in the domestic sphere. There are some differences between legal orders following the methods of adoption or transformation.

The adoption method opens the domestic legal order to the treaty with its unchanged content. The international rules concerning languages are therefore mandatory and cannot be replaced by other rules for the internal application. If the national language is one of the authentic languages, it may be primarily used for the internal application of the treaty as long as there are no doubts about the conformity of the different authentic texts. An official translation usually published together with the treaty may be used exclusively as an auxiliary means to understand the authentic texts.

Under the transformation method the State has a broader discretion in these matters. Though the language clause in the treaty is transformed together with it by the ordinance of application, the State is able to decree that the internal application follow other rules. It could limit the publication to certain languages, for instance in the national language. It could even publish only an official translation which is not authentic. Of course, the State would run the risk of an erroneous application of the treaty by such dubious practices and could be made responsible for a resulting failure to comply with its obligations.

Considerable differences exist concerning reservations. If the treaty is adopted with its content determined on the international level, reservations declared by either party have effect automatically. Though an official publication is advisable for informative purposes, it is not strictly necessary in order to give effect to the reservation internally. Under the transformation method the legal situation differs when this method is strictly applied. If the application of the treaty is ordered before reservations have been declared, it would be necessary to repeat the application ordinance in order to give effect to the amended content of the treaty. This would eventually necessitate a new statute. This is, however, not State practice; in general they do no more than publish the reservations declared and behave as if the adoption method were valid.

3. Customary Law

(a) Special character

The rules for the application of → customary international law in municipal law have some elements in common with those for treaties. In both cases there is a problem of defining the relationship between an international rule and domestic law. Possible conflicts between both of them have to be solved. The principles of State sovereignty, of a reciprocal harmony between the two categories of norms and finally of the supremacy of the international legal order have to be brought into balance.

Nevertheless there are some significant differences concerning the internal application of rules of customary law which mainly result from the varying manner in which these come into being and are declared applicable internally.

Every treaty is the expression of the current political will of the participating States and therefore necessarily has repercussions in their domestic spheres. The dynamic element of the executive branch has to reach a compromise with the more static legislative power for the conclusion of each treaty which exercises an influence on the internal legal order. The protection of the proper spheres of competence determines the rules for their cooperation in concluding treaties and in making them applicable internally.

This political element does not play the same role for customary law. Rules for its validity and applicability in the domestic sphere are either enacted in advance and in a general way in some sort of constitutional instrument intended to remain in force for a longer period, or are developed by the judiciary in a gradual process. The protection of the interests of the State on the one hand and the readiness to conform to general rules of international law on the other play a role when the constitution is drafted and in the judicial process, but are not raised on a continuous basis.

This difference between the two sources of law explains why no uniform solution has been developed for their internal application as well as why the rules concerning customary law in constitutions are much less elaborate than those on the application of treaties. Customary law no longer constitutes the larger part of international rules, since the many efforts towards a codification of international law in treaties has fundamentally changed the proportions.

The following survey is limited to those elements where differences from the rules for treaties appear.

(b) Legal basis and limitations

Under a monist doctrine no special ordinance for the application of customary law in the domestic sphere is necessary. As far as any form of dualist view prevails, such an ordinance is indispensable. It can be a customary rule of municipal law developed by courts, a general provision in the constitution that the constitutional order conforms to the rules of international law, or a special constitutional provision concerning "general rules of international law" or specifically customary law.

Whatever the basis for the internal application of customary law may be, its rules are applicable with the content they have at the date of their application. Recent developments on the international level, even after the relevant domestic provision came into force, are not excluded. The same is valid for customary law created before such provision came into force. As the variability of customary international law is an inherent element in it, eventual changes are always included in their adoption.

A dualist view still regards constitutional provisions on the application of customary law as agents of "general transformation". In a similar way as an act ordering the application of treaties, the constitutional provision is regarded as having the effect of transforming a customary rule into a norm of municipal law. If one remains within the logic of this argument, it is inevitable that this process of transformation imparts the international rule with the content it has at the date the constitution is enacted. Thus it would be petrified. Moreover, this would entail a highly artificial construction, since it is evident that this regularly does not correspond to the intentions of the authors of a constitution. Even future developments which may be unexpected and unforeseeable should be transformed together with the rule of customary law. The idea of an anticipated transformation of an uncertain norm is incompatible with the very logic of this doctrine. It "amounts to a disguised application of the adoption doctrine which adjusts itself easily to the variability of the rules" (Resolution 11 of the German Society for International Law (1963), in: Partsch, p. 167). Supporters nevertheless defend this idea (Rudolf, p. 161 et seq.).

An integral application of customary rules may be avoided or limited in a variety of ways. Only those rules of customary law which are "universally" recognized, whereby the State in question is included, may be declared applicable. This may be interpreted liberally as excluding only rules whose application has been expressly refused by a respective State (Mosler, L'application, p. 694). Nevertheless it is a limitation and it is significant that its insertion was expressly and intentionally rejected when the Basic Law of the Federal Republic of Germany was drafted and adopted. It should not be possible for a State to withdraw its recognition in order to act contrary to general rules.

In common law countries the opinion is widespread that rules of customary law need to be accepted expressly or implicitly by national organs before they can be applied internally. Relevant precedents are not required and the practical application of this principle shows much flexibility (Brownlie, p. 45). Certain limitations furthermore result from an incorporation into the national hierarchy of norms if the rules of customary law are superseded by domestic rules of a higher rank.

A psychological factor may exercise some influence. National judges may prefer to apply a provision of domestic law with which they are familiar instead of making considerable efforts to find out whether a rule of international customary law may perhaps be in conflict with this provision. As a matter of fact, difficulties sometimes arise in ascertaining not only the existence but also the content of a rule from a less-known legal order which is only rarely relevant for a municipal court. States should help their judges in fulfilling this function.

Certain political factors cannot be neglected. Among new States there exists a certain mistrust of legal rules created at a time when they were not yet able to participate in the formation of international law. This mistrust is mainly directed against customary law, a product of colonial times. One result of this is the insistence on codification to replace customary rules created without these States' participation. Another reaction may be found in the fact that the constitutions of Third World countries seldom contain express recognition of the general rules of international law.

A somewhat comparable situation exists in socialist States. It is for instance well known that

the Soviet Union is rather reluctant to recognize general rules developed by non-socialist countries and it is regarded as remarkable progress that its 1977 Constitution provides for its readiness to fulfil in good faith "obligations arising from the generally recognized principles and rules of international law" (Art. 29). It is open to doubt, however, whether this provision constitutes a basis for the application of customary rules on the internal level (as Uibopuu hopes, p. 669 et seq.). In general, the internal organs of the Soviet Union are only entitled to apply rules of international law if an express reference is made to them in domestic law.

(c) Relationship to municipal norms

The following systematic survey of some types of solutions does not consider the important rules of construction, discussed above, by which courts endeavour to ensure greater respect for international obligations.

A State can open its legal order to the general rules of international law without reservations and without making an attempt to incorporate the general rules into the internal hierarchy of norms. Under this system domestic courts are entitled to recognize the pre-eminence of customary international law over all statutes, irrespective of the date of their enactment. This system has been adopted by the Netherlands for treaties. Unfortunately, its Constitution is silent as to whether it also applies to general rules, but this would be theoretically possible.

The State's constitution could also constitute a barrier to the application of customary law. The procedure introduced in some countries for the adoption of treaties to be exempted from constitutional barriers (see *supra*) is not accessible to customary law, as it does not require an *ad hoc* legislative act. Customary law could be freed from this barrier only by the constitution itself. Thus Art. 25 of the Basic Law of the Federal Republic of Germany states that general rules of public international law, i.e. not only customary law but also general principles, "shall have precedence over the law". Though it was apparently the intention when this provision was drafted that "the law" should include the Basic Law itself, this clause is largely, though not unanimously, interpreted as meaning "precedence over statutes" (Geck, p. 137). Under this restrictive interpretation it would be necessary to amend the Basic Law if a conflict with a general rule should occur. Under whatever circumstances, this clause precludes any statute conflicting with a general rule from being enacted or applied. In order to implement this provision, a special procedure leading to the Constitutional Court has been created. A State which in this way opens its internal legal order to international law accepts even later developments on the international level and their effects on its internal legal order.

If a State's constitution provides that international law is the supreme law of the land or that the State conforms to the rules of international law (Preamble of the French Constitution of 1946, compare Art. 10 of the Italian Constitution), it precludes the enactment of statutes conflicting with these rules. Whether such provisions also prevent an application of conflicting statutes depends upon the powers of the judiciary. If courts are entitled to subject statutes to judicial review, they can at least refrain from applying them if the measures conflict with international law. If the courts lack this competence, the substantive provision is without effect.

A strong respect for the national legislature may lead to a preference for statutes which conflict with customary law. This is the situation in the majority of States (Morgenstern, p. 70 et seq.; Mosler, L'application, p. 695). Under the *lex posterior* rule, a differentiation between statutes enacted before and after a general rule has been formed is hardly possible (Mosler, ibid., p. 696). An exact date of the formation of a general rule can hardly be established, although courts have sometimes applied this rule to customary law. In this regard, the rules of construction are of utmost importance.

Wherever a higher status is internally attributed to rules of customary law than to treaties, a difficult and controversial problem arises. Does the principle *pacta sunt servanda* as a "general rule" determine the hierarchy of treaties and confer on them the same internal position as attributed to general rules? Does a norm of international law in this way have a direct effect on the international application of its norms? Discussions have thus far been sustained with arguments based on constitutional law (Doehring, p. 130 et seq.). Basic is the question of who is the subject of

the principle: certainly the State. Whether it reaches further is still an open question.

(d) Interpretation

In view of the lack of a written text, the first endeavour of domestic organs entrusted with the application of customary law is directed towards considering if a rule of this kind exists and how its contents can be defined. Not in all States are domestic courts entrusted with this task. It may be reserved to organs of the executive in view of their greater knowledge of → international relations and of the specific position taken by their State. These considerations have for instance led to a recognition in France of an executive prerogative not only for the applicability and interpretation of treaties but also regarding customary law of a certain character.

In States where such a prerogative does not exist, domestic courts are free to decide whether a general rule exists, what its contents are and whether it is internally applicable. There is nearly universal agreement that the rules of interpretation of rules of international law have to be respected in this task.

A special solution has been found in the Federal Republic of Germany where the competence to decide "whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual" is concentrated in the Federal Constitutional Court (Art. 100(2) of the Basic Law). Upon the request of any other tribunal, this Court decides the issue and its judgment has the force of law (Federal Constitutional Court Rules, see 31(2); for particulars see Geck, p. 142 et seq.). Quite a number of such cases in which the claimant had referred to a general rule have been brought to the Court. Up to now it has never decided that a provision of national law is incompatible with a general rule. A similar solution exists in practice in Italy on the basis of the concentration of judicial review with the Constitutional Court, and it is also envisaged in the Austrian Constitution (Art. 145). A law implementing such a provision is, however, still lacking.

Finally, the relevance of decisions of international courts or tribunals for domestic courts is treated in a separate article (→ International Law in Municipal Law: Law and Decisions of International Organizations and Courts).

E. Conclusion

Whether a conclusive formula can be given for the actual relationship between international and municipal law remains in question. It certainly cannot be found in adherence to either of the traditional theoretical approaches. Dualists have had to introduce so many elements from the opposing concept that their position appears weakened. Likewise monists have had to make considerable concessions in the light of State practice, which has deeply affected their initial idealistic concept.

In new attempts to circumscribe this relationship, terms such as "interaction", "interdependence", "complementariness" and "dialectic link" are used. The proposition that any kind of hierarchy exists between the legal order on the international and on the municipal level is avoided. It is recognized that international law needs the collaboration of States for its implementation and that reciprocal cooperation from both sides is necessary. These elements should not be underestimated.

In these descriptions the margin for the free movement of States remains open, so too its limits drawn by external obligations. Finally, the extensive network created by the international community restricting the States' own sovereignties is also acknowledged.

There is no doubt that the number of international obligations has increased considerably and that this development has had an influence on the extension of the proper domain of internal jurisdiction. Whether the readiness of States to conform to these obligations has grown to the same extent remains in doubt. The main barrier is State sovereignty. This concept has lost much of its attraction in certain regions where closer communities with substantial competences have been founded (e.g. → European Communities). This is one example of the trend to recognize the increasing → interdependence of States, but not the only one.

On a larger scale, a remarkable development is taking place. It is directed towards a greater readiness to open the domestic legal order to international obligations and to recognize there-

with the need for harmonizing rules. It would be premature to state that the rule of the supremacy of international law has been accepted everywhere in the domestic sphere. The widely accepted principle that domestic norms have to be constructed in conformity with international obligations is a step in this direction, increasing the international element in the "dialectic link" with the internal order.

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KARL JOSEF PARTSCH

INTERNATIONAL LAW AND MUNICIPAL LAW: CONFLICTS AND THEIR REVIEW BY THIRD STATES

1. The Problem

When a domestic court is required to apply foreign law, the question arises whether the judge will make the application of the foreign law contingent upon its conformity with → international law (→ International Law and Municipal Law). In other words, will a domestic court take into consideration the validity in international law of the foreign law which it is called upon to apply (be it constitutional, legislative or administrative), and will it refuse to apply the foreign law if it is found to contravene the rules of international law? (→ Recognition of Foreign Legislative and Administrative Acts; → Minimum Standard).

The problem is not only a theoretical one, for with the proliferation of international exchanges it increasingly appears under various circumstances. A typical example is the examination by a domestic court of the validity of foreign legislation concerning the → expropriation and nationalization of private assets (→ Aliens, Property; → Foreign Investments). The owners of nationalized assets may contest the validity of the legislation, or claim either restitution or the price of commodities produced by those assets in a third State jurisdiction. An abundant case-law has thus developed as a result of the Russian nationalization after 1917 (→ Etat russe v. La Ropit), the Iranian nationalization in 1951 of the Anglo-Iranian Oil Company's → concessions (→ Anglo-Iranian Oil Company Case), the nationalization of Dutch interests in Indonesia in 1959, the Cuban nationalization of American-controlled banks, tobacco and sugar plantations in 1959/60 (→ Sabbatino Case) and the Chilean nationalization in 1971 of the copper industry (→ Chilean Copper Nationalization, Review by Courts of Third States). Apart from disputes over the ownership of goods, the problem again presents itself when a judge is called upon to consider, in the light of the → Nottebohm Case, the international enforceability of foreign legislation on → nationality, or the validity of measures taken in virtue of an → annexation of territory contrary to international law (for example the case of the German annexation of Alsace-Lorraine in 1940; → Territory, Acquisition; → Occupation, Belligerent).

In such cases the domestic court is presented with a difficult problem. Firstly, theoretical questions of a formidable nature are raised: the equality of sovereign States (→ States, Sovereign Equality), the relationship between international and municipal law and the extraterritorial effects of State acts (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). The court then encounters more practical problems. Judicial reticence is understandable when the

litigation has essentially a political character which opposes interests likely to disturb the good relations between States. This is particularly the case when the exercise of a State's economic → sovereignty may be called into question in a nationalization dispute. Such reserve is even more understandable when one considers that in many cases it is the fortuitous and perhaps temporary location of the disputed goods within the jurisdiction which gives rise to the litigation (on the basis that the goods are subject to the *lex situs*).

The problem should be carefully defined and distinguished from related issues which may in practice cloud the understanding of it. First of all, it should not be confused with the doctrine of → State immunity which protects a State from prosecution in a foreign jurisdiction. A decision on the international validity of a foreign law requires a court to consider the merits of the question – once the jurisdiction of the domestic court has been established. The doctrine of sovereign immunity, on the other hand, raises a jurisdictional obstacle which prevents a court from considering the question of international validity at all. Furthermore, the problem only arises when a foreign law is considered by a court in the light of international legal norms. A reference by the court to national legal norms is irrelevant as the court in this case conducts its enquiry outside the scope of international law.

Finally, the problem is only encountered once the foreign law is held to apply to the case before the domestic court. It is distinct, therefore, from the question of the extraterritorial effect of municipal laws. The problem is one of public international law and not → private international law, since it concerns the question of the → jurisdiction of States as defined by international law. We can therefore state the problem in the following terms: does there exist a rule of international law, in a case concerning the international legality of a foreign law, which imposes a specific rule of conduct on a domestic court?

2. *Case-Law*

The case-law, which is provided by a relatively small number of countries, presents various solutions of greater or lesser relevance. We can, however, distinguish four general trends from the cases.

The first approach, illustrated by the French decisions, is to evade the problem altogether by treating the question as one of public order (→ Ordre public (Public Order)). The law of the forum is held to constitute the only law relevant to determine the applicability of the foreign law, and the question is therefore examined exclusively in this context. Notwithstanding several isolated decisions which mention the incompatibility of the foreign law with international law, the private international law approach could support the refusal of French courts to apply rules of international law. (For example, the annexation of Alsace by Germany was held to be "en violation du droit des gens et à l'encontre des clauses de la Convention d'armistice du 23 juin 1940", Cass., Bull, civ. (1954 I) p. 298.) The French courts thus prefer to ignore the problem by basing their decisions on the firmer ground provided by the *lex fori*.

A second approach, adopted principally by the German and Japanese courts, also looks to the *lex fori* to determine the applicability of the foreign law. In this case, however, the court refuses to examine the international validity of the foreign law on the basis that "... no universally accepted principle of international law that the effect of a foreign law may be adjudged invalid by the courts of a State has yet been established ..." (Higher Court of Tokyo, Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha (Nissho Maru Case), ILR, Vol. 20 (1953) p. 305, at p. 313) and 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" (Court of Hamburg, Chilean Copper Nationalization Case, ILM, Vol. 12 (1973) p. 251, at p. 274).

A third approach is provided by various national courts which recognize the existence of a rule authorizing them to examine the international validity of the foreign law. To this effect a Dutch court held that "a court can hardly be held to be dispensing justice in accordance with international law if it gives legal effect to acts which have been performed contrary to international law" (District Court of The Hague, February 20, 1962, ILR, Vol. 33 (1962) p. 30, at p. 36). The decisions which

incorporate international legal rules into municipal law arrive at a similar result, whether they find the foreign law to be invalid (the Aden Supreme Court in the → *Rose Mary* Case: refusal to recognize the validity of Iranian legislation on nationalization "following international law as incorporated in the domestic law of Aden" (ILR, Vol. 20 (1953) p. 316, at p. 317)) or whether they find that the foreign law conforms with international law (Court of Rome in the Mirieila Case, ILR, Vol. 22 (1955) p. 23). The solution in the latter case are less conclusive however, since a foreign law which violates international law also, by definition, violates the municipal law.

A final approach, more complex and difficult to analyze, is manifest in the Anglo-American case-law dealing with the act of State doctrine. This doctrine confers an initial and complete jurisdictional immunity before a foreign court on all → acts of State. At the end of the last century, the United States Supreme Court stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" (Underhill v. Hernandez, 168 U.S. 250 (1897)). It is "an exception to the general rule that a court of the United States . . . will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law" (First National City Bank Case, ILM, Vol. 11 (1972) p. 811, at p. 813). In looking exclusively to the legislation passed by a foreign State within its own borders, the act of State doctrine constitutes an application, pushed to the extreme, of the principle of → territorial sovereignty. But it is fundamentally foreign to international law. Nevertheless, the doctrine is recognized by the United States Supreme Court on the grounds that there is no rule of international law which prevents a court from refusing to pronounce on the validity of a foreign law (→ Sabbatino Case, ILM, Vol. 3 (1964) p. 381, at p. 391). The act of State doctrine is based, in the first place, on the comity among nations, which is viewed as a unilateral decision of the forum, not as an act required by a rule of public international law. Secondly, the doctrine is supported by the desire of the judiciary not to interfere with the government's execution of foreign policy. It is viewed therefore as "a juridically accepted limitation on the normal adjudicative processes of the courts" (First National City Bank Case, op. cit., at p. 816).

The act of State doctrine has, however, recently received a restrictive interpretation which would permit the judicial review of foreign acts of State by American courts. A precedent was established in the Sabbatino case, where for the first time the United States Supreme Court recognized that the validity of a foreign law could be determined by reference to international law. Although the Court in the Sabbatino case did not examine the international legality of the foreign law in question, it acknowledged that such a determination would be possible in future cases on condition that the relevant international legal rules were clearly established ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it" (ILM, Vol. 3 (1964) p. 391, at p. 394)), and that such an examination would not lead the Court to venture into sensitive areas concerning "the practical and ideological goals" of other States (ibid., at p. 395). This evolution in the American position was confirmed one year later in 1965 by the Congressional Hickenlooper Amendment (22 U.S.C. § 2370(e)(2) (Supp. 1966)) which imposed an obligation on the American courts, in the absence of a government veto, to ensure the international validity of foreign laws applicable to disputes over property rights. In the 1972 First National City Bank case (op. cit.), the Supreme Court further enlarged its jurisdiction by declaring that in cases falling outside the scope of the Hickenlooper Amendment, "the normal adjudicative process of the courts" should follow its course where government approval was forthcoming. In the Dunhill case (Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)), the Court was influenced by the distinction adopted by Congress concerning the sovereign immunity of foreign States (The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, § 1, 90 Stat. 2891, codified as amended in scattered sections of 28 U.S.C.). It decided to remove foreign commercial legislation from the protection previously afforded it by the act of State doctrine. Henceforth the examination of its conformity with internation-

al law, as well as with that of municipal law, would be an obligation imposed by virtue of the rule of law. In the final analysis, this evolution shows that the American courts and legislature have come to consider the judicial review of foreign acts of State not only possible, but in certain cases necessary.

The American position is adopted by the English courts, but with minor variations. There exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign States. "These are not issues upon which a municipal court can pass" (House of Lords, Buttes Gas and Oil Co. v. Hammer, ILM, Vol. 21 (1982) p. 92). The tendency of the English courts, however, is only rarely to apply the principle, which is not one of discretion, but is inherent in the very nature of the judicial process. Apart from this hypothesis, a court is obliged to enforce clearly established rules of international law but has a discretion when determining the clarity of their existence (Oppenheimer v. Cattermole (1976) A.C. 249).

3. *Doctrine*

The doctrinal treatment of the subject is less subtle than that afforded it by the case-law. The partisans and opponents of judicial review have split into radically opposed groups.

(a) Pro judicial review

Support for a judicial review of acts of State seems dominant among international jurists. (This is the position of Akehurst, Baade, Domke, El Kocheri, Fachiri, Francioni, H. and E. Lauterpacht, Mann, Morgenstern, Oppenheim, Seidl-Hohenveldern, Verzijl, Zander). Their arguments are substantially the following: Firstly, one must consider the principle of the supremacy of international law over municipal law. Since international legal rules take precedence over municipal legal rules, one cannot accept the application by a national court of a rule which is contrary to international law, since to do so would be to ignore this principle. A partisan of judicial review thus writes: "It should not be a breach of international law to apply international law" (M. Zander, The Act of State Doctrine, AJIL, Vol. 53 (1959) p. 826, at p. 844). According to these authors judicial review is not merely an exercise of judicial discretion, but rather an obligation binding the courts, for otherwise the courts would "close their eyes to a lawless act" (dissenting opinion of Judge White in the Sabbatino case, op. cit., at p. 408). The second argument is based on the necessary collaboration of the domestic courts in the application and development of international law. The domestic courts are a palliative for the inadequate legal mechanisms existing on the international level. They operate to compensate for the deficiencies existing in the international system, and act like "véritables collaborateurs de la justice internationale" (P. Reuter, Droit international public (1976) p. 71). Finally, a practical argument is raised in favour of judicial review: the need to protect foreign investments. An action brought in a third party jurisdiction, even when the outcome is doubtful, can nevertheless prove an effective pressure tactic *vis-à-vis* a State – especially in cases involving a nationalization without compensation. Such litigation may convince the State to negotiate an amicable settlement, and therefore put an end to tactics such as the pursuit of "hot commodities".

(b) Contra judicial review

These arguments are disputed by the opponents of judicial review (who include Falk, Henkin, Novoa Monreal, Reeves, Wright and Friedmann). The "supremacy" argument is countered by an argument based on State sovereignty. To permit a national court to paralyze the effect of a foreign act of State would violate the principle of the sovereign equality of States which is the keystone of → international relations. Such a judicial review threatens to contravene the principle of → non-intervention in the internal affairs of a foreign State, and threatens as well to upset international relations based upon a reciprocal courtesy (→ Reciprocity; → Comity). In the words of Charles De Visscher, foreign acts of State should be respected "comme la manifestation d'une souveraineté étrangère dans les limites internationalement reconnues de sa compétence" (Théories et réalités en droit international public (1970) p. 272). Moreover, in the case of a decentralized, horizontally-structured international society which brings into juxtaposition several legal jurisdictions, it is difficult to concede that one national court can impose its own interpretation of an international legal rule on other national

courts. In the contested areas of international law – the law concerning nationalizations for example – the decisions rendered are inevitably "arbitraires et contradictoires" (G. Fouilloux, La nationalisation et le droit international public (1962) p. 410) and cannot but reflect the interests of the State in whose courts the case is tried. In short, the judicial review practiced by foreign courts will produce a gradual disintegration of international legal norms and "will only add to the insecurity and uncertainty in the matter" (W. Friedmann, Act of State: Sabbatino in the Courts and in Congress – Remarks, ColJTransL (1964) p. 103, at p. 106).

Finally, the practical argument that judicial review is necessary to protect foreign investments is rejected as being both ineffective and dangerous. It is ineffective because isolated decisions, impossible or very difficult to execute outside the forum, are unlikely to cause a State to change its behaviour. The argument is dangerous because such judicial conduct disturbs international relations and is likely to unsettle the climate of security required by international commerce. As an opponent of judicial review writes, "it creates international animosities and breeds chaos" (W.H. Reeves, Act of State Doctrine and the Rule of Law – A Reply, AJIL, Vol. 54 (1960) p. 141, at p. 148). These differences of opinion are more a reflection of personal preferences than the result of a rigorous analysis of the case-law, and therefore do little to advance a just solution to the problem.

4. Conclusion

It appears that there is no rule of international law which forbids a court to examine the international validity of a foreign law. It has long been accepted that domestic courts should apply international law. Hersch Lauterpacht noted in 1929 that "there is . . . hardly a branch of international law which has not received judicial treatment at the hands of municipal tribunals" (Decisions of Municipal Courts as a Source of International Law, BYIL, 1929, p. 67). It follows that if a domestic court is competent to apply international law, it should also be competent to apply its → sanctions. The States themselves seem to accept the practice of judicial review, since they rarely protest against its exercise (→ Protest).

On the other hand, it is difficult to admit the existence of a rule which obliges a court to exercise its control in all cases. The consequences of such a rule would be unacceptable – the act of State doctrine and the case-law based on the rule of public order would both consequently violate international law, thereby engaging the international responsibility of States such as the United States and France (→ Responsibility of States: General Principles).

The only possible solution, therefore, is that there exists a rule which permits the court, without obliging it, to exercise its power of judicial review (Weil). To adopt such a solution would be, of course, to favour the exercise by the courts of judicial review, and to render the absence of judicial review the exception to the rule. In contemporary international society, we cannot deny the right of each individual State either to modify its exercise of judicial review, substitute alternative controls, or even renounce its exercise altogether. Such a solution should avoid previous objections. Once the principle of judicial review is accepted, it should only result in a declaration to the effect that the foreign law is contrary to international law in cases where there is a violation of an international rule stated in clear, unequivocal terms. Conversely, when the international legal norm is in doubt, the presumption of the validity of State acts should apply, and override a declaration to the contrary. In the final analysis this is what the United States Supreme Court decided in the Sabbatino case. Those who favour or oppose judicial review both agree on the one hand that "a judge will not attribute the character of an international delinquency to a foreign law unless there has been a clear breach of a clear international duty" (Mann, p. 383) and on the other hand that judicial review is acceptable when the foreign law contravenes a rule of international law on which there exists a true consensus (Falk, The Complexity of Sabbatino, AJIL (1964) p. 935, at p. 945).

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INTERNATIONAL LAW IN MUNICIPAL LAW: LAW AND DECISIONS OF INTERNATIONAL ORGANIZATIONS AND COURTS

A. Significance

Decisions of international institutions constitute a heterogeneous source of law (→ Sources of International Law; → International Legislation). They embrace such diverse phenomena as regulations by regional or global organizations such as the → European Communities, the → European Free Trade Association (EFTA), the → International Civil Aviation Organization (ICAO) and the → World Health Organization (WHO), official interpretations by organizations of their constitutive instruments, recommendations by the → United Nations General Assembly (→ International Organizations, Resolutions), decisions by the → United Nations Security Council and judicial decisions by international courts and arbitral tribunals, to name just a few (→ International Courts and Tribunals). The potential effect of these international decisions on the municipal law of → States is considerable. There is hardly any area of municipal law which has not been the subject-matter of deliberations or decisions by some international institution, although certain areas such as → human rights, economic cooperation or → traffic and transport have naturally attracted special attention. At the same time, international organizations and courts depend on the cooperation of States for the implementation of their decisions. In many situations this requires appropriate action by national legislatures, domestic courts and administrative authorities. The status and treatment of decisions of international organizations and courts in municipal law are therefore often of decisive importance for their effectiveness.

In view of the diversity of the decisions involved and of the national approaches to international law, it is not surprising that neither legal theory nor State practice has been able to develop a uniform approach to the complex interactions of decisions of international institutions and municipal law. Important progress has been made towards the clarification of these interactions in the area of European Communities law (→ European Communities: Community Law and Municipal Law). However, these specific European developments cannot simply be extended to traditional international organizations and courts.

B. Constitutional Setting

Most national constitutions do not contain specific provisions governing the status of decisions of international organizations and courts in municipal law comparable to the frequent constitutional provisions concerning → customary international law and → treaties. The pertinent provision of the Netherlands Constitution is therefore atypical: Its Art. 67 provides that decisions made by organizations based on international law shall be treated like treaties. This means that such decisions, provided they are directly applicable, are not only generally binding in the Netherlands but also take precedence over conflicting domestic law (Arts. 65 and 66).

A number of other constitutions contain clauses providing for the transfer of sovereign powers to international organizations or institutions (→ Sovereignty). They include: Austria (Art. 9(2)), Belgium (Art. 25*bis*), Denmark (Art. 20(1)), Federal Republic of Germany (Art. 24), Italy (Art. 11), Luxembourg (Art. 49*bis*), Norway (Art. 93) and Sweden (Ch. 10, Art. 5). Although these provisions do not deal directly with the status of decisions of international organizations and courts in municipal law, they are sometimes construed as a constitutional basis for incorporation.

It has been the subject-matter of some legal

debate whether such a constitutional authorization to transfer powers to international institutions is or should be subject to certain limitations. This question has received special prominence in the Federal Republic of Germany in connection with possible encroachments by European Community decisions on civil liberties guaranteed by the West German Constitution. If such limitations on the powers of international organizations were to be accepted, any international decision contrary to certain domestic constitutional principles might be held inapplicable in municipal law.

Some writers have sought a constitutional basis for the internal validity of international decisions by treating them as an annex to treaty law. The fact that international organizations and courts are almost invariably set up by treaty is seen as a link to constitutional provisions dealing with the internal application of treaties (→ International Law and Municipal Law). This theory appears convincing where international organizations have the power to amend their constitutive instruments by majority decisions. In member States these decisions amending treaties are normally subjected to the same procedure as ordinary treaty law. Their internal application has created no special problems.

C. Incorporation and Internal Validity

There are several possible motives for incorporating decisions of international organizations and courts into municipal law. A more theoretical reason is based on the dualist notion that unless municipal law incorporates international law, the latter has no internal validity. A more practical reason is based on the realization that implementing measures are often a prerequisite for the effective municipal application of international decisions. Problems with an international decision's direct applicability (→ Self-Executing Treaty Provisions) and the endeavour to integrate it into the municipal law system and terminology may militate in favour of legislative measures.

On the other hand, it is clear that it would be quite unrealistic to expect States to take specific measures incorporating each and every decision of an international organization and court into their municipal law. The willingness to take such measures and the kind of measure adopted will to a large extent depend on the type of international decision involved and its significance for the State concerned. It follows that one of the most important questions for the effectiveness of decisions of international organizations and courts in municipal law is the willingness of the organs applying municipal law to rely on international decisions in the absence of specific measures of incorporation.

In any survey of the practice of such organs, especially courts, it must always be borne in mind that in the vast majority of cases pertinent international decisions are not even mentioned. The main reason for this is probably that neither the parties nor the decision-maker are aware of the existence of an applicable international decision. Therefore, the cases in which domestic courts openly deal with the various legal issues concerning international decisions are in a sense an unrepresentative sample of actual practice.

1. International Regulations

(a) Incorporation

Some international organizations clearly expect member States to pass legislation in order to implement their general decisions. In fact, member States frequently adopt legislation or amend existing legislation in order to comply with such decisions. For example, the Standards adopted by ICAO in the form of Annexes to the → Chicago Convention are either implemented through national statutes and executive orders or by references in national legislation to the Annexes as currently adopted by the Organization.

In other cases regulations issued by international organizations are simply published in the official government gazettes. This is the preferred method with the International Sanitary Regulations of WHO and with many decisions of the Council of EFTA.

(b) Internal validity

In cases where international regulations are incorporated by municipal legislation or executive orders, no problems concerning their internal validity arise. Domestic organs may apply them without even realizing their international origin. Cases in which such an incorporation is lacking are not uniform. Sometimes courts refuse to apply Annexes to the Chicago Convention under these

circumstances. In other cases they apply them without insisting on implementing measures, possibly without realizing they are decisions of ICAO and not part of the treaty. At any rate, the number of known cases is too small to permit any general conclusions.

The internal law of international organizations (→ International Organizations, Internal Law and Rules), especially the law governing employment, is not incorporated into municipal law for obvious reasons. Nevertheless, domestic courts on occasion rely on staff regulations in order to delimit their own jurisdiction or have to resolve a conflict of obligations under an international organization's staff rules and municipal law (Keeney v. U.S., ILR, Vol. 20 (1953) p. 382).

Some constitutive treaties of international organizations such as the → International Monetary Fund (Art. XXIX), the → International Bank for Reconstruction and Development (IBRD; Art. IX), the → International Finance Corporation (Art. VIII) and the → International Development Association (Art. X) provide for their official interpretation by specially assigned organs. Some of these official interpretations have considerable significance for domestic litigation. The cases in which these interpretations are relied upon permit the conclusion that domestic courts have no misgivings concerning the absence of their incorporation into municipal law.

2. *Recommendations*

(a) Incorporation

Recommendations by international organizations, although not binding in a strict sense, have repeatedly given rise to legislative measures. In fact, some of their constitutive instruments, such as Art. 19(6) of the → International Labour Organisation and Art. IV(4) of the → United Nations Educational, Scientific and Cultural Organization, specifically oblige member States to initiate the necessary legislative procedures in order to give internal effect to their recommendations. An obligation of member States to report on any implementing measures for these recommendations, such as is also frequently provided in → Council of Europe resolutions, is also primarily directed towards implementation by legislative measures.

Not infrequently municipal legislation is prompted or at least influenced by recommendations of international organizations. There is no clear line between actual incorporation of recommendations and legislation which is just inspired by them. Obvious examples are legislative instruments, especially constitutions, which are evidently modelled on the Universal Declaration of Human Rights (→ Human Rights, Universal Declaration (1948)). In other cases, recommendations such as the Universal Declaration of Human Rights or Council of Europe recommendations are simply published on the municipal level in an appropriate official journal.

(b) Internal validity

Certain recommendations of international organizations, such as the Universal Declaration of Human Rights, are frequently directly invoked before domestic courts. In only a few of these cases do the courts refuse to consider the Universal Declaration because it has not been incorporated into the local law. In numerous cases courts refer to it when interpreting domestic law or treaties dealing with human rights questions without addressing the question of internal validity. In some cases the Universal Declaration serves as an international standard for → *ordre public* where courts refuse to apply foreign law which is seen to violate its principles (→ Recognition of Foreign Legislative and Administrative Acts; → Minimum Standard). There are indications that domestic courts will also refuse to enforce private transactions which are in violation of certain international recommendations (German Bundesgerichtshof, Decision of June 22, 1972, BGHZ 59, 83).

There is also some room for direct executive enforcement of recommendations. In trying to induce corporations to abide by → codes of conduct adopted by international organizations, governments may want to make → diplomatic protection, export credits, subsidies and investment insurance conditional on their observance.

3. *Operative Decisions*

(a) Incorporation

Operative decisions in concrete situations such as non-military enforcement action (→ Sanctions)

taken by the Security Council will normally require incorporation into municipal law in order to become effective. A number of States have passed enabling legislation providing for executive orders to implement Security Council decisions. Practice in connection with the boycott resolutions against Southern Rhodesia shows that many member States enacted detailed provisions to carry out their obligations (→ Boycott; → Embargo; → Economic Coercion; → Rhodesia/Zimbabwe).

(b) Internal validity

Domestic courts have generally attached much weight to the existence of implementing legislation in cases involving the internal enforcement of operative international decisions. This means that an action to force the executive to abide by Security Council decisions may fail on the ground that the resolutions are not self-executing (Diggs v. Richardson, 555 F.2d 848 (D.C. Cir.1976)). A government trying to carry out Security Council decisions without first securing appropriate implementing legislation may even be faced with an injunction by a domestic court (Bradley v. Australia, ILR, Vol. 52 (1979) p. 1).

The situation is totally different where operative international decisions are not relied upon in situations of enforcement but in order to clarify preliminary points. This applies especially to international decisions determining questions of status with effect *erga omnes*. For instance, an admission to membership by an international organization can serve as conclusive proof that the particular territory enjoys the quality of statehood. UN General Assembly decisions on territorial questions can help to settle the extent of a municipal court's jurisdiction or determine a connecting point with a foreign legal system. A formal incorporation of these decisions into domestic law is not seen as a prerequisite for their application.

4. Decisions of International Courts

(a) Incorporation

Decisions of international courts and tribunals involving pecuniary obligations have sometimes been accorded the status of final domestic judgments by treaty or statute, in order to facilitate their enforcement. The most important example, apart from the → Court of Justice of the European Communities, is Art. 54 of the IBRD Convention of March 18, 1965 (→ Investment Disputes, Convention and International Centre for the Settlement of). This provision accords awards rendered under the Centre's procedure the status of final domestic judgments in all member States.

International judicial decisions not involving pecuniary obligations may under certain circumstances necessitate changes in municipal law. The most obvious examples are the repeated instances in which States adhering to the → European Convention on Human Rights (1950) have amended their legislation in reaction to adverse findings of the → European Court of Human Rights or the → European Commission of Human Rights.

(b) Internal validity

The municipal legal status of international judicial decisions is particularly complicated due to the different circumstances under which these decisions are invoked. A domestic organ may be faced with a claim to enforce the international decision. In other cases the purpose of its invocation may be merely to clarify a preliminary point or to serve as a "precedent".

Domestic courts usually treat decisions of international courts and arbitral tribunals involving pecuniary obligations like foreign judgments and awards (→ Recognition and Execution of Foreign Judgments and Arbitral Awards). This means that these decisions are sometimes accorded an *exequatur* as a formal preliminary step to their execution by domestic courts. The internal effectiveness of these international decisions will therefore largely depend on the attitude of the particular municipal legal system towards foreign judgments and awards. These attitudes vary considerably and can involve a reexamination on the merits. Much will also depend on whether the forum State is a party to any of the multilateral conventions dealing with the enforcement of foreign arbitral awards.

Domestic organs are sometimes also in a position to implement non-pecuniary international judicial decisions. For instance, domestic courts may act in pursuance of international judicial decisions delimiting jurisdiction between States,

especially on territorial questions (→ Jurisdiction of States; → Boundaries). These international decisions will usually arise in connection with preliminary points. In situations of this kind domestic courts see no obstacle to relying directly on these international decisions.

The most frequent examples of direct application of decisions of international courts and tribunals in municipal law involve reliance on them as "precedents", that is as authoritative statements on points of law. An incorporation of the case-law of international courts and tribunals into domestic law for the purpose of their internal application is not a realistic possibility, although suggestions to this effect have been made occasionally. The practice of domestic courts reveals that no problems are usually seen with the internal validity of international judicial decisions under these circumstances. There are only a few isolated cases in which dualist conceptions have prompted courts to reject recourse to "international precedent" The growing tendency of domestic courts to examine international judicial decisions dealing with analogous legal questions is particularly noticeable in regional settings. Reference and deference to the case-law of the European Court of Human Rights, the European Commission of Human Rights and even more to that of the Court of Justice of the European Communities have become common practice for domestic organs, especially courts.

D. Relation to Municipal Law

National constitutions, even where they contain references to the decisions of international organizations and courts are normally silent on the relationship of these decisions to substantive municipal law. Art. 67(2) of the Netherlands Constitution, which extends the precedence accorded to treaties over internal law to international decisions as well, is therefore exceptional (see B *supra*).

Various suggestions have been made. One is to treat an international decision in the same way as the treaty setting up the institution from which it originates. This theory is convincing where the international decision in question amends or authoritatively interprets that treaty. With other international decisions it might be argued that they should rank below the treaties which are their constitutional basis. These theories have the drawback of linking the status of international decisions to different municipal rules concerning treaties. In the European Communities it is now widely accepted that the binding decisions of Community organs take precedence over contrary domestic law without abrogating it. This solution also commends itself for decisions of other international institutions. It is not based on the notion of a hierarchy of norms but on the recognition that where powers have been transferred to international institutions these institutions have to that extent acquired jurisdiction at the expense of national decision-makers.

State practice, especially as seen in court decisions, does not offer a clear picture. Domestic courts tend to evade the issue of a conflict between international decisions and municipal law either by a harmonizing interpretation or by simply applying one or the other without addressing the question of conflict. In situations of political confrontation between the international institution and the forum State, domestic courts will either ignore the international decision or explicitly give precedence to contrary domestic provisions (Diggs v. Shultz, ILR, Vol. 60 (1981) p. 393). In other situations a domestic court may simply apply an international decision, such as an international organization's labour law, notwithstanding contrary municipal law but without addressing the question in terms of conflicting norms.

E. Conclusion

The rules and principles governing the status of decisions of international organizations and courts in municipal law are by no means the only factor determining their internal effect. A domestic organ may be faced with the question of the international decision's authority or binding force. This problem arises especially with recommendations and the case-law of international courts and tribunals but is usually not directly addressed. In numerous cases domestic courts draw on these international decisions without discussing their legal authority. Occasionally even an international decision's legality and validity may be cast in doubt before a domestic court.

Of more practical importance, but also more elusive in legal terms, are the interests at stake in a particular situation. International decisions involv-

ing controversial political questions, possibly affecting the forum State's interests, will have little chance of being applied internally. Decisions on other issues like simple pecuniary claims or human rights questions are part of the everyday business of many domestic courts and are therefore much more likely to be implemented or at least respected.

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INTERNATIONALIZATION

1. Notion

The term internationalization was originally introduced to describe a situation where a territory (e.g. → Danzig; → Saar Territory), a river (→ International Rivers) or a → canal (e.g. → Kiel Canal, → Panama Canal, → Suez Canal) within the territory of one State was brought under the protection or control of another State or of several States. One feature of this concept is that the → territorial sovereignty of a specific → State is limited in favour of another State, a larger group of States or the community of States as a whole. Even though the benefit of internationalization may accrue to only one State, such benefit must be founded on the common interest of a larger group of States. Internationalization always results in the establishment of some form of direct or indirect international administration. Such administration may be exercised by an international organization or by one or more States acting on behalf of the community of States. In the latter case internationalization can be distinguished from a → condominium in that the limitation of the territorial sovereignty of one State derives its justification from its serving the interests of the world community. Thus, the concept of internationalization is characterized by three elements: the abolition or limitation of the → sovereignty of a specific State; the serving of community interests or at least the interests of a group of States; and the establishment of an international institutional framework, not necessarily involving an international organization.

The efforts after World Wars I and II to solve territorial problems by involving the → League of Nations and the → United Nations respectively resulted in a wider application of the concept of internationalization. Two different types of internationalization can be distinguished, according to whether the territorial sovereignty of a State over a specific area was abolished or merely limited. In the former case one may speak of territorial, in the latter of a functional internationalization, terms which originally were used in the deliberations of the United Nations on the status of → Jerusalem. In recent times the system of internationalization has undergone some development. Application was made not to State territories but to areas beyond national jurisdiction (→ Sea-Bed and Subsoil; → Outer Space Treaty; → Antarctica). Thus it became important to foster the development of an international administrative law (→ Administrative Law, International Aspects).

2. Territorial Internationalization

Of the different types of internationalization, the establishment of a direct international administration, i.e. territorial internationalization, is the more far-reaching one. It removes the given area totally from the → jurisdiction of a certain State and transfers sovereignty to an international organ established by the parties to the relevant agreement. In this case public → international law applies directly. Therefore most of the statutes of internationalized areas incorporate specific rules of international law. As part of the agreement establishing such an area the statute serves as a constitution.

This type of internationalization was applied to the Saar Territory from 1919 to 1935 (Arts. 45 to 50; → Versailles Peace Treaty (1919), CTS, Vol. 225, p. 118). In this period the Saar Territory was under the sovereignty of the League of Nations, the government of the Saar being entrusted to an "International Governing Commission" representing the League.

The system for the Free City of Danzig from

1919 to 1939 (Arts. 100 to 108, Versailles Peace Treaty (1919); Treaty of Paris between Poland and Danzig, November 9, 1920, LNTS, Vol. 6, p. 189) should also be classified as territorial internationalization, though the function assumed by the League of Nations did not embrace the functions of government. The role of the League was a threefold one: to → guarantee the Constitution, i.e. the democratic government of Danzig; to protect the existence of Danzig against external → aggression; and to provide for the settlement of disputes between Danzig and Poland. These functions were entrusted partly to the Council of the League of Nations and partly to the High Commissioner, appointed by the Council.

A third example of territorial internationalization was the International Zone of Tangier from 1924 to 1956 (Convention regarding the Organisation of the Statute of the Tangier Zone, December 18, 1923, LNTS, Vol. 28, p. 542 as amended 1928, 1945, 1947). In contrast to the two cases mentioned above, its international administration was not executed by an international authority but only by a limited group of signatory powers of the Statute of Tangier. Furthermore, the zone of Tangier was not looked upon as being separated from the territory of Morocco, these signatories rather exercised through the International Control Commission the powers delegated by the nominal sovereign, the Sultan of Morocco.

Further attempts at territorial internationalization never became effective. This was the case with the Free Territory of → Trieste. The Permanent Statute of the Free Territory of Trieste as embodied in the 1947 Peace Treaty with Italy (Arts. 21 and 22 and Annex VI to X; UNTS, Vol. 49, p. 3; → Peace Treaties of 1947) placed Trieste under the direct authority of the → United Nations Security Council and under the administration of a Governor to be appointed by, and accountable to, the United Nations. The "Permanent Statute" was to have the function of a constitution for the Trieste Territory. In contrast to the High Commissioner in Danzig, the Governor of Trieste was to act as head of State and to control foreign affairs; moreover he was empowered to veto and to actively prevent the execution of legislative and administrative measures deemed to be contrary to the Permanent Statute or the responsibilities of the Security Council in Trieste. But a governor was never appointed (→ Free Cities).

A similar case was the proposal embodied in Resolution 181 (II) of the → United Nations General Assembly of November 29, 1947. The objective was to place the City of Jerusalem and its surrounding area as a *corpus separatum*, a distinct international entity, under the direct control of the Trusteeship Council, administered by a UN Governor (→ United Nations Trusteeship System). In accordance with this Resolution, the Trusteeship Council elaborated a Draft Constitution for the City of Jerusalem (UN Doc. A/1286) based primarily on the recommendations of the United Nations Special Committee on Palestine (UNSCOP; → Palestine). Pursuant to this Draft Constitution the chief administrative powers were vested in the Governor who was to be appointed by, and accountable to, the Trusteeship Council. His competences exceeded those envisaged for the Governor of Trieste and left a very narrow margin of autonomy for the local population of Jerusalem. The Draft Constitution for Jerusalem was the proposal for a territorial internationalization which itself specified the common interest in such a régime most clearly. Its → preamble emphasized that an internationalization was needed to "foster and to preserve the unique spiritual and religious interest located in the City of the three great monotheistic faiths throughout the world". Some of the arguments put forward orally during the discussions very much resembled those which have been voiced to justify the common heritage principle, as Jerusalem was called the "common patrimony of humanity".

One more recent example of territorial internationalization is the régime of the United Nations Convention on the Law of the Sea (December 10, 1982, UN Doc. A/CONF.62/122 with Corr.) governing deep sea-bed mining (→ Sea-Bed and Subsoil; → International Sea-Bed Area; → Law of the Sea). Part XI of the Convention constitutes the first and up to now the only régime on international common areas modelled so as to satisfy primarily the interests and needs of the world community. Such an objective is expressed by the principle that the sea-bed and its resources are the → common heritage of mankind. The régime very strictly limits the relevant jurisdictional powers of States with respect to deep

sea-bed activities in order to serve this purpose. This régime's institutional centerpiece is the International Sea-Bed Authority which will administer, control and even carry out deep sea-bed mining like a sovereign (Art. 156). The régime on deep sea-bed mining thus includes all the constituent elements of the system of territorial internationalization. Nevertheless, some differences exist in comparison with the classical cases where the territorial sovereignty of a State has always been restricted. The régime on deep sea-bed mining, however, limits jurisdictional powers exercised outside State territories. Furthermore, the restrictions imposed are general ones and legally, though not in practice, apply to all States. The indicated differences, however, give no reason to exclude the régime on deep sea-bed mining from the examples of territorial internationalization. To the contrary the essential features of this concept are clearly covered: the limitation of the powers of States for the benefit of the world community and the exercise of State-like powers through an international organization.

3. Functional Internationalization

Internationalization need not be so comprehensive as to fulfil the interests for which it has been established. During the debates concerning Jerusalem, for example, Sweden tabled a counterproposal which was to oblige Israel and Jordan to guarantee free access to the → Holy Places, whereas the functions conferred upon the United Nations were limited to control powers. Sweden intentionally used the term "functional internationalization" to characterize its proposal and to underline that only one aspect of the territorial sovereignty of the States concerned should be limited and be put under international control. Precedents of such a restricted limitation of territorial sovereignty serving certain interests of the world community are fairly frequent. Their appearance differs widely depending on the accompanying institutional framework. Three different types can be distinguished: In some cases special international organizations are vested with the power to exercise jurisdiction within the territory of a State by which its sovereignty is correspondingly restricted. This results in the establishment of a direct, though functionally limited, international administration. In the cases of a second category special international régimes govern parts of a territory such as a river or a canal which, however, remains under the sovereignty of the State concerned. The particular State is bound to fulfil certain obligations which serve the interests of other States or the State community. The State is furthermore subject to international control which may but need not be vested in a special international organization (indirect international administration). Finally, a third type of functional internationalization has recently emerged. Its main feature is that States in the interest of the world community assume certain functions outside the realm of their national jurisdiction. In this way they act as a kind of custodian of the State community.

One example of the first type of functional internationalization is the administration of the lower → Danube River by the European Commission of the Danube from 1856 to 1940 (Art. 16 → Paris Peace Treaty (1856), BFSP, Vol. 46, p. 8). Having accomplished the canalization of the Danube between Isatcha and its mouths in the Black Sea, it developed after 1865 into an international river administration with independent legislative and administrative powers. A similar régime existed for the management of the lighthouse of Cape Spartel in Morocco (Treaty of March 31, 1958, UNTS, Vol. 320, p. 103; → Lighthouses and Lightships). The ten contracting parties committed themselves to financing the running of the lighthouse, but reserved for themselves its management, which was exercised by the "conseil international de surveillance et d'entretien du phare du Cap Spartel". Corresponding competences to those exercised by the European Commission of the Danube were assigned by the General Act of the → Berlin West Africa Conference (1884/1885) to an International Commission for the Navigation of the Congo. This Commission, however, never became effective.

The second type of functional internationalization represents the largest group. This type has been mostly utilized for international rivers. In these cases the national administration of the watercourse is carried out under international control exercised by a river commission. International rivers of this kind include among others the → Rhine River, the → Elbe River, the → Scheldt River, the Po (Treaty of Milan, July 3,

1849, BFSP, Vol. 38, p. 130), the upper → Danube River, the → Mekong River, the → St. Lawrence Seaway and most recently the → Moselle River. The river commissions which have been created in more recent times not only cover navigation but various forms of water usage as well.

Further examples of functional internationalization include the régimes governing international canals and → straits like the → Suez Canal, the → Panama Canal, the → Kiel Canal and the Dardanelles (→ Dardanelles, Sea of Marmara, Bosphorus). In these cases, except for the Dardanelles, no controlling commissions existed. The 1982 Convention on the Law of the Sea has expanded the system of functional internationalization used for international navigation by establishing the system of transit passage (→ Innocent Passage, Transit Passage).

Other examples are the régimes governing → Spitzbergen/Svalbard, the outer space (→ Outer Space Treaty) and, at least according to the understanding of the Consultative Parties, → Antarctica.

Finally, the Third UN Conference on the Law of the Sea has taken up the idea of internationalization apart from the deep sea-bed régime by entrusting States rather than international organizations with the relevant functions (→ Conferences on the Law of the Sea). Most important in this respect is the port State approach, by which States have the power to prosecute offences against international environmental standards committed on the → high seas when the respective ship enters their → port (→ Environment, International Protection). This power signifies a change in the status of States. They do not act by virtue of their territorial sovereignty but as mandataries of powers attributed to them by international law.

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INTERNATIONALLY WRONGFUL ACTS

1. Notion

It is a recognized principle of international law that committing an internationally wrongful act entails international responsibility (→ Responsibility of States: General Principles). Although the justification of this principle in international law treatises differs, it has been upheld in numerous judicial decisions of the → Permanent Court of International Justice and the → International Court of Justice (ICJ) (→ Wimbledon, The; → German Interests in Polish Upper Silesia Cases; → Phosphates in Morocco Case; → Corfu Channel Case; → Reparation for Injuries Suffered in Service of UN (Advisory Opinion); → Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)). Furthermore, a series of arbitral awards (Claims of Italian Subjects resident in Peru, Award of September 30, 1901, R. Descamps and L. Renault, Recueil international des traités du XXe siècle, 1901, p. 699; Dickson Car Wheel Company Case, G.H. Hackworth, Digest of International Law, Vol. 5, p. 622; the International Fisheries Company Case, ibid., p. 643; and the Armstrong Cork Company Case) have repeatedly affirmed this principle (→ Arbitration).

The commission of an internationally wrongful act creates a new international legal relationship characterized by legal attributes distinct from those which existed previously. This relationship is established between the subject to which the act or omission is imputable and the subject whose rights have been affected. Thus, the rules relating to this new legal relationship – ascribed as international responsibility – are complementary to the original legal obligation between those subjects. Opinions about the scope and content of the legal relationship created by an internationally wrongful act differ according to whether it is seen only as a

foundation for a claim for reparation or whether it also provides for a punitive action against the offending subject (→ Reparation for Internationally Wrongful Acts; → Satisfaction; → Reprisals; → Retorsion).

Although the commission of an internationally wrongful act entails international responsibility, this does not mean that only internationally wrongful acts have such an effect. It is recognized that there might be cases in which → subjects of international law incur international responsibility for harmful consequences of certain activities which are not prohibited by international law (see → International Law Commission (ILC), Preliminary Report on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, YILC (1980 II, Part 1) p. 247; → Responsibility of States: Fault and Strict Liability).

Although the régime of international responsibility has been developed with respect to States, corresponding responsibility on the part of international organizations cannot be excluded (→ International Organizations, Responsibility). This is due to the fact that international organizations are capable of committing an internationally wrongful act. However, it remains questionable from case to case, whether an internationally wrongful act committed by an international organization also entails responsibility of its member States.

Traditionally, two constituent elements of an internationally wrongful act are distinguished: a subjective element, consisting of conduct that must be capable of being attributed to a subject of international law, and an objective element, which indicates that the subject to which the conduct in question is attributed has failed to fulfil an international obligation. Thus, the term internationally wrongful act is normally defined as any act or omission attributable to States or other subjects of international law which constitutes a breach of an international obligation (see Art. 3, ILC Draft on State Responsibility, YILC (1973 II) p. 165 and p. 179 et seq.).

Following ILC usage, internationally wrongful acts have to be distinguished from → international crimes. An international crime is defined as the breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole. A much broader category, covering a whole range of less serious offences, is described as international delicts. The origin of this distinction may be found in an *obiter dictum* of the ICJ in the → Barcelona Traction Case. Thus, the term internationally wrongful act has to be regarded as a generic term which covers both the international crime and the international delict.

2. *Elements of an Internationally Wrongful Act*

(a) Attribution of the conduct of organs

An internationally wrongful act can be committed either through action or through omission. Such action or omission must be attributable to a subject of international law. The possibility of attributing given conduct to a subject of international law raises two questions. The first basic task is to establish when, according to international law, a specific subject can be regarded as acting. As a general principle, all acts of its organs or agents are to be attributed to the subject of international law to which they belong. Such a general principle, however, demands modification. Where an organ of a subject of international law has been placed at the disposal of another subject of internatioanl law, international responsibility will devolve upon the latter. This rule, for example, would apply where a section of a State's health service is placed under the orders of another country or international organization to alleviate the consequences of a natural disaster. The corollary to this principle is that the official conduct of a State organ which takes place in the territory of another State may not be considered as an act of the latter State (see Art. 12, ILC Draft on State Responsibility). This situation arises rather frequently, e.g. in connection with the activities of diplomatic or consular officials, the operation of foreign military bases (→ Military Bases on Foreign Territory; → Military Forces Abroad), etc. The same principle applies with respect to the conduct of international organizations in the territory of a State.

In accordance with established precedent in international law, the ILC expressed the view that situations existed where the conduct of organs was not attributable to the respective subject but to

another subject of international law. This was the case where, for one reason or another, a situation of international dependence existed between two States. In such a case international responsibility for an internationally wrongful act committed by a dependent State devolved upon the dominant State, in so far as the wrongful act fell into a sphere in which the dependent State was acting subject to the direction or control of the dominant State. The same principle applies if the internationally wrongful act committed by a State was the result of coercion exercised by another State.

As to the attribution of acts and omissions of organs to the subject of international law to which they belong, the question arises whether the activities of certain categories of organs should be excluded from the general rule. Further, it has to be considered whether or not it is appropriate to attribute to a subject of international law acts of persons who do not compose the subject's organs in the proper sense. Both questions arise primarily with respect to States. The formulation of Art. 5 of the ILC Draft on State Responsibility, according to which the conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned, can be taken as a general rule recognized both explicitly and implicitly in international judicial decisions (Claims of Italian Subjects resident in Peru, op. cit.). This rule has been unanimously endorsed in the relevant international law literature. The same principle applies *mutatis mutandis* to international organizations. However, such conduct can only be attributed to the subject of international law in question if the persons of whom the organ is composed of have acted officially and not in their private capacity. This qualification is equally recognized in international judicial decisions.

Controversies existed and to a certain extent still exist as to whether the conduct of all organs is attributable to the subject of international law. It is undisputed that not only an act or omission of an organ responsible for conducting external relations can constitute an internationally wrongful act; the acts of an organ performing internal functions can be equally relevant. Furthermore, acts or omissions committed by legislative as well as judicial organs are attributable to the State concerned and may thus trigger international responsibility. The opposite view, expressed in the 19th century and invoking the sovereignty of Parliament or the independence of the judiciary, has been rejected in a number of judicial decisions (Salvador Commercial Company Case; → German Interests in Polish Upper Silesia Cases; → Lotus, The; → Phosphates in Morocco Case, Series A/B, No. 74 (1938) p. 28; → Ambatielos Case). The wording of Art. 6 of the ILC Draft on State Responsibility, according to which acts and omissions of any State organ – whether of the legislative, executive or the judiciary – can be attributed to the State as internationally wrongful acts, reflects a general principle recognized in international law. However, an act of the legislator constitutes a breach of international law only if such an act itself constitutes a breach. It is not sufficient that legislation makes such a breach possible. Nevertheless, a State is internationally responsible if its legislative acts are in a way imperfect so that the judiciary or the executive power are unable to act in accordance with international law (→ Alabama, The). A State is internationally responsible if the legislator fails to make provision for a State organization fit to fulfil the obligations under international law. The judiciary may commit a breach of international law by the non-application or false application of a rule of international law, as well as by violating general principles on orderly jurisdiction, such as inexcusable delay of proceedings, → denial of justice, obvious discrimination against foreigners (→ Discrimination against Individuals and Groups; → Aliens), or palpable and malicious inequity of judgment (→ Salem Case).

There is still some controversy as to whether only the conduct of superior organs is attributable to the State. Can the State be held responsible for an act by a subordinate organ if such an act has not been endorsed by superior organs? Accepting such a limitation to the attributability of acts to the State would introduce significant uncertainty into the system of international responsibility. It was on the merits of this argument that the ILC rejected the idea of differentiating with respect to international responsibility between organs of the State according to their rank (see Art. 6, ILC Draft on State Responsibility). However, acts of subordinate organs constitute a breach of interna-

tional law only after having become effective according to the municipal law of the State concerned (exhaustion of → local remedies clause; see Art. 22 of the ILC Draft on State Responsibility; → Interhandel Case; → Calvo Doctrine, Calvo Clause). The local remedies clause may not be invoked if available remedies are ineffective (Northern Ireland Case). The ineffectiveness of available remedies may result from a legal situation or circumstances which do not permit any hope of redress (Ambatielos Case, RIAA, Vol. 12 (1963) p. 83).

(b) Attribution of the conduct of other entities

The general principle that acts of organs are attributable to a subject of international law cannot be read to mean that only acts of organs may have such an effect. It is recognized that, in some circumstances, the conduct of entities other than organs may be attributable to the subject of international law. This problem primarily concerns States. Because the position of an organ in the organization of a State is irrelevant, it is evident that the conduct of an organ of a territorial governmental entity within a State has to be considered as an act of that State under the régime of international responsibility. The principle that a State is responsible for acts or omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has been unequivocally recognized. It has been disputed, however, whether the acts or omissions of the organs of component states of a → federal State are to be attributed to the latter. This has been affirmed by some legal decisions even in cases where the internal law did not provide the federal State with the means to compel the organs of the component states to abide by the federal State's international obligations. For example, the France-Mexico Claims Commission held in the Pellat Claim (RIAA, Vol. 5 (1929) p. 534) that responsibility of the federal State cannot be denied, even where the federal constitution denies the central government the right of control over the separate states. Although unanimity exists with respect to the content of this principle, there is no agreement with respect to its justification. Those who see the structure of a federal State merely as some form of decentralization which has no effect upon the State's outward appearance treat the acts of component states and acts of municipalities, regions etc. alike. The opposing view regards the federal State as a composite State and considers whether an organ of a component state has an international obligation for its acts or omissions. In the former case such an act or omission is regarded as an act of the federal State on the same footing as municipalities; in the latter such conduct cannot be attributed to the federal State. However, according to those favouring the latter approach, international responsibility can be invoked as indirect responsibility. The federal State may be exempted from such indirect responsibility by specific treaty provisions (→ Federal Clause, Colonial Clause; → Federalism in the International Community).

Apart from the acts and omissions of organs of territorial governmental entities, the conduct of other entities empowered to exercise some governmental authority are attributable to the State concerned (see Art. 7(2) of the ILC Draft on State Responsibility).

One of the most disputed questions in international law is whether the acts or omissions of organs are attributable to the State in question if such organs have exceeded their competence or have acted contrary to instructions (*ultra vires*). The ILC took the view that international responsibility should be established by international law alone and that the municipal law of States was of no relevance (see Art. 10, ILC Draft on State Responsibility). The ILC based its finding upon a decision of the United States-Mexican General Claims Commission (Youmens Claim, RIAA, Vol. 4 (1926) p. 110) and a decision of the French-Mexican Claims Commission (Coure Case). In both cases it was held that a State was internationally responsible for all acts committed by its officials or organs irrespective of whether the officials or organs in question had acted within or beyond the limits of their competence. Yet, it is questionable whether this holds true if the act or omission is wholly foreign to the specific functions of the organ or if the organ's lack of competence was manifest. Nevertheless the ILC decided against such a clause on the grounds that it would create a loophole in particularly serious cases where the responsibility of the subject ought to be affirmed.

Even the conduct of private persons is attribut-

able to a State when such persons are acting on behalf of the State without having acquired the status of State organs or of other entities empowered to exercise governmental authority (→ Responsibility of States for Activities of Private Law Persons). Such attribution is possible if the person or the group of persons acting as auxiliaries are appointed by organs of the State to discharge a particular function. Such an appointment, however, is not always a prerequisite. If a person or a group of persons exercise governmental authority in the absence of official authorization and if, from the given circumstances, such exercise of authority is justified, the conduct of the private person or group shall be attributed to the State concerned (see the wording of Art. 8 *lit.* b of the ILC Draft on State Responsibility and the commentary thereto; YILC (1974 II, Part 2) p. 283 et seq., which emphasizes that such a principle may only be applied in genuinely exceptional cases such as → war or major natural disasters).

It follows that in all cases where the conduct of a private person or of a group cannot be regarded as acts of a State organ, such conduct cannot be considered as an → act of State. This principle is also valid with respect to acts of insurrection movements, unless the movement has become the new → government. For example, the Great Britain-United States Mixed Commission observed in the Home Missionary Society Case (Hackworth, op. cit., p. 671) that no government could be held responsible for acts of rebels committed in violation of its authority where it is itself guilty of no breach of → good faith, or of no negligence in suppressing insurrection (see Arts. 14 and 15 of the ILC Draft on State Responsibility which adopt the rulings of various arbitral awards). However, some exceptions to this general principle exist. Responsibility of the State concerned may arise on the basis of express approval and adoption of the acts of individuals on the part of the organs of State. The ICJ in the case concerning → United States Diplomatic and Consular Staff in Tehran stated that official government approval translated continuing occupation into acts of State. Furthermore, when there is a duty to exercise → due diligence in some particular respect, State responsibility may arise when the failure to exercise due diligence occurred in the context of violent acts by private individuals. Thus, the State is responsible only for the act or omission of its organs where they are guilty of not having done everything within their power to prevent the injurious act of the private individual or to punish it suitably if it has occurred. The State is responsible for having breached not the international obligation with which the individual's act might be in conflict, but the general or special obligation imposed on its organs to provide for protection. Finally, in some cases State responsibility for the conduct of private persons may be formally accepted through specific agreement (see Art. VII, → Outer Space Treaty; and Convention on International Liability for Damages caused by Objects Launched into Outer Space).

Apart from cases where a subject of international law is held responsible for the acts or omissions of its organs, international law also provides for the responsibility of subjects assisting others in the commission of wrongful acts. One of the most frequently mentioned examples is putting territory at the disposal of another State to make it possible, or at least easier, for the latter to commit an offence against a third subject. Another example of complicity is that of a State which supplies another State with weapons to attack a third State (→ Arms, Traffic in). Conduct by which one subject of international law helps another to commit a wrongful act may but need not constitute a breach of an obligation. The essential element which renders assistance an internationally wrongful act is the intent of the assisting State to collaborate in the execution of such an act.

It has often been asserted that the list of constituent elements might be supplemented by the requirement of fault, that is, wrongful intent or negligence. This, however, does not fit into the system of international responsibility. What is generally relevant is not the psychological attitude of the individual but the objective conduct of the subject of international law. The responsibility of the subject of international law does not require an act of malice; it may equally consist of a general defect or failure in the organization of the subject concerned and be entirely divorced from any subjective intention. As has been pointed out, it may even lie in the insufficiency of the legal powers of the government.

Damage, material or moral loss or detriment suffered is not a constituent element of an internationally wrongful act (→ Damages).

(c) Breach of an international obligation

It is this second, objective element – breach of an international obligation – which makes an act internationally wrongful. Thus, the source of international responsibility lies in the nonconformity of actual conduct with the conduct the subject ought to have adopted in order to comply with a particular international obligation. The respective obligations may be structured differently by determination of the means by which the subject is supposed to discharge them. The obligation may consist of a requirement to perform or to refrain from a specifically determined action or it may require that a certain situation be brought about without specifying the means.

The term "international obligation" used in this context means a legal obligation incumbent upon the State under international law regardless of the origin of such obligation, whether customary, conventional or other. Thus, the origin of the international obligation breached has no bearing on the characterization of the act constituting the breach as internationally wrongful. Equally irrelevant is the subject-matter of the obligation breached. The differentiation between international crimes and international delicts may have some bearing upon the scope of international responsibility.

However, the breach of obligations embodied in contracts concluded between subjects of international law and private persons, cannot be regarded as breaches of international legal obligations. This is due to the fact that such contracts are not rooted in international law (→ Contracts between States and Foreign Private Law Persons).

The international obligation in question must have been in force at the time the act considered a breach was committed.

(d) Circumstances precluding wrongfulness

It is recognized that no internationally wrongful act exists if there are circumstances precluding wrongfulness. The circumstances usually considered to have this effect are consent and countermeasures in respect of an internationally wrongful act.

If a subject of international law consents to an act which, without such consent, would constitute a breach of an international obligation, that consent amounts to an agreement between the two subjects concerned which removes the potential illegality of the act. Such consent, however, may not justify an act of another subject of international law, if the act in question is contrary to an obligation imposed by → *jus cogens*.

An act of a subject of international law, although not in conformity with what would be required of it under an international obligation towards another subject, is not internationally wrongful if it constitutes the application of a measure permissible in international law as a reaction to a previously committed internationally wrongful act. Apart from *force majeure* and fortuitous event, distress, state of emergency and → self-defence are frequently invoked as grounds for precluding the wrongfulness of an act.

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JUDICIAL ACTIVITIES ON FOREIGN TERRITORY *see* Administrative, Judicial and Legislative Activities on Foreign Territory; Extraterritorial Effects of Administrative, Judicial and Legislative Acts; Recognition of Foreign Legislative and Administrative Acts

JURISDICTION OF STATES

A. Notion and Different Usages of the Term

1. General Concept

In its broadest sense, the jurisdiction of a → State may refer to its lawful power to act and hence to its power to decide whether and, if so, how to act. While lawyers frequently use the term "jurisdiction" more narrowly to refer to the lawful power to make and enforce rules, it is useful to bear in mind the broader meaning. For example, the → United Nations may not intervene in matters essentially within the → domestic jurisdiction of a State (→ United Nations Charter, Art. 2(7)).

2. Municipal Competence Distinguished

The power of an organ or subdivision of a State to act is defined by its municipal law. International law normally addresses the allocation of powers by the municipal law of a State only to the extent that the exercise of those powers, or failure to exercise them, violates the duties of the State under international law or agreement (→ International Law and Municipal Law). Rarely does international law address the question of which organ or subdivision of a particular State is competent to act.

3. Types of Jurisdiction

The term "jurisdiction" is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons. A State exercises its jurisdiction by establishing rules (sometimes called the exercise of legislative jurisdiction or prescriptive competence), by establishing procedures for identifying breaches of the rules and the precise consequences thereof (sometimes called judicial jurisdiction or adjudicative competence), and by forcibly imposing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules (sometimes called enforcement jurisdiction or competence).

These distinctions can be important in determining the limits of jurisdiction. The requisite contacts with a State necessary to support the exercise of jurisdiction differ depending on the nature of the jurisdiction being exercised.

It is widely assumed that a State may not

enforce its rules unless it has jurisdiction to prescribe those rules. One must bear in mind which rules are being enforced in this regard. A court may, and in civil cases often does, apply foreign law, or compel the production of evidence in aid of foreign judicial proceedings. One State may arrest a person for → extradition to another State, even though the former may lack legislative jurisdiction over the conduct for which the person will be tried by the latter.

These distinctions also may be misleading. The mere enactment of a statute or delivery of a summons may give rise to international → protest because enforcement is implicitly threatened. In criminal, administrative and tax cases, judicial jurisdiction is rarely exercised in the absence of legislative jurisdiction by the same State, because courts rarely apply the administrative, criminal or tax laws of other States. In civil cases, judicial jurisdiction involves the exercise of legislative jurisdiction to apply the procedural, evidence and choice of law rules of the forum. Moreover, the very exercise of judicial jurisdiction involves important aspects of enforcement, which itself is subject to rules enacted by the State.

4. Public Law and Private Law

It is sometimes asserted that international law deals only with the criminal, administrative and fiscal jurisdiction of a State, that is with obligations owed to the State itself, and not with its jurisdiction to define, adjudicate and enforce the obligations of private persons to each other. The latter jurisdiction is said to belong to the field of → private international law or conflict of laws, a matter regulated in principle by the municipal law of each State. This analysis is conceptually rooted in the distinction between private law and public law in certain municipal legal systems; international law is regarded as a part of public law from that perspective.

In reality, it is often difficult to distinguish between the two, as in the application of antitrust laws that permit either the State or a private citizen to bring a law suit or in the practice of assessing punitive damages against a defendant in a civil action. Moreover, efforts by the courts of one State to compel foreigners to appear or produce evidence in some civil cases have led to protests from other States on grounds of violation of their → sovereignty. States are increasingly entering into → treaties with each other defining their rights and obligations with respect to private international law matters, in particular through the → Hague Conventions on Private International Law and among members of the → European Communities.

B. Bases of Jurisdiction

1. Objectives

There are well over 150 States on the earth. International law determines which State has jurisdiction in which respects.

In this regard, four fundamental objectives should be borne in mind. The first is to establish limits of jurisdiction that protect the independence and sovereign equality of States (→ States, Sovereign Equality) by balancing each State's interest in exercising jurisdiction to advance its own policies with each State's interest in avoiding interference with its policies resulting from the exercise of jurisdiction by foreign States. The second is to recognize the → interdependence of States by ensuring that effective jurisdiction exists to achieve certain common objectives of States. The third is to harmonize the rights of two or more States when they have concurrent jurisdiction, that is when each of them has jurisdiction over the same matter. The fourth is to protect individuals from unreasonable exercises of jurisdiction either by a single State or by two or more States seeking to impose conflicting or compounding obligations on the same person.

2. Concept of Bases of Jurisdiction

It is unclear whether a State may exercise jurisdiction only where there is a recognized basis for its exercise or, as asserted in the → Lotus Case, in the absence of any prohibition on its exercise. Whatever the underlying conceptual approach, a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction. In this regard, various bases of legislative jurisdiction have been identified, particularly in the context of the criminal law (Harvard Research in International Law, AJIL, Vol. 29 (Supp. (1935), p. 435)). These are alternatives. A State may have more than one basis for the exercise of jurisdiction in a matter

and more than one State may have a basis for the exercise of jurisdiction over the same matter.

3. *Territory and Nationality*

(a) Concept of the State

The fundamental bases for the exercise of jurisdiction by a State are rooted in two aspects of the modern concept of the State itself: defined territory and permanent population. In principle, a State has jurisdiction over all persons, property and activities in its territory; a State also has jurisdiction over its nationals wherever they may be.

(b) Scope of territorial jurisdiction

(i) Since territorial jurisdiction is the basis of jurisdiction most often invoked by States, the geographic scope of that jurisdiction is of considerable importance. In addition to its land territory, the → territorial sovereignty of a State extends to its → internal waters, to the → territorial sea adjacent to its coast, to archipelagic waters in the case of an archipelagic State (→ Archipelagos), and to the air space above its territory, including the waters subject to its territorial sovereignty (→ Air, Sovereignty over the; → Airspace over Maritime Areas).

(ii) The coastal State has sovereign rights and jurisdiction over certain activities beyond its territory, notably with respect to the exploration and exploitation of natural resources in the → exclusive economic zone and on the → continental shelf adjacent to its territorial sea. This jurisdiction is not strictly territorial: The areas are outside the territory of the State and the jurisdiction is not plenary, but rather applies only to certain activities. This jurisdiction is analogous to territorial jurisdiction in that it applies to all persons and is exercised only by one State within a defined area.

(iii) Jurisdiction analogous to territorial jurisdiction may be exercised over areas leased by a State in accordance with the terms of the lease (→ Territory, Lease) or, for some purposes, over areas subject to military occupation (→ Occupation, Belligerent).

(iv) The exercise of territorial jurisdiction does not require that all of the acts or omissions constituting elements of an offence occur in the territory of the State.

(v) There is some controversy over the extent to which a foreign company may be subject to the territorial jurisdiction of a State with respect to matters unrelated to the company's activities in that State's territory or with respect to the activities in that State of a separate corporate affiliate.

(c) Scope of nationality

The municipal law of a State determines whether natural or juridical persons have the → nationality of that State. However, international law determines whether a claim of nationality by one State must be accepted by another. The requirement of a "genuine link" with the State, first articulated with respect to a natural person (→ Nottebohm Case, ICJ Reports 1955, p. 4), has now been applied to ships and appears to be accepted as a general rule (Art. 5 of the Convention on the High Seas, April 29, 1958, UNTS, Vol. 450, p. 82; Art. 91 of the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF. 62/122 with Corr.). The most controversial issues arise from conflicting assertions of jurisdiction over dual nationals or over a company organized, or a ship registered, under the laws of one State that is controlled by a company organized under the laws of another State.

Domicile or residence is sometimes used instead of nationality as a basis of jurisdiction, particularly in private law and tax law and with respect to immigrants (→ Aliens).

4. *Effects Doctrine*

The most common problem posed by a system of territorial jurisdiction arises when an act committed in State A causes injury in the territory of State B. The conflict of laws principles applied by most States in private cases have long recognized the propriety of State B applying its own substantive laws to determine whether any compensation must be paid by a person whose act or omission in State A injures a person in State B.

Where the criminal law is concerned, the Lotus Case specifically recognizes the right of State B to try and punish under its own laws a person whose behaviour outside its territory causes injury inside

its territory. The underlying principle is called the objective territorial principle or the effects doctrine. Jurisdiction is grounded in the fact that the injurious effect, although not the act or omission itself, occurred in the territory of the State. In the Lotus Case, the Court emphasized that the injurious effect itself was a constituent element of the offence; not all municipal courts have adhered strictly to this limitation by requiring proof of such an effect.

While the Lotus Case itself involved negligent rather than intentional misconduct, the Court did not discuss the problem of extending criminal jurisdiction to a person who neither knew nor should have known that his acts or omissions would cause effects in a particular foreign State prohibited by its criminal laws. This may explain in part why the strict holding of the case with respect to collisions was not codified (Art. 11 of the Convention on the High Seas, Art. 97 of the 1982 Law of the Sea Convention).

Moreover, the Court addressed a situation in which the effects were physical. Most of the controversy surrounding the principle involves its application to economic effects because economic activity in one State may have effects in many States. The same is true of speech.

In limited circumstances the effects doctrine may be the basis for enforcement jurisdiction at sea, for example with respect to non-economic installations, pollution and illicit broadcasting (1982 Law of the Sea Convention, Arts. 60(1)(c), 109, 220(6), 221).

5. Protective Principle

Another basis of jurisdiction that has emerged relates to the need of the State to protect its own governmental functions. The so-called protective principle allows a State to exercise jurisdiction over foreigners outside its territory who, for example, engage in counterfeiting its currency or official documents, submit false statements to its officials or, as in recent events, attack its diplomats (see Art. 3(1)(c) of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973, UNTS, Vol. 1035, p. 167).

6. Ships, Aircraft and Spacecraft

Ships raise a special jurisdictional problem. A ship moves, and might from time to time be on the → high seas or within the territory of many different States. The persons on board might be nationals of different States.

In response to this problem, the principle emerged that a ship has the nationality of the State in which it is registered, and that the ship and all persons and property on board are subject to the jurisdiction of the State of nationality of the ship (→ Ships, Nationality and Status). With the advent of modern technology, the principle of the jurisdiction of the State of registry has now been extended to → aircraft and → spacecraft (Art. 8 of the → Outer Space Treaty). Special arrangements may emerge with respect to multinational space stations.

7. Armed Forces

Since a State has understandable reasons for subjecting its armed forces to its jurisdiction and at least in some respects for insulating them from the jurisdiction of other States, there are numerous status of forces agreements that deal with jurisdiction over members of the armed forces of one State stationed in the territory of another (→ Military Bases on Foreign Territory; → Military Forces Abroad). Some of these agreements are notable for their express treatment of cases of concurrent jurisdiction.

8. Passive Personality Principle

Perhaps the most controversial basis of jurisdiction proffered by some States is the nationality of the victim. These States assert the right to try a foreigner for injuring a national of the State outside the territory of that State. This so-called passive personality principle was the basis in Turkish law for the exercise of jurisdiction by Turkey in the Lotus Case, but the Court declined to address its permissibility.

The principle has not been widely accepted. It has received some recognition in international agreements dealing with the control of → terrorism (e.g. Art. 5(1)(d) of the International Convention against the Taking of Hostages, annexed to UN GA Res. 146 (XXXIV), December 17, 1979) and may be invoked in the

legislation of an increasing number of States in response to the problem of terrorism.

9. Piracy and Universal Jurisdiction

The problem of → piracy on the high seas or outside the territory of any State was resolved by giving any State the right to board a ship on reasonable suspicion of piracy, and to arrest the ship and try and punish the pirates. This is the classic example of so-called universal jurisdiction: The right of any State to arrest and try a person for certain internationally defined offences (→ International Crimes).

As the → human rights content of international law expands, it is argued that universal jurisdiction also expands, and may now embrace slave trade (→ Slavery), → genocide, and certain → war crimes. Universal jurisdiction over these human rights offences would not be limited to situations in which they are committed in areas outside the territory of any State.

A number of international agreements designed to suppress aircraft hijacking, → apartheid and terrorism may come close to establishing a system of universal jurisdiction. Pursuant to those agreements, a State is required either to try or to extradite a suspect found within its territory. The new jurisdiction of a State to prosecute foreign ships visiting its ports for violating international environmental standards while at sea may be viewed as universal jurisdiction with some qualifications (Art. 218 of the 1982 Law of the Sea Convention; → Environment, International Protection).

While the exercise of universal jurisdiction in the case of piracy as a practical matter often devolved upon maritime powers with an independent interest in avoiding unreasonable intrusions on the high seas freedoms of any State, its extension to other offences creates the spectre of trials by the State of the victim or some other State with particular grievances against the defendant. From that perspective, universal jurisdiction at the least shares both the advantages and dangers of the passive personality principle, namely substantial pressure to prosecute, convict and punish untempered by any particular interest in the well-being of the defendant. It should be noted, for example, that trial of → prisoners of war during an ongoing armed conflict has been discouraged.

There have been efforts to define international crimes and to establish some form of international tribunal with original or appellate jurisdiction over such crimes (→ Criminal Law, International; → International Criminal Court). The war crimes trials after World War II are cited as precedent in this regard (→ Nuremberg Trials; → Tokyo Trial).

C. Limitations on Jurisdiction

The classic exception to jurisdiction is the immunity enjoyed in certain circumstances by each State, its ships and other State property, and its diplomatic and consular representatives from at least the enforcement and judicial jurisdiction of any other State (→ State Immunity; → State Ships; → Diplomatic Agents and Missions, Privileges and Immunities).

Another important exception is that a State may not send its agents to arrest or restrain any person or property, or perform any governmental act (→ Acts of State), in the territory of another State without the latter's consent (→ Administrative, Judicial and Legislative Activities on Foreign Territory). The same exception applies with respect to foreign ships outside the territory of a State, albeit with significant qualifications. Nevertheless, some municipal courts will not necessarily refuse to allow proceedings against persons arrested in violation of international law, leaving the matter instead to the discretion of the political authorities.

There are also limitations on territorial and coastal State jurisdiction designed to protect international communications rights, such as navigation in the territorial sea and exclusive economic zone (→ Navigation, Freedom of), and, by agreement or → comity, use of → canals, rivers (→ Navigation on Rivers and Canals), → ports, railways, airways, → airports, etc. For example, absent a request from the master, States generally do not exercise jurisdiction aboard a foreign ship in port unless the consequences of conduct on board extend beyond the ship. There is doubt as to the extent to which exercise of jurisdiction over a person in transit through a State, solely on the grounds of his physical presence and for acts or

omissions unrelated to this presence, is consistent with international law.

As the content and enforcement of international human rights law expands, the traditional analytical emphasis on the jurisdictional rights of States *vis-a-vis* each other must be tempered by an inquiry into the content of the right of an individual to be free from unreasonable assertions of coercive power by any State. A parallel may be found in the significant human rights content of the analysis by the United States Supreme Court of the jurisdiction of the states of the United States over each other's citizens. Many recent multilateral treaties that expand the jurisdiction of States, or require them to prosecute persons within their jurisdiction, contain substantial human rights protections, including precise definitions of offences and restrictions on multiple prosecutions for the same offence.

In the field of taxation one finds considerable sensitivity to the interests of the person subject to the jurisdiction of two or more States. Numerous treaties have been concluded for the purpose of avoiding → double taxation, perhaps because it is most evident in such cases that the concurrent exercise of jurisdiction could result in cumulative burdens that impede desirable transnational economic activity.

D. Conflicts and Solutions

It is apparent that more than one State may assert jurisdiction over any given act or omission in any given place. This poses little or no problem when, as in the case of piracy on the high seas, the jurisdictional principles are agreed, the offence is universally condemned and internationally defined, there is little evidence of aggressive use of the jurisdiction in a manner that would interfere with the interests of other States, and there appears to be little concern about the relative fairness of the adjudicative procedures employed by different States. The problem becomes more serious when one or more of these factors is missing.

Both the nationality principle and the effects doctrine inevitably raise the problem of concurrent jurisdiction with the State in whose territory the act or omission occurred (→ Extraterritoral Effects of Administrative, Judicial and Legislative Acts). What if one State prohibits an act that the other permits or, worse still, requires? This has led to arguments that, in general, territorial jurisdiction is primary and that extraterritorial jurisdiction must be restrained in deference to the policies of the State where the act or omission occurs.

The problem has proven to be most severe where transnational economic activity is concerned. Various governments have reacted negatively to efforts by the United States Government to control the activities of foreign subsidiaries and licensees of American companies, primarily to enforce restrictions on exports to third countries, and to apply its antitrust and securities laws to activities of foreign nationals outside the United States that affect the United States market (→ Antitrust Law, International); some have enacted so-called blocking statutes prohibiting their nationals from cooperating in the enforcement of foreign laws. Similar problems have arisen more recently with respect to the application of European Community regulations to foreign nationals outside the Community.

The solution to the problem of concurrent jurisdiction lies either in narrowing the limits of the different bases of jurisdiction so as to reduce the number of instances in which conflicting or cumulative assertions of concurrent jurisdiction may arise, or in agreeing on the substantive rules and human rights safeguards to be applied by the different States that may assert concurrent jurisdiction, or in developing rules of comity, that is, principles of priority and practices of cooperation and restraint, designed to minimize the friction and unfairness that can result from conflicting or cumulative assertions of concurrent jurisdiction (e.g. sec. 403 of the American Law Institute, Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 7 (1986), approved, American Law Institute Reports, Vol. 8 (July 1986) p. 1).

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KEHLER HAFEN CASE

The Federal Constitutional Court of the Federal Republic of Germany (Bundesverfassungsgericht) dealt in the Kehler Hafen Case with constitutional problems concerning the exercise of the → foreign relations power in the German federal system (→ Federal States). In doing so, it concentrated on the question whether an agreement between a German Land and a foreign public corporation is a treaty requiring the approval of the Federal Parliament (→ Treaties).

The decision of the Federal Constitutional Court in the Kehler Hafen Case of June 30, 1953 (BVerfGE 2, p. 347) is based upon the following facts. After World War II the town and the port of Kehl on the → Rhine river were occupied by French troops; both were administered by the prefect of the Département Bas-Rhin (→ Germany, Occupation after World War II). Endeavours of the French authorities to annex the territory of Kehl were resisted by the other Allied Powers in 1948 (→ Annexation; → Boundaries). The foreign ministers of the three Western Occupying Powers agreed on April 8, 1949 that:

> "The French control authorities with the assistance of the Strasbourg French authorities will maintain under existing conditions jurisdiction over the Kehl port zone until establishment of the German Federal Government and conclusion of negotiations between the French and German Authorities with respect to a joint port administration for Kehl" (Agreement Regarding Kehl, part of the Washington Trizone Agreement, UNTS, Vol. 140, p. 196 at p. 214).

To this end negotiations were initiated between the Land Baden, on the German side, and the prefect of the Département Bas-Rhin, the mayor of Strasbourg, and the director of the Port Autonome de Strasbourg, on the French side. These negotiations led, with the consent of the German Federal Government, to the signing of an agreement between the Land Baden and the Port Autonome de Strasbourg on October 19, 1951 (for text, see BVerfGE 2, pp. 358–361), which provided for the joint administration by the parties to the Agreement of the port of Kehl and, for that purpose, for the establishment of a public corporation under the law of Baden; however, French nationals were to take a share in the management of this corporation.

The German Federal Government did not submit the Kehler Hafen Agreement to the Federal Parliament for approval. This was the reason why the parliamentary section of the German Social-Democratic Party instituted proceedings before the Federal Constitutional Court on March 7, 1972 demanding a judicial finding that the Kehler Hafen Agreement was invalid since the Federal Government had violated the rights of the Federal Parliament under the Basic Law (Federal Constitution) by having given its consent to the Agreement in the absence of parliamentary approval required by Art. 59(2) of the Basic Law. The applicant took the view that the Agreement was a treaty regulating the political relations of the Federal Republic within the meaning of Art. 59(2) of the Basic Law ("Treaties which regulate the political relations of the Federation . . . shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation") since the French Republic and the German Federal Republic were the real parties to the Agreement. Moreover, its effect was, in the applicant's opinion, an → internationalization of the Kehler Hafen which, according to Art. 24(1) of the Basic Law ("The Federation may by legislation transfer

sovereign powers to inter-governmental institutions"), required the approval of the Federal Parliament.

The Federal Government asked that the claim be dismissed as inadmissible or, at least, unfounded by arguing that the Kehler Hafen Agreement was not a treaty with a foreign State within the meaning of Art. 32(3) of the Basic Law ("In so far as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign States") and that, therefore, the Land Baden was able to conclude this Agreement legally even in the absence of the Federal Government's consent since it was competent to do so under the Basic Law.

The only question the Federal Constitutional Court had to answer in its decision of June 30, 1953 was whether the Federal Government disregarded the rights of the Federal Parliament by having given its consent to the Kehler Hafen Agreement in the absence of the latter's approval. The Court found that there had been no such disregard on the part of the Federal Government because the Agreement was not a "treaty with a foreign State" in the sense of Art. 32(3) of the Basic Law. The Court declared that, on the French side, the contracting party was not the French Republic, but the Port Autonome de Strasbourg, i.e. a public corporation subject to the municipal law of France; the latter acted on its own behalf. This is, in the opinion of the Court, all the more true as there is no treaty-making in → international relations by concealed proxy. The Court advanced the following arguments:

> "The provisions of the Constitution concerning international treaties apply only to treaties with foreign States and subjects of international law which are to be assimilated to foreign States. So far as concerns the Contracting Parties on the German side, these are the Federal Republic and the 'Länder'. The foreign Contracting Parties must also satisfy these requirements. The term 'treaties with foreign States' in the sense of Articles 32 and 59 of the Constitution must, however, be interpreted extensively. The foreign Contracting Parties may also be such subjects of international law as are akin to States. Thus, treaties with Unions of States and with international and supranational organs of Communities of States, in so far as their legal personality is recognized by international law (as, e.g., the European Coal and Steel Community, the International Labour Office, and the Security Council of the United Nations) may be regarded as treaties within the meaning of Articles 32 and 59 of the Constitution, in analagous application of the principles of that Basic Law. The qualifications here postulated, however, are lacking in the case of legal entities which in all matters are subject to the law of a superior State community. Among the latter may be included public corporations which are entirely subject to municipal law. The Port Autonome de Strasbourg is such a corporation. It is neither a State nor a legal entity which in international relations is recognized as an international organization. The Constitution does not contain any provision applicable to agreements with foreign public corporations which are neither States nor assimilable to States." (BVerfGE 2, pp. 374–375; English translation in ILR, Vol. 20 (1953) pp. 408–409).

Apart from these arguments the Court stated that the Land Baden was competent to conclude the Kehler Hafen Agreement under municipal law. As to the applicant's contention that the corporation for the joint port administration was an intergovernmental institution in the sense of Art. 24(1) of the Basic Law, the Court held that this corporation was not such an institution since it was established and functioned under the municipal law of Baden, therefore being solely subject to German law and German State control; the fact that foreign nationals were entitled to influence its decisions could not alter this finding. In conclusion, the Court decided that the consent of the Federal Government to the Agreement, being a governmental act *vis-à-vis* the Land but not *vis-à-vis* a foreign State, violated neither the rights of the Federal Parliament under Art. 59(2) nor those under Art. 24(1) of the Basic Law.

This decision of the Federal Constitutional Court is of considerable legal significance in defining the scope of the treaty-making power of the German Länder under the Federal Constitution. Most important is the extensive interpretation given by the Court to the term "treaties with foreign States" in Arts. 32(3) and 59 of the Basic Law. However, critics are right in saying that this interpretation does not go far enough. As the

Court stated, legal entities being "akin to States" or not being "in all matters subject to the law of a superior State community" have competence to enter into relations governed by international law. Beyond this and irrespective of such qualifications, all political subdivisions of a State which are endowed by their constitution with limited powers to act in this field should be deemed to have this competence provided that they are recognized as subjects of international law. The Court's decision makes plain that an agreement cannot be regarded as an international treaty if, as in the case of the Kehler Hafen Agreement, one of its contracting parties lacks the status of a → subject of international law; but it leaves open the question under which legal régime other than public international law such an agreement ought to be placed.

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ULRICH BEYERLIN

LATERAN TREATY (1929)

1. Historical Background

The primary goal of the Italian Risorgimento, the political unification of the Apennine Peninsula, was achieved between 1859 and 1870 under the aegis of the Kingdom of Sardinia-Piedmont, renamed the Kingdom of Italy in 1861. This process gradually dissolved the temporal power of the → Holy See. Four-fifths of the papal States were broken away in 1859/60, and the rest, i.e. Rome with a strip of territory including the coastal town of Civitavecchia, was occupied and annexed by Italy in 1870, taking advantage of the Franco-Prussian War which had forced Napoleon III to withdraw the French troops which had hitherto protected the Patrimony of St. Peter against further Italian encroachments.

Pope Pius IX (1846 to 1878) protested against this spoliation, refused to recognize the → annexation and withdrew into the Vatican Palace, regarding himself a prisoner if not of Italy then of the circumstances created by Italy. This dispute between the Holy See and Italy, the so-called Roman question, continued under Pius' successors, Leo XIII (1878 to 1903), Pius X (1903 to 1914), Benedict XV (1914 to 1922) and Pius XI (1922 to 1939). It prevented the Holy See *inter alia* from participating in the → Hague Peace Conferences of 1899 and 1907, since Italy made her own participation dependent upon the exclusion of the Holy See for fear that the Roman question might be raised there. Even more serious was Italy's unwillingness, after having entered World War I, fully to respect the privileges and immunities of the Central Powers' diplomatic missions (→ Diplomatic Agents and Missions, Privileges and Immunities); this was a clear proof of the shortcomings, in law and in fact, of the Holy See's position as provided for in the Italian Statute of Guarantee of May 13, 1871, and support for the Holy See's contention that some kind of temporal power was necessary for the independent fulfilment of its mission. At the same time, the situation was a source of constant embarrassment for Italy, which was held responsible for the unsatisfactory position of the Holy See and had shown itself unable to live up to its earlier assurances regarding the free exercise of the Holy See's world-wide mission.

In these circumstances, it became clear that both powers would profit by a compromise, Italy recognizing that the question of the temporal power was not yet closed, and the Holy See being satisfied with the restitution of only a minor part of its former territory. The Holy See had indeed been

ready for such a compromise from the Pontificate of Pius X onwards, and Italy began to consider it around the end of World War I. After Mussolini came to power in 1922, he indicated his willingness to settle the Roman question by agreement, and Italy and the Holy See entered into formal but secret → negotiations which went on for several years and were successfully concluded in 1929 (→ Diplomacy, Secret).

2. The Lateran Treaties of 1929

The accord between the Holy See and Italy was embodied in three agreements, all signed in the Lateran Palace on February 11 and ratified on June 7, 1929; a (Political) Treaty, a → Concordat, and a Financial Convention (BFSP, Vol. 130, p. 801). These agreements are jointly referred to as the Lateran Treaties; all three, particularly the Concordat, constitute a whole, since the concessions on the territorial question were made by the Holy See only in consideration of its pastoral interests secured in the Concordat. In the singular, Lateran Treaty refers only to the political agreement.

The Lateran Treaty establishes the Vatican City State (Stato della Città del Vaticano), declares the person of the Pope to be sacrosanct and inviolable, recognizes the → sovereignty of the Holy See and its right of legation (→ Diplomatic Relations, Establishment and Severance), settles certain questions regarding real property of the Holy See outside the Vatican City State, and provides for the non-interference of the Holy See in temporal disputes unless asked for by all parties, reserving however its right to bring to bear, in any case, its moral and spiritual authority.

The Concordat, *inter alia*, guarantees the free exercise of the Church's spiritual power, exempts the clergy and all members of religious orders from military service and certain other civic duties, abolishes the *Exequatur* and the *Placetum Regium* so far claimed by Italy as legitimate *jura circa sacra*, and obliges it to conform its law in ecclesiastical matters to the spirit of the Lateran Treaties. It also contains provisions concerning matrimonial and educational questions, and recognizes the right of the Pope to confer titles of nobility and orders of merit with effect for Italy also.

The Financial Convention, having the purpose of indemnifying the Holy See for the loss of the papal States, recognizes the compensation paid by Italy as inadequate. However, the Holy See waives all further claims "in consideration of the financial situation of the State and the economic condition of the Italian people after the War" (→ Preamble; → Waiver).

The Vatican City State comprises the Vatican Palace and Gardens, the patriarchal basilica of St. Peter and St. Peter's Square, altogether only 0,44 square kilometres (→ Micro-States). Certain other premises in Rome and Castel Gandolfo, while not forming part of the Vatican City, enjoy much the same inviolability and protection as the premises of diplomatic missions. According to Art. 24 of the Lateran Treaty, the Vatican City is a permanently neutral State (→ Permanent Neutrality of States). Since there exists only a police force for internal security and for ceremonial purposes (especially the Swiss Guard) and no army, the permanent neutrality of the Vatican City is not an armed one. This can be explained by the nature and special position of the Vatican City, which was listed in its totality in the International Register of Cultural Property Under Special Protection in 1960, exempting it from any possible future → armed conflict (→ Cultural Property, Protection in Armed Conflict).

In the Lateran Treaty, Italy undertakes various obligations with regard to the Vatican City State, in particular to supply it with water and to provide the necessary connections with the international railway, post, telegraph and telephone systems. Italy also guarantees the freedom of the conclave and of all councils convoked by the Pope, whether held inside or outside the Vatican City, including free transit and access for all cardinals and bishops concerned. The Holy See for its part undertakes to maintain free access to all objects of cultural and scientific interest situated in the Vatican City or in the Lateran Palace.

According to the Vatican Fundamental Law of June 7, 1929, the supreme power is concentrated in the Pope, and during the vacancy of the papal see in the college of cardinals. The internal affairs are entrusted to the Office of the Governor, while the foreign affairs are handled by the Secretariat of State dealing also with the international relations of the Holy See. The diplomatic representation of the Vatican City abroad is exercised by the

Missions and Delegations of the Holy See.

International → treaties concerning the Vatican City were concluded, during the early years of its existence, by the State itself. But from 1932, the Holy See "acting for the Vatican City State" has appeared as the party to these treaties. Since, however, the Holy See concludes, in its capacity as supreme organ of the Catholic Church, treaties not only in religious but also in temporal matters, the question whether a particular treaty was concluded by the Holy See in its spiritual or its temporal capacity can be answered only by interpretation of the treaty (→ Interpretation in International Law). In case of doubt it must be presumed, according to a manifest intent of the Holy See, that the treaty was concluded by the supreme organ of the Church rather than by the head of the Vatican City State.

The same rule applies to the Holy See's participation, whether in the form of membership or otherwise, in the work of intergovernmental organizations. Yet according to repeated manifestations of the Holy See, the Vatican City itself is a member of various → United Nations Specialized Agencies and other international organizations for technical cooperation.

Nationality of the Vatican City State is limited to cardinals residing in Rome, members of the papal diplomatic service abroad, and persons with permanent residence in the Vatican City State because of holding an office there (→ Nationality).

Having a territory, nationals, and a supreme power not derived from any other State, the Vatican City is itself a → State and therefore a → subject of international law. The fact that the → territorial sovereignty over it is exercised by the Holy See concerns the purpose of the Vatican City State and its internal law only and has no direct bearing on its standing under → international law.

3. Evaluation; Subsequent Development

While the arrangement of 1929 has stood the test of time in general, the territory of the Vatican City is sometimes considered to be of unsatisfactory size. For instance, when, in the course of World War II, most of the diplomatic missions accredited to the Holy See had to move into the Vatican after their countries had become enemies of Italy, the very limited room available there created many inconveniences both for the missions' personnel which had to be drastically reduced and for the Holy See. Yet the latter has never officially raised the question of a territorial enlargement of the Vatican City State.

The settlement contained in the three Lateran Treaties was expressly recognized by Art. 7(2) of Italy's Republican Constitution of 1947. However, after lengthy negotiations between the Holy See and Italy for the revision of the Concordat to make its provisions conform better to the spirit of the Constitution and Decrees of the Second Vatican Council and the political and social change in Italy over the last decades, an Agreement amending the Concordat was signed, together with an interpretative Additional Protocol, on February 18, 1984 (ILM, Vol. 24 (1985) p. 1589). Although for Italian constitutional reasons the 1929 Concordat was not formally abolished, all its provisions not reproduced in the Agreement are repealed, with the exception of those relating to certain financial questions which were taken care of by a subsequent Protocol signed on November 15, 1984. All three instruments together thus constitute in fact a new Concordat. It reaffirms the mutual independence of Church and State and their commitment to reciprocal collaboration for the promotion of man. However, the Catholic religion is no longer the sole religion of the Italian State, religious instruction in public schools is given only to those who have registered, and the clear distinction between the religious and the civil aspect of marriage, already recognized in an understanding of 1982, is accentuated by the provision that judgments of nullity pronounced by ecclesiastical tribunals shall be given civil effect only upon verification of the compliance of the proceedings with fundamental principles as contained in the Italian legal system. To the principle of self-financing of the Church based on voluntary subsidies corresponds its freedom from any financial control by the State.

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LEASE OF TERRITORY *see* Territory, Lease

LEGISLATIVE ACTIVITIES ON FOREIGN TERRITORY *see* Administrative, Judicial and Legislative Activities on Foreign Territory; Extraterritorial Effects of Administrative, Judicial and Legislative Acts; Recognition of Foreign Legislative and Administrative Acts

MANDATES

1. Notion

Mandates or mandated territories are territories which were detached at the end of World War I from Germany and Turkey and placed under the control of one of the victorious powers acting in turn under the supervision of the → League of Nations. The mandate system was embodied in Art. 22 of the Covenant of the League of Nations. The rights and duties of the mandatories were specified in the mandates for each territory, agreed to by the mandatory and confirmed by the Council of the League.

2. Origin

The idea that colonial rule over a foreign population must benefit that population can be traced back in the history of legal thinking (→ Colonies and Colonial Régime). Some elements of the concept are embodied in Arts. 6 and 9 of the General Act of the → Berlin West Africa Conference (1884/1885). Prior to the adoption of Chapter XI of the → United Nations Charter, this principle was not incorporated in any international instrument for the government of colonies in general. As a compromise after World War I, the principle was adopted in the form of the mandate system for the administration of the former colonies and dependent territories of the German and the Turkish Empires. During the war Great Britain, France, Russia, Japan and Italy agreed separately on the allocation of the enemy's dependent territories and the delimitation of their zones of interest, planning the → annexation of those territories. On the basis of its anti-colonial position, the United States, however, emphasized the principles of → self-determination and non-annexation and proposed to establish a mandate system under the supervision of the League of Nations, thus taking up European ideas of a trust for colonial territories. Important aims were "to protect the native populations from exploitation" and "to ensure that the interest of other foreign states are not ignored". President Wilson embodied these proposals as points 5 and 12 in his declaration of January 8, 1918 (→ Wilson's Fourteen Points). General Smuts of South-Africa proposed a mandate system under the supervision of the League and based on the principles of non-annexation, self-determination and the open door. However, he thought the system only applicable to European territories formerly under Russian or Austrian domination and to territories formerly under Turkish rule. Like his colleagues from Australia and New Zealand, he proposed that the German colonies should be annexed. During the negotiations at the 1919 peace conference, the mandate system was agreed upon as formulated in Art. 22 of the Covenant (→ Versailles Peace Treaty (1919)).

Like the Covenant of the League of Nations as a whole, the article on the mandate system forms part of the Paris Peace Treaties of 1919 (→ Peace

Treaties after World War I). Under this article the populations of the mandated territories are characterized as "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" (Art. 22 (1)); "the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility" (Art. 22 (2)). The character and the terms of the mandates differed according to the special circumstances, but all mandates had some general principles in common: (a) The territories were administered as mandates of the League; they were not annexed by the mandatory and were not part of that State's territory; thus, the domestic laws adopted by a mandatory were not *ipso jure* applicable in the mandated territories, but could expressly be extended to them. (b) The administration had to act with a view toward the well-being and development of such peoples, whereby the economic exploitation of the territory or its population was forbidden. (c) The administration of the mandate was supervised by the organs of the League, assisted by the Permanent Mandates Commission (Art. 22(7) and (9)). The Council had certain regulatory powers concerning the relation between the mandatory and the League.

3. *Establishment of the Mandates*

(a) "A" mandates

Art. 22 of the Covenant distinguishes between three types of mandates according to the standard of development of their inhabitants. Art. 22(4) deals with the communities formerly belonging to the Turkish Empire. These are deemed to have reached a stage of development whereby their existence as independent nations can be recognized, although they receive the advice and assistance of a mandatory until such time as they are able to stand alone.

The territorial interests of Great Britain and France were delimited in the Sykes-Picot Agreement of May 16, 1916 (Martens NRG3, Vol. 10, p.350; → Spheres of Influence). According to this agreement, reflecting the military disposition of their troops, France became the mandatory of Syria (including the Lebanon) and Great Britain of Iraq and → Palestine. This allocation was accepted at the San Remo Conference (April 18 to 26, 1920) of the Allied and Associated Powers. The organization of the "A" mandates and their allocation to France and Great Britain took place notwithstanding existing Turkish titles: the 1920 Peace Treaty of Sèvres was rejected by Turkey, and the → Lausanne Peace Treaty of July 24, 1923 (LNTS, Vol. 28, p. 11) did not mention the Arab regions formerly under Turkish rule (→ Interpretation of Treaty of Lausanne (Advisory Opinion)).

In 1921, the Arab kingdom of Iraq was established under British occupation in Mesopotamia. On October 10, 1922, Iraq and Great Britain concluded a treaty, which the League of Nations' Council approved on September 27, 1924 as being consistent with Art. 22 of the Covenant (LNTS, Vol. 35, p. 13). The treaty of June 30, 1930 (LNTS, Vol. 132, p. 363) terminating the mandate system for Iraq took effect when Iraq was admitted as a member to the League on October 10, 1932.

After its conquest by British forces in 1917/1918, Palestine remained under British administration. On July 24, 1922, the Council of the League confirmed the Palestine mandate, which officially came into force on September 27, 1923 (LoN, Official Journal (1922) p. 825). In contradiction to Art. 22(4) of the Covenant, Art. 1 of the mandate instrument conferred direct and full powers for legislation and administration on the mandatory. The mandatory, however, was obliged to honour the Balfour Declaration of November 2, 1917 concerning the establishment of a national home for the Jewish people in Palestine. Since the Arab majority rejected this plan, it proved impossible to establish any kind of self-government. Great Britain administered Palestine according to the British Order in Council Providing for the Administration of Palestine of August 10, 1922. On May 15, 1948, Great Britain ended the mandate according to sec. 1 of the Palestine Act 1948 (11 & 12 Geo. 6 ch. 27). On the same day, the State of Israel was proclaimed (→ Israel: Status, Territory and Occupied Territories; → Israel and the Arab States).

The Balfour Declaration did not apply to the territory of Palestine east of the Jordan river. In 1922, the Council of the League accepted a British proposal to separate the territory of Transjordan

from Palestine. Self-government was subsequently proclaimed in Transjordan by Emir Abdullah in 1924. Relations between Transjordan and Great Britain were defined in the treaty of February 20, 1928 (Martens NRG3, Vol. 22, p. 1). In the treaty of March 22, 1946 (UNTS, Vol. 6, p. 144), Great Britain recognized the sovereignty and independence of Transjordan.

The French mandate over Syria and the Lebanon was approved by the Council of the League on July 24, 1922 (LoN, Official Journal (1922) p. 825) and entered into force on September 29, 1923. According to Art. 1 of the mandate, the mandatory was responsible for creating constitutions for Syria and the Lebanon respecting the rights and interests of all segments of the population. The population of the Ottoman Sanjak of Lebanon, which mainly consisted of Maronites, had formerly had a certain autonomy within the Turkish Empire (→ Autonomous Territories). France enlarged the Sanjak's territory, adding the city of Beirut and some other areas, and on September 1, 1920 proclaimed the State of Lebanon.

In the Syrian part of the mandated territory, France had established five separate States, which were united with Syria in 1925. In 1939, the Sanjak of Alexandrette was ceded to Turkey. At the end of 1936, France agreed upon the termination of the mandate with both States, but did not ratify the respective treaties. During World War II, the French mandate over Syria and the Lebanon ended.

In its resolution of April 18, 1946 (Yearbook of the UN 1946/1947, Vol. 1, p. 575), the Assembly of the League recognized that since its last meeting the mandates concerning Transjordan, Syria and Lebanon had been terminated and that these States were independent members of the community of nations.

(b) "B" mandates

The régime for the mandates in Central Africa was regulated in Art. 22(5) of the Covenant; specific rules were included in special agreements for each territory. The common principles of these agreements were the following: (i) the mandatory was responsible for the peace, order and good government and the economic and social development of the population; (ii) freedom of conscience and religion was guaranteed, subject only to the maintenance of public order and morals; (iii) it was forbidden to establish fortifications or military and naval bases or to give military training to the native population for other than police purposes or the defence of the territory; (iv) the mandatory was responsible for the prohibition of the slave trade, traffic of arms and liquor; (v) the mandatory was to secure equal opportunity for the trade and commerce of other members of the League (open door principle). These principles followed those of Arts. 1 to 5 and Arts. 6 and 9 of the General Act of the Berlin West Africa Conference and were binding for all "B" mandates.

Only the former German colonies in Central Africa were mandates according to Art. 22(5) of the Covenant. During the war these colonies were conquered by British and French forces. On May 7, 1919, the Supreme War Council of the Allied Powers decided on the allocation of the German colonies to the various mandatories. The change of rights and titles was declared in Art. 119 of the Treaty of Versailles: "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions." But it took three more years to establish the "B" mandates in Central Africa. After deliberations within the organs of the League and with the mandatories, the Council of the League confirmed the instruments for the "B" mandates on July 20, 1922 (LoN, Official Journal (1922) pp. 862, 865, 869, 874, 880, 886).

The larger portion of former German East Africa became the British mandate known as the Tanganyika territory. This mandate was administered by a British governor, assisted from 1926 by a legislative council. Like all other "B" mandates, Tanganyika became a UN trust territory under Chapter XII of the UN Charter (→ United Nations Trusteeship System); on December 13, 1946, the trusteeship agreement was approved, according to Art. 77(1)(a) of the Charter, by the → United Nations General Assembly together with the other "B" mandates. The trusteeship ended when Tanganyika became independent (UN GA Resolution 1642 (XVI) of November 6, 1961).

The remainder of German East Africa became the Belgian mandate comprising the kingdoms of Ruanda and Urundi. According to Arts. 10 and 11

of the mandate agreement, the mandatory was authorized to administer the mandate territory as an integral part of its own territory and to integrate the mandate territory into a customs, fiscal or administrative union with the adjacent territories under its → sovereignty or control, provided that the measures adopted to that end did not infringe upon the other provisions of the mandate. Accordingly, Ruanda-Urundi was administered as a district of the Belgian Congo, under the authority of a vice-governor. After having been converted into a UN trust territory in 1946 (UNTS, Vol. 8, p. 106), the entities comprising the mandate became independent and members of the → United Nations under the names of Rwanda and Burundi in 1962.

The former German colonies Cameroons and Togoland were divided between France and Great Britain as mandatories. The British Cameroons were administered as a part of British Nigeria; British Togoland was administered as a part of the Gold Coast Colony. Both became trust territories in 1946. Togoland became a part of Ghana on March 6, 1957. The northern part of British Cameroon joined Nigeria, the southern part the Republic of Cameroon; both States became independent in 1961 (cf. also → Northern Cameroons Case).

The main part of the former German colony Cameroons became the mandate of French Cameroons. This mandate was administered as an autonomous territory by a French governor and became independent in 1960, after another 14 years under UN trusteeship. The French part of Togoland was administered as a separate French mandate. After having been a trust territory, this mandate also became independent in 1960.

(c) "C" mandates

South-West Africa and the South Pacific islands, formerly under German rule, became "C" mandates. According to Art. 22(6) of the Covenant, these territories are characterized by the sparseness of their population, their small size, their remoteness from the centres of civilization, or their geographic contiguity to the territory of the mandatory. Because of these characteristics, paragraph 6 states that these territories "can be best administered under the laws of the Mandatory as integral portions of its territory". This provision constitutes a compromise between the claims of the British Dominions for annexation and the principle of non-annexation and trusteeship.

The German protectorate of South-West Africa was conquered by the South African Union in 1914/1915. The German possessions in the Pacific Ocean were occupied by forces of Australia, New Zealand and Japan in 1914. These former German territories were allocated to the occupation powers as mandates by the decision of the Supreme War Council of the Allied Powers on May 5, 1919. The mandates were confirmed by the Council of the League on December 17, 1920 (LoN, Official Journal (1921) pp. 87, 89, 91, 93). Their contents are almost identical.

For the former German possessions in the Pacific, four different mandates were established. The mandate territory of New Guinea comprised north-eastern New Guinea, the islands of the Bismarck Archipelago, and the German portion of the Solomon Islands. This mandate was conferred on Australia. Having been a United Nations trust territory since 1946, the mandate formed part of an administrative union with the Australian territory of Papua. Papua New Guinea became a fully independent State on September 16, 1975.

The former German colony of Samoa became the mandate of Western Samoa with New Zealand as mandatory. New Zealand's administration continued after 1946 under United Nations trusteeship. Western Samoa became independent on January 1, 1962.

The mandate for the island of Nauru was conferred on Great Britain. However, both the mandate and the trusteeship of 1947 were administered jointly by Great Britain, Australia and New Zealand. Nauru gained independence in 1968.

The mandate for the former German possessions in the Pacific Ocean north of the equator comprised the Mariana Islands, the Caroline Islands and the Marshall Islands. This mandate was conferred on Japan, which used the islands *inter alia* for military purposes. Subsequent to conquest by United States forces in World War II, these islands became United Nations trust territory in the special form of a → strategic area. For further development see → Pacific Islands.

The mandate over the territory which formerly constituted the German → protectorate of South-

West Africa was conferred on the Union of South Africa. South Africa was the only mandatory which did not transfer its mandated territory to the United Nations trusteeship system. This led to the conflict between the United Nations and South Africa regarding the status of South-West Africa (→ South-West Africa/Namibia (Advisory Opinions and Judgments); → Namibia).

4. The Competence of the League of Nations

In its advisory opinion of July 11, 1950 concerning the status of South-West Africa, the → International Court of Justice (ICJ) said that the mandatories only exercised an international function of administration. The mandate was seen as an international institution with an international object. The framework for this international institution was the League of Nations.

According to Art. 22(8) and (9) of the Covenant, authority over the mandates was vested in the Council. It was for the Council to confirm the mandates and to decide on any modification of their terms. In particular, the Council was competent to determine any infringements of the mandatory's obligations derived from Art. 22 or the mandates. Even if the mandatory was not a member of the Council, it was invited to send a representative to attend any meeting in which matters especially affecting its interests (Art. 4(5)) were considered; since decisions of the Council required the agreement of all members of the League represented at its meetings, the mandatory had practically a right of → veto in all questions concerning the administration of its mandate.

In its functions concerning the mandate system, the Council was assisted by a Permanent Mandates Commission (Art. 22(9) of the Covenant). According to its constitution (LoN, Official Journal (1920) p. 87), approved by the Council on November 29, 1920 and later amended, the Commission's members were appointed by the Council and selected for their personal merits and expertise. As independent experts, they could not hold any office which would make them directly dependent on their governments. The majority of the ten members had to be nationals of non-mandatory States. The Commission had to examine the mandatories' annual reports on the administration of the mandated territories (Art. 22(7)). The Permanent Mandates Commission sent questionnaires to the mandatories in order to draw their attention to questions of slavery, labour, traffic with arms and ammunition, alcohol and drugs, freedom of conscience, military clauses, economic equality, education, public health, real property, moral, social and material well-being, public finances, and demographic statistics. By means of this questionnaire the reports became more substantive and comparable. The Commission also had to deal with petitions from inhabitants of the mandated territory. The observations of the Commission were to be discussed with the mandatory power and were to be submitted to the Council for decision.

The Assembly could discuss general and special questions of the mandate system, but could not interfere with the competence of the Council by making decisions of its own. The rule of unanimity in voting prevented a conflicting decision in any case. A special department of the Secretariat dealt with questions concerning the mandates, but had only secretarial functions and no competence to make decisions.

When accepting the mandates, each of the mandatory powers agreed that any dispute between the mandatory and another member of the League relating to the interpretation and application of the mandate should be referred to the → Permanent Court of International Justice, unless the dispute could be settled otherwise. This clause was never invoked during the existence of the League, but was the basis on which the majority decision of the ICJ rejected the → preliminary objections of South Africa in the South-West Africa Case of 1962.

The competences of the organs of the League mentioned here were limited. The League had no real choice as to selection of a mandatory, because the mandated territories were already under the military occupation of the later mandatories and the decision to allocate the mandates had been made by the Supreme War Council of the Allied Powers prior to the creation of the League. After having confirmed the respective mandate, the authority of the League was not stronger. Neither the obligation to submit a report every year nor the general obligation to provide information vested the organs of the League with real authority. The mandatory could veto any decision of the Council because of the Council's unanimity rule.

The mandatory who violated the Covenant could, according to Art. 16(4) of the Covenant, be declared to have forfeited membership in the League. However, it was questionable whether a violation of provisions of the mandate could be deemed a violation of the Covenant. Furthermore, when Japan left the League in 1935, she refused to return control of the mandated Pacific islands to the League, which was not able to enforce its claim to the mandate.

5. Special Problems

It must be kept in mind that the mandate system operated for less than twenty years. As reflected in the terms of the mandates, there was a common agreement that the mandated territories were to be administered in a way similar to that of the colonies of the mandatories. Owing to the limited competence of the League and the limited means of the mandatories, expectations placed on the mandate system must be limited as well.

(a) Reports and petitions

The main source of information for the Permanent Mandates Commission was the annual reports of the mandatories answering the questionnaire prepared by the Commission. The reports on the administration of the fifteen mandated territories provide a record of the development of these communities between the two World Wars. Owing to the deliberations of the Permanent Mandates Commission and the Council, this kind of colonial administration became a matter of public interest throughout the world.

The question of petitions was regulated neither in Art. 22 of the Covenant nor in the mandates. Nevertheless, petitions arrived at the Secretariat of the League and had to be dealt with. On January 31, 1923, the Council adopted rules of procedure (LoN, Official Journal (1923) pp. 211, 298) with respect to petitions concerning inhabitants of mandated territories, which were based on a British memorandum. According to these rules, petitions were to be sent to the Secretariat only through the mandatory government. Any petitions from inhabitants through other channels were to be returned with reference to the correct channel of communication. The petitions and the mandatories' remarks attached to them were discussed by the Mandates Commission. The Commission did not hear oral petitions. The observations of the Commission on petitions were included in the report to the Council. A great number of petitions was received by the League, but very few were passed to the Council.

Neither the Covenant nor the instruments of the mandates contained any provisions concerning visits of inspection to the territories. This question was discussed on a number of occasions, but not formally decided upon. In fact, neither the Mandates Commission nor authorized members or employees of the Secretariat ever paid any official visits to a mandated territory for inspection.

Thus, information about the situation in the mandated territories was limited. Yet owing to the personal competence of the members of the Permanent Mandates Commission, their abstention from issuing direct advice or criticism and their political impartiality, the Commission gained extensive authority in collaboration with the administrating powers.

(b) Uncertainty of mandate status

During the functioning of the mandate system, the question as to the possession of sovereignty over "B" and "C" mandates was not decided. Because of the principle of non-annexation, sovereignty could not reside with the mandatory powers. However, it is equally clear that sovereignty was not vested in the League. The mandatory powers were not only mere tenants at will; they also had legal security of tenure that was derived from the history of the establishment of the mandate. (In its resolution 2145 (XXI) of October 27, 1966, the UN General Assembly declared that South Africa had failed to fulfil its obligation as mandatory and had disavowed the mandate. The ICJ affirmed this view in its Advisory Opinion of 1971. Such a case did not occur in the practice of the League.)

The Mandates Commission and the Council confirmed on several occasions the obligation of the League to guard the integrity of the institution of the mandate. The organs of the League did not disapprove of the administration of British Togoland by the Gold Coast Colony or the administration of the British Cameroons by the authorities of Nigeria; they insisted, however, on separate reports for the mandated territories. The same applied to the position concerning the administra-

tion union in French West Africa, including French Togo. On several occasions the Mandates Commission and the Council discussed plans for a customs and administration union for Tanganyika, Kenya and Uganda. Those plans were not approved. The Commission and the Council also refused the incorporation of South-West Africa into the Union of South Africa and defended the integrity of the mandate.

(c) Nationality

With the detachment of the German colonies, the colonies' inhabitants lost their → nationality or their status as persons protected by Germany. According to Art. 127 of the Treaty of Versailles, the native inhabitants of the former German overseas possessions were entitled to the → diplomatic protection of the governments exercising authority over these territories. The instruments of the mandates did not regulate questions of nationality or diplomatic protection. This was discussed on several occasions by the Mandates Commission. In August 1922, the League Council decided, on the basis of reports of the Commission, on a recommendation concerning the national status of the inhabitants of the territories of the "B" and "C" mandates. According to the Council's recommendation, the inhabitants were to have a national status distinct from that of the nationals of the mandatory power, namely as "administered persons under mandate" or "protected persons under mandate" (→ Protected Persons). The practice in the various mandated territories followed these recommendations.

(d) The open door principle

The terms of the "B" mandates provided in a special article for the complete economic, commercial and industrial equality of all nationals of States members of the League of Nations. The Mandates Commission was very active in this sphere. The results are difficult to assess. In Western Africa, the open door principle was more or less applied as agreed under the General Act of the Berlin West Africa Conference. There is some evidence that the share of the mandated territories in foreign trade was higher than the share of the other colonies, although the mandates did not play an important part in world trade.

6. Appraisal

In assessing the mandate system, the following points are important:

The mandated territories were not administered by an international institution but by the mandatory States, who were obliged to respect the terms of the mandate. The mandate system is not, therefore, an example of an international administration of territory.

As far as the "A" mandates are concerned, the system was successful in the sense that the mandate States became independent – with the exception of Palestine, since the later State of Israel was not identical with the entity administered under the mandate.

The mandate system and its supervision by international organs successfully guarded the integrity of the mandated territories. Up to 1986, the status of South-West Africa/Namibia as a mandated territory prevented its annexation by South Africa.

The mandates which were converted to UN trust territories gained self-government and independence under international supervision. The reports of the administering States and the records of the supervisory bodies provide us with a continuous history of this development. The colonies purely under national administration, however, aquired self-government and independence at about the same time. International interest in the fate of the mandated or trust territories supported this development.

Even under the mandate system, the political problems of areas such as Lebanon, Palestine and South-West Africa/Namibia could not be solved. Some of these problems even arose from decisions made under the mandate system.

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DIETRICH RAUSCHNING

MAPS

1. Maps as Documents

In international territorial transactions maps were for a long time not of much use, the imperfection of methods and instruments making them unreliable. In distant regions they often misrepresented or misnamed the features of the terrain. The practice was to rely on the description of new or newly defined → boundaries, the map being no more than an illustration. The Peace Treaty with Italy of February 10, 1947 (UNTS, Vol. 49, p. 3) recalls this principle in Art. 1 (→ Peace Treaties of 1947). Nowadays the quality of maps is high, and aerial photographs often take their place.

From as early as about 1775 there occur boundaries drawn authentically on maps; even typographical features on maps have become key points for boundaries. The so-called McMahon Line, whatever its legal relevance, was drawn in 1914 offhand on a small-scale map as the eastern sector of the India-Tibet boundary (→ Boundary Disputes in the Indian Subcontinent). The Peace Treaty between Russia and Finland of October 14, 1920 (Martens NRG3, Vol. 12, p. 37) declares the description authentic for some parts, the maps for other parts of the new boundary (→ Peace Treaties after World War I). In the Peace Treaty of February 10, 1947 with Finland (UNTS, Vol. 48, p. 203), the retrocession of Petsamo to the Soviet Union under Art. 2 refers simply to a map (see also the Treaty between Czechoslovakia and the Soviet Union of June 29, 1945 (UNTS, Vol. 504, p. 300, cession of the Trans-Carpathian Ukraine), and the Treaty of August 16, 1945 between Poland and the Soviet Union (UNTS, Vol. 10, p. 193, the description in the text being very summary)). For examples from another quarter, see the Treaty of July 16, 1963 between France and Luxembourg (UNTS, Vol. 645, p. 37 – exchange of small parts of territory) and the Treaty of September 24, 1956 between Belgium and the Federal Republic of Germany (German Bundesgesetzblatt, 1958 II, p. 263).

The very first case of modern → arbitration which concerned the St. Croix River Boundary between the USA and Great Britain (→ Jay Treaty (1794)) lays down the line on a map, as do the awards on the Alaska Boundary in 1903 (RIAA, Vol. 15, p. 491) in the → Grisbadarna Case (RIAA, Vol. 11, p. 155), and in the → Timor Island (ibid., p. 481), → Rann of Kutch (RIAA, Vol. 17, p. 570), → Beagle Channel and → Continental Shelf Arbitrations (France/United Kingdom) (RIAA, Vol. 18, p. 177). The awards in the Honduras-Guatemala dispute (RIAA, Vol. 2, p. 1307) and the → Argentina-Chile Frontier Case (RIAA, Vol. 16, p. 181) refer partly to aerial photographs.

Member States of federations have seen disputed boundaries adjudicated on existing or newly drawn maps (e.g. Indiana v. Kentucky, 163 U.S. 520 (1896); Maryland v. West Virginia, 225 U.S. 1 (1912); North Carolina v. Tennessee, 240 U.S. 652 (1916); Decisions of the Swiss Bundesgericht in Grisons v. Ticino (1892), BGE 18, 673 and in Valais v. Ticino (1980), BGE 106 Ib, 154).

An example of legislation relating partly to maps when delimiting a boundary of a subordinate entity is the Canada (Ontario Boundary) Act 1889 (52 and 53 Vict., ch. 28).

On the other hand, in the → Gulf of Maine Case, the parties in the *compromis* and the chamber of the ICJ attributed only illustrative value to the map (ICJ Reports 1984, p. 246). Therefore, there does not exist a general rule on the significance of maps as documents. Difficulties of interpretation may also arise; a recent example is the dispute between China and USSR over the eastern sector of their common boundary (→ Boundary Disputes between China and USSR).

2. *Maps as Evidence*

Maps serve frequently as evidence for old title or possession of territory (see → Evidence before International Courts and Tribunals and the articles on → Territory). It goes too far to reject them offhand as hearsay. The King of Spain arbitrating the → Honduras-Nicaragua Boundary Dispute was impressed by the great conformity of maps indicating the easternmost boundary point. Such conformity may express common knowledge and form the basis of judicial reasoning.

Hundreds of maps have been laid before the commission in the Sino-Indian dispute. Courts and arbiters have weighed the value of maps, *inter alia* in the → Eastern Greenland Case and in the → Palmas Island, Rann of Kutch, and Beagle Channel Arbitrations. Where the → *uti possidetis* doctrine prevails, maps originating from the former colonial authorities may decide the case (see also → Boundary Disputes in Latin America).

Parties produce with evident relish maps published in the opposing State, or even by it, which contradict its official thesis, as have both sides in the Sino-Indian dispute. The leading case is the → Temple of Preah Vihear Case (ICJ Reports 1961, p. 17), which Thailand lost because she had made official use of a map showing the Temple in Cambodian territory. Likewise in the → Minquiers and Ecrehos Case (ICJ Reports 1953, p. 47, at p. 71), the Court held against France partly because in 1820 she had laid before the British a map showing those islets and rocks as British.

States therefore use caution. Argentina, when involved in the dispute with Brazil over the Misiones, issued a statement that no map published in Argentina may be considered as official unless expressly confirmed by the Foreign Department. India, in 1961, had a statute against publication and diffusion of detrimental maps.

3. *Legal Doctrine relating to Maps*

Up to now, the legal doctrine relating to maps has been hardly adequate, although some awards have expanded on it, as for example in the Rann of Kutch and Beagle Channel cases.

When erroneous maps have led the parties to the conclusion of a treaty, it is necessary to establish their common intent. Such would be the rule drawn from cases such as the St. Croix River Boundary or the Timor Island Arbitration. Sometimes it is simply *falsa demonstratio*.

Official maps showing boundaries convey not only geographic information, but state the extent of → territorial sovereignty. If drawn by the neighbouring States in common, for example by mixed demarcation commissions, such maps bind them. Otherwise unilateral pretensions cannot modify established title. Therefore so-called cartographic aggression is an exaggerated term, although an offended State would do well to lodge a protest, especially if such maps come to be reproduced on postage stamps with a propagandistic aim. The international postal regulations do not seem to offer ways and means to stop such goings-on (→ Postal Communications, International Regulation). At all events the State concerned can consider a dispute as existing and take steps to settle it (→ Peaceful Settlement of Disputes).

On the other hand, boundaries on an official map prove the intention not to claim territories lying beyond.

In remote and sparsely populated areas it is often difficult to prove continuous exercise of sovereign power at particular places. It may well be in such cases that a uniform representation of the boundary on neutral maps can provide sufficient evidence.

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MICRO-STATES

1. Notion

Micro-States have never been authoritatively defined. Whether one determines a maximum or minimum population, extent of territory or degree of effectively exercised State power, a clearcut definition can hardly avoid arbitrariness. A definition would be necessary, if micro-States, despite their name, were not in reality → States under public international law, and lacked such attributes of statehood as the capacity to become a member of the → United Nations (→ United Nations Charter, Art. 4) or to become a party to the Statute of the → International Court of Justice (ICJ Statute, Art. 34), or to become a party to other international instruments and to participate in international → conferences and congresses. Defining micro-States would also be appropriate if their membership in international organizations were subject to special rules (→ International Organizations, Membership).

2. History

Micro-States, in the sense of very small political entities, have played a role in the international community since the times of the → League of Nations. They were given various names, such as city-States, diminutive States, lilliputian States, micro-States, mini-States, miniature States, pygmean States or very small States. The term micro-States is consistent with the terminology of the → United Nations Secretary-General, who used it first during the 1960s with regard to the emerging problems of → decolonization, when numerous newly-independent and very small entities, particularly → islands, were claiming membership in the organization.

A distinction has to be drawn between micro-States dating from the times of the League of Nations (→ Liechtenstein; → Monaco; → San Marino; and in a sense also → Andorra, which is still a → condominium between France and Spain) and the many originating in the framework of decolonization. The first ones came into being as a consequence of the oddities of European history, independently of any efforts by the League or the United Nations. They gave rise to a known and limited set of legal problems. Following decolonization, however, large numbers of newly-independent nations have been joining the community of States, changing traditional voting patterns in the United Nations. This latter category of micro-States owes its creation to the support of the United Nations Special Committee with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (established by UN GA Res. 1654(XVI) of November 27, 1961). Joining the organization seems a natural consequence of their becoming full and independent members of the community of States. However, pursuant to Art. 4 of the UN Charter, only States may become members, and accordingly a distinction has to be drawn between the quality as a State and possible membership in the United Nations. The threshold question is, therefore, whether micro-States are States under public international law.

3. Quality as a State

(a) League of Nations and United Nations

Liechtenstein's application for membership confronted the League of Nations with the problem whether that entity was a State according to the terms of the Covenant (Art. 1(2)). The competent committee expressly called Liechtenstein a State but denied it admission to the League. The official statement of reasons reads, *inter alia*, that Liechtenstein, because of her small territory and diminutive population, had transferred some attributes of → sovereignty to representatives, and consequently was not in a position to fulfil all obligations deriving from the Covenant

(→ Foreign Relations Power). This does not prove, however, that the League considered very small entities like Liechtenstein to be States, for it may be that the official statement called Liechtenstein a State only out of diplomatic consideration. No European micro-State applied for League membership after that, and the United Nations has not yet had to concern itself with the State quality of these entities. However, Monaco is a member of the → United Nations Educational, Scientific and Cultural Organization (UNESCO) and Liechtenstein and San Marino have been admitted parties to the ICJ Statute. That implies that the United Nations considers them States (UNESCO Constitution, Art. 2(2); ICJ Statute, Art. 34(1)). Regarding Vatican City, see articles on the → Holy See and the → Lateran treaties.

As for the second category of micro-States, those which emerged in the course of decolonization, their State quality has never been denied by the United Nations and applications for admission are regularly granted. Moreover, the United Nations provides a forum for the smallest political entities, enabling them to establish and maintain → international relations with many States. Micro-States particularly depend on communication by way of and protection through the United Nations. This is consistent with common scholarly opinion that neither the size of a territory nor that of its population is of any relevance for the notion of the State.

(b) Capacity for relations with other States

Problems as to the classification of micro-States as States might arise, however, with regard to another criterion: the capacity to enter into relations with other States (Montevideo Convention on Rights and Duties of States, 1933, LNTS, Vol. 165, p. 19, Art. 1; see → States, Fundamental Rights and Duties). That capacity pertains to the effective exercise of sovereignty, and refers to the notion of the State under public international law as opposed to that same notion under national law. As the main → subjects of international law, States must have at least the capacity to participate visibly in international intercourse. Yet this does not mean that they are required, for example to maintain armies as a precondition to participation in the → United Nations Peacekeeping System or to defend their neutrality. Such a requirement would counteract international efforts for the limitation of arms (→ Disarmament). Moreover, there are personal and financial preconditions for establishing and maintaining legations and attending conferences abroad (→ Diplomatic Agents and Missions).

The capacity to enter into relations with other States as an additional criterion for statehood, however, implies again the delicate problem of quantity: To what extent must political entities be able to maintain such external relations in order to be considered States? Indeed, States might fulfil obligations under public international law simply by ensuring its observance on their own territory, however small. Finally, Art. 4(1) of the UN Charter, pursuant to which "membership . . . is open to . . . states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations", rather supports the distinction between the capacity to enter into relations with other States to a specific extent and the quality as a State.

4. Membership in International Organizations

If even very small political entities are to be considered as States under public international law, the question arises whether their membership in international organizations is subject to special rules. Public international law is based on the principle of sovereign equality of States (→ States, Sovereign Equality). If this rule were followed strictly, every State would have the same voting power, regardless of the size of its territory or population or of its economic capacity. That could produce the result that a resolution of the → United Nations General Assembly accepted by a two-thirds majority might only have the support of States that in total do not even represent ten per cent of the world population. Micro-States, which are mostly poor and powerless, often follow different voting patterns from the States traditionally prevailing in the United Nations. In the 1960s, therefore, proposals were made within the United Nations that micro-States be given a special status, without voting power, but with financial benefits. It was supposed that sovereign equality would not be violated if micro-States accepted these conditions when applying for admission. At present, however, proposals for a special status for micro-

States have returned to oblivion. However, in certain → United Nations Specialized Agencies resort is made to → weighted voting and to guaranteed representation by industrially important States on governing organs.

5. *Evaluation*

The UN General Assembly, where the principle of one State one vote applies without restrictions, does not make legally binding decisions (→ International Organizations, Resolutions). To the extent that international organizations do make important, legally binding decisions, the formal principle of sovereign equality tends to be weakened (e.g. → European Communities; → International Monetary Fund). Criteria such as the size of the population represented or economic capacity then become relevant. In organizations serving a limited, technical or economic purpose, contributions of States with regard to this specific purpose are sometimes taken into consideration in measuring their voting power. But to the extent that international cooperation is not particularly developed or specialized, and where States face each other as independent and sovereign entities according to the concept of classic international law, their potential relations remain based on the formal principle of absolute sovereign equality. To that extent recourse to such internal factors as the size of the population or territory of micro-States is excluded. Nor does the fixing of minimum criteria for statehood appear advisable, because the UN General Assembly, a political body, might always admit to the organization as States very small entities not meeting the requirements of the definition.

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MUNICIPAL LAW AND INTERNATIONAL LAW *see* International Law and Municipal Law

NATIONAL LEGAL PERSONS IN INTERNATIONAL LAW

1. *Notion*

The various types of legal persons include States, public enterprises, foundations, non-profit associations and private corporations. In view of the similarities between these types of legal persons relevant legal principles often apply across the board. Yet significant differences and particular problems remain, making impossible a generalized treatment of legal persons in international law. This article focuses mainly on private corporations, with reference as necessary to special problems of other types of legal persons (→ Individuals in International Law; → Non-Governmental Organizations).

Corporations are the creations of national law. Their mobility and their connections and activities across national borders raise numerous legal problems which traditionally have been dealt with by the → private international law rules of each State, but which have become increasingly relevant to public international law as well. The notion of corporate nationality has thus acquired particular importance, although it is generally accepted that, with respect to legal persons, → nationality does not have the same meaning or the same function as it does with respect to individuals. The term "corporate nationality" may thus be seen as a shorthand reference to a multiplicity of legal policies and rules which are frequently applied without express reference to the concept of nationality. Application of the criteria for determining corporate nationality and the actual signifi-

cance of the notion itself vary according to the legal and practical context in which issues arise. It is still an open question whether a single test or definition of corporate nationality is desirable, rather than several tests and definitions adapted to particular situations and purposes. Legal persons may also be subjected to differing and sometimes conflicting requirements by States claiming jurisdiction over them on the ground of nationality as well as on other grounds. Under certain conditions, however, corporations may have independent access to some kind of international legal process.

2. *The Criteria of Corporate Nationality*

In municipal as well as in international law, three principal criteria have been used to determine the nationality of corporations. A corporation is deemed to have the nationality of: (a) The place of its incorporation, i.e. the State according to the laws of which the corporation is formed. This test is applied by countries where the Anglo-American common law system prevails and by a few others. (b) The place of its seat (*siège social*), i.e. the State where the centre of its management is located. This test is applied by the civil law countries in continental Europe and elsewhere. Emphasis on the formal aspect of this test, viz. on the corporation's statutory seat, brings it in operation closer to the incorporation test since a corporation's statutory seat is frequently located in the State of incorporation. In many cases, however, where the statutory seat is seen as not corresponding to the actual location of corporate administration, the "real" seat (*siège social réel*) is used as the criterion of nationality. With respect to → transnational enterprises or groups of companies, it has been suggested that the enterprise's centre of decision-making provides a more appropriate test. (c) The State of nationality of controlling shareholders. This test was introduced during wartime to determine the enemy character of property (→ Enemy Property). First applied during World War I, it was largely abandoned in the inter-war period and then revived during World War II. The test was originally based solely on share ownership, but has been extended to cover the nationality of principal corporate officers, the exercise of controlling influence through means other than shareholding and the presence of substantial though not necessarily controlling interests. After the war, the test was retained in many countries in specific legislative measures involving the economic regulation of foreign trade and investment for political or economic purposes.

Singly or in combination, the three tests are common in international treaty practice. There is an infinite number of variations in formulation, corresponding to particular circumstances and needs as perceived by the contracting parties. Treaties dealing generally with trade and investment (→ Foreign Investments), particularly treaties of establishment or → treaties of friendship, commerce and navigation, tend to adopt the tests of incorporation and seat, while instruments or provisions directed at the protection of nationals usually add some version of the control test. In post-war treaties of friendship, commerce and navigation of the United States, for example, the general definition of the companies considered as "companies of the Parties" utilizes the incorporation test, but the contracting parties are allowed to deny the advantages of the treaty to such companies when they are controlled by third-country nationals, while the control test is explicitly used in other provisions.

3. *Principal Contexts of Application*

The application of the criteria of corporate nationality and the content and significance of that notion itself vary according to the context in which issues are considered. It is therefore necessary to review the principal contexts.

(a) Private international law

National legal systems vary in the extent to which they utilize and rely on the notion of nationality for corporations. Regardless of their precise approach, however, most countries use the incorporation or the seat test to determine the law that governs the existence, capacity and internal structure of a corporation. The same tests are normally in use in applying laws concerning the operations of foreign companies, although in this connection the control test is also sometimes used. In the past, a major issue was that of the "recognition" of foreign corporations, owing to the principle that a company could have no existence beyond the borders of the State that

created it. The domestic law of most countries, supplemented by bilateral and multilateral treaties, has by now moved beyond such restrictive approaches, although special requirements for registration and authorization and other such conditions continue to exist in many cases. Two significant multilateral instruments dealing with various aspects of recognition and personal law of companies are the Hague Convention of June 1, 1956 (Moniteur Belge (1966) p. 10850) concerning recognition of the legal personality of companies, associations and foreign foundations and the Brussels Convention of February 29, 1968 (German Bundesgesetzblatt 1972 II, p. 370) on the mutual recognition of companies and legal persons.

Public corporations owned by foreign States are usually treated in the same manner as private corporations. Such State enterprises normally possess legal capacities similar to those of private corporations and are not excluded from doing business in other countries. The major special problem in their case is the possibility of their claiming → State immunity. The widespread acceptance in practice of the restrictive theory simplifies matters in this respect, although complex problems remain.

(b) Enemy property

As already noted, the control test was introduced during World War I to ensure the effectiveness of measures against enemy property. First applied in the United Kingdom, it was then used in most other belligerent countries, with the exception of the United States, and in the peace treaties at the end of the war (→ Peace Treaties after World War I). During World War II, adoption of the control test was universal and it was again applied in the peace treaties (→ Peace Treaties of 1947; → Peace Treaty with Japan (1951)). Since then, control has been the principal test of the nationality of enemy corporations in numerous small-scale wars as well as in connection with measures of peacetime → economic warfare, such as trade controls.

(c) Regulation of foreign investment

In a few developed and in most of the developing countries, foreign direct investment is regulated with varying degrees of strictness. The control test is generally applied to determine the nationality of companies, in particular to the question which locally incorporated companies are to be considered foreign for the purposes of relevant laws and regulations. Such foreign-owned companies may be subjected to various restrictions and requirements, such as exclusion from certain sectors, registration of → technology transfer agreements, etc. They may also be granted special treatment such as freer remittances abroad, guarantees against takings and other measures, etc. Measures of this type are in effect in most countries with respect to specific sectors or particular types of legal acts, for example, registration of ships and aircraft, cabotage, mining concessions, etc.

(d) Diplomatic protection

It is well established that → diplomatic protection may be exercised on behalf of corporations, but the modalities of its exercise remain confused and uncertain. While treaty practice has moved considerably beyond → customary international law and the case-law of international tribunals in devising ways and means for dealing with the related problems, general rules and standards are still hard to find. The difficulties in establishing clear rules in this domain must be attributed in large part to the problems today confronting the institution of diplomatic protection rather than the otherwise quite real conceptual complexities of the notions of legal personality and nationality.

The topic is traditionally treated in two parts: Protection of corporations, and protection of shareholders. The dividing line between the two is not as clear as may at first appear, but it remains a convenient way to approach the matter.

(i) Protection of corporations

Early 19th century international legal doctrine and diplomatic practice adopted in the main a negative stance on this issue, accepting the exercise of diplomatic protection solely for individuals. Attitudes changed by the turn of the century and both case-law and treaty practice accepted corporations as "nationals" for the purpose of diplomatic protection. The test of nationality applied, by reference to municipal law, was generally that of incorporation or seat. Control did have some importance, however, in that States frequently

refrained from acting on behalf of corporations in which their nationals did not have a substantial interest. The most recent pronouncement of the → International Court of Justice (ICJ), in the → Barcelona Traction Case, emphasizes the traditional tests, rejecting use of the control test by itself. In a key paragraph, the Court stated:

> "In allocating corporate entities to States for purposes of diplomatic protection ... (the) traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office" (ICJ Reports 1970, p. 42).

Combination of these tests with that of control was not wholly excluded but was in no way stressed. Such a combination, allowing for the exercise of diplomatic protection only when the corporation involved is incorporated and has its statutory seat in the claimant State and is controlled in whole or in part by nationals of that State, has found strong support both in theory and in recent treaty practice.

From a doctrinal standpoint, such an additional requirement, showing the presence of an effective connection between the corporation and the State seeking to exercise protection, along the lines of the → Nottebohm Case rationale, seems particularly appropriate in an era of increasing internationalization of business operations.

Bilateral agreements providing for compensation on a lump-sum basis for properties of nationals of one party nationalized or otherwise taken by the other (→ Lump Sum Agreements) generally apply a combination of the incorporation and seat tests with variants of the control test requiring a "substantial" or "predominant" interest (see Lillich and Weston, Vol. 1 (1975) pp. 76–77). A similar definition of companies considered as "nationals" of the parties is found in the agreement of January 19, 1981, on the settlement of claims between the United States and Iran (ILM, Vol. 20 (1981) p. 230, at pp. 232–233, Art. VII(1); → United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)).

Bilateral agreements for the promotion and protection of investments are less unanimous on this point. Those concluded by some major capital-exporting countries (e.g. France, Federal Republic of Germany, United Kingdom) utilize the traditional incorporation and seat tests, referring to control or substantial interest only in specific contexts, such as the grant of national treatment to investments by nationals of a party. The agreements of other countries (e.g. United States) use the incorporation and seat plus substantial interest combination, while those of still others (e.g. Switzerland) rely exclusively on the control test (see Klebes, pp. 196–206).

(ii) Protection of shareholders

The position of shareholders, who may be individuals or companies, becomes of relevance when the State of their nationality cannot exercise protection over the company whose shares they hold, either because the company is incorporated in the respondent State or because of other reasons, such as incorporation in a third State, minority shareholding, etc. Each of these situations raises different difficulties. Classical international law again started from a wholly negative stance. However, arbitral and treaty practice in the first half of this century (see C. Rousseau, Droit international public, Vol. 5, Les rapports conflictuels (1983) pp. 131–151), while not unanimous, accepted the exercise of diplomatic protection on behalf of shareholders in a considerable number of situations. The trend was reinforced by recent peace treaties and lump sum agreements, nearly all of which provide for shareholder claims, and by a sizeable body of scholarly opinion. In 1970 the ICJ, in the Barcelona Traction Case, adopted a more restrictive position, allowing for direct protection of shareholders only in exceptional situations involving e.g. State action against shareholders as such (for example in cases of confiscation of shares or dividends), the total extinction of the company, etc. The Court refused to express itself on the most difficult case, namely that of foreign shareholders in corporations incorporated in and administered from inside the respondent State. The whole matter remains unsettled and highly controversial.

(iii) Protection by special agreement

Uncertainties in this area are tolerated in practice because of the possibilities for protection provided by agreements concluded either at the intergovernmental level, such as investment pro-

motion treaties, lump sum agreements, etc., or at the company level (→ Contracts between States and Foreign Private Law Persons). A method of particular interest is that devised by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (→ Investment Disputes, Convention and International Centre for the Settlement of). This method is imitated in a few bilateral international agreements. Art. 25(2)(b) of the Convention provides that the parties to a dispute may agree to treat as a national of another contracting State a legal person which has the nationality of the State party to the dispute but which is controlled by foreign interests.

(e) Exercise of jurisdiction

Control of corporations incorporated in other States by a State's own nationals, whether individuals or companies, is sometimes invoked as the basis for claims of legislative jurisdiction by that State over such corporations (→ Jurisdiction of States). It is true that, in the case of individuals, nationality is generally accepted as a principal basis for legislative jurisdiction by a State over its own nationals present or resident in another State, subject to limitations on prudential as well as on legal grounds. The situation is more difficult in the case of corporations, especially when conflicts of jurisdiction are exacerbated by divergences in national policies.

The principal instance of extensive claims to jurisdiction on such grounds is that of United States legislation concerning regulation of foreign trade and investment, primarily for political ends (e.g. Trading with the Enemy Act, International Emergency Economic Powers Act, etc.). Under these laws, persons "subject to the jurisdiction of the United States" are prohibited from engaging in certain activities or transactions or directed to act in a certain manner. Although nationality as a general basis for the exercise of jurisdiction is often mentioned in justification of such measures, the actual legislative language refers, as noted, solely to "persons subject to the jurisdiction of the United States". That term is so defined as to cover not only individuals, nationals and residents of the United States, as well as corporations organized under United States law, but also companies "owned or controlled" by such persons, i.e. primarily subsidiaries of United States companies incorporated in other countries.

On that basis, under various laws, the United States has in the past three decades imposed → embargoes on trade and investment with a number of countries (China, 1949–1970; North Korea, since 1950; Vietnam, since 1964 (North) and 1975 (South); Cuba, since 1963; Rhodesia, 1965–1979). While there is a common pattern in United States action in all these cases, there is no complete uniformity. Measures with extraterritorial effect on other bases (e.g. territoriality) are usually also involved. Moreover, even under the provisions considered here, relevant regulations do not always cover foreign subsidiaries of United States companies in the same manner or to the same extent.

The two major recent instances of the use of such measures were the freezing of Iranian assets under United States control (1979–1981) and the restrictions on transactions relating to equipment and technology to be used for a natural gas pipeline from Siberia to Western Europe (1981–1982). In the former case, the United States sought to stop withdrawal of all Iranian assets in United States dollars held by banks in the United States and by their branches and subsidiaries abroad. The measures were contested as to their extraterritorial effects but litigation in France and the United Kingdom stopped after the January 1981 settlement. In the pipeline case, the United States, relying in part on the exercise of jurisdiction over foreign subsidiaries of United States companies, sought to prohibit the export to the Soviet Union of oil and gas equipment and technology of United States origin. Again, the measures were challenged, in Europe and the United States, but their lifting in late 1982 precluded further legal developments.

These controversies are part of the broader issue of extraterritoriality in modern international law and relations (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). For present purposes, three points may be made, as follows.

In the first place, it is obvious that differences between nations on concrete issues of foreign policy and international relations exacerbate the problems arising from measures involving the extraterritorial exercise of jurisdiction. But even

where countries are in broad accord as to policy, such measures create difficult and divisive problems.

Secondly, the principal argument against the extension of United States jurisdiction to foreign subsidiaries of United States companies has been that such subsidiaries, being incorporated and having their principal administrative seat in another State, are "nationals" of that State or, more precisely, are subject to its laws and jurisdiction. Such jurisdiction may not be exclusive as to all matters, but it is argued that on fundamental questions with regard to the public order, including foreign policy, of the host State it must be understood as exclusive. The most recent revision of the American Law Institute's Restatement of the Foreign Relations Law of the United States (1985) establishes a presumption against the exercise of jurisdiction over foreign subsidiaries on the basis of their being controlled by nationals, allowing limited departure from this principle where it is not "unreasonable" for a State so to act (Draft No. 6, para. 414).

A third possibility is to approach the question by way of the competing doctrines of corporate personality and enterprise unity. The issue then becomes whether in situations such as the ones described here it is appropriate to "lift the veil", that is to disregard the existence of separate corporate entities and treat parent and subsidiary companies as parts of the same single entity. National legal systems accept, although to widely varying degrees, that the corporate veil may, under certain circumstances, be disregarded. On the international plane, such an approach appears to have fairly broad support with respect to certain areas of regulation of corporate action, for example, antitrust (→ Antitrust Law, International), requirements concerning disclosure, or taxation (→ Taxation, International).

In many of these cases, however, assertion of jurisdiction, legislative or judicial, assumes the reverse form from the one here examined: It involves the exercise of some type or degree of jurisdiction over the parent company when the State concerned has jurisdiction over the subsidiary. Adopting this approach for the kinds of claims to jurisdiction examined here would place them in the same general category with other claims, widely differing in purpose and effect, without providing satisfactory answers to the persistent questions. Instead of seeking to determine under what conditions and according to which principles it is possible to disregard the nationality of a foreign subsidiary or to override the claim to jurisdiction of its State of incorporation and seat, we now would ask under what conditions and according to which principles it is possible to disregard the corporate personality of the subsidiary. It is not obvious that the answers to the latter question are easier to reach than those to the former.

4. Direct Access to Legal Process

By virtue of international intergovernmental agreements or of contracts with States, private corporations, like individuals, may have access to legal process other than strictly national. Sometimes this is called "quasi-international" legal process; it involves in virtually all cases some type of → arbitration. The principal contemporary international instrument establishing related arrangements is the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded and administered under the auspices of the World Bank, which provides for conciliation and arbitration proceedings between States and foreign investors, normally corporations. Similar proceedings are possible on the basis of contractual arrangements between States and foreign enterprises. While in many or probably most cases such proceedings move along lines very similar to those of private international → commercial arbitration, in some cases they exhibit special characteristics differentiating them from wholly private proceedings. This is especially apparent in some recent arbitration awards (see → Contracts between States and Foreign Private Law Persons).

A number of writers have suggested that current developments and arrangements point to the possible emergence of transnational enterprises as relatively independent legal entities, possessing a degree of international legal capacity. The suggestion is rejected by a solid majority of scholars and by the apparent totality of governments, at least as far as any explicit recognition of their international status is concerned. The suggestion's proponents argue that transnational enterprises already are important international actors in non-legal terms.

A number of current efforts at the international level (e.g. State contracts, as already noted, → codes of conduct for enterprises, etc.) may be seen as attempts to give some legal form to this factual datum. Subjecting transnational enterprises to the norms of international law would make possible the development of rules and procedures which would better fit the qualities and faults of these enterprises and the opportunities and dangers stemming from them, without elevating them to the status of States or treating them as equals to States. Such a move would involve, on the one hand, complex interactions between national and international law, and on the other, changes in international legal rules which have evolved with a view to their being applicable only to States.

5. Concluding Observations

It is evident that the reception of the notion of the legal person from national law into international law does not occur without serious friction. The concerns of municipal law which have shaped the modern legal institution of the legal person are not the same as those of contemporary international law. As a result, international law cannot rely on municipal law, as it does in other instances, for the basic legal determinations and qualifications it needs in order to formulate and apply its own principles and rules. The example of corporate nationality is characteristic: No clear, all round notion has developed in municipal law, presumably because it has not been needed; no single, privileged link between country and corporation has emerged. The lack of unity in the treatment of corporations in this connection is apparently tolerable in the municipal law context; it creates serious difficulties in international law. More generally, the very notion of the legal person, or at least that of the private corporation, does not fit easily into international law. It cuts through the fundamental relationship between the State and the individual national. Moreover, the traditional equivalence between natural and legal persons is today put to the test by the growth of very large, transnational enterprises, on the one hand, and the increased willingness of decision-makers (i.e. legislators or judges) to disregard legal personality by "lifting the veil", on the other. It may be exaggerated to argue that the device of the corporation, largely responsible for the growth of modern capitalism, has reached the limits of its usefulness in its present form. However, international law may have to develop its own concepts and standards in this domain, instead of continuing to rely on those of municipal law.

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A.A. FATOUROS

NATURAL RESOURCES, SOVEREIGNTY OVER

1. Introduction

Problems concerning sovereignty over natural resources have become increasingly important in recent years. This is understandable in view of the great economic stakes involved and the weight which the doctrine of → sovereignty continues to possess in legal theory. Furthermore, the progress of → decolonization has naturally had a distinct impact on these questions.

For a long time States thought of natural resources as being the object of unlimited exploitation by those possessing them. The keen interest in gaining natural resources was one of the most significant motives behind the drive to find new areas and territories during the period of colonization. The State that was successful enough to establish an administrative system to govern a colonial territory was considered to be entitled by right to make use of all the natural resources found thereon (→ Colonies and Colonial Régime).

In addition to States, national and multinational corporations also participated in this exploration and exploitation (→ Transnational Enterprises). Only rarely could the local population resist this development. The colonial powers may have often fought among themselves for control over the natural resources but they felt no obligation to grant corresponding rights to the local population. For obvious reasons, this led to deep dissatisfaction among those local leaders who understood the value of the natural resources. Thus during the 20th century many voices have been raised claiming that the sovereignty over natural resources should be returned to the local inhabitants.

2. United Nations

(a) United Nations Charter

Problems concerning sovereignty over natural resources were not discussed as such at the San Francisco Conference. Nevertheless, the → United Nations Charter includes provisions which have significance for the solution of these problems.

The second paragraph of the → preamble includes a reference to faith in fundamental → human rights and in the equal rights of nations large and small (→ States, Sovereign Equality). In the fourth preambular paragraph the peoples of the → United Nations promise to promote social progress and better standards of life in larger freedom. To achieve these ends the peoples of the United Nations also promise to employ international machinery for the promotion of the economic and social advancement of all peoples.

Art. 55 includes a provision to the effect that, with a view 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 United Nations shall promote certain causes. Among these are higher standards of living, full employment, and conditions of economic and social progress and development together with solutions of international economic, social, health, and related problems.

In Chapter XI of the Charter, entitled "Declaration regarding Non-Self-Governing Territories", Art. 73 provides that the members of the United Nations which either 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 such territories are paramount. Furthermore, these members of the United Nations accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the Charter, the well-being of the inhabitants of these territories. To this end they promise also to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses (→ Non-Self-Governing Territories; → United Nations Trusteeship System).

Considering the above-mentioned provisions, it is not surprising that the United Nations soon had to take a stand as regards the protection of those

States and territories whose natural resources were subjected to economic exploitation by foreign States and enterprises. The situation was complicated, however, by the fact that during the first years of activity of the United Nations the inhabitants of the States and territories concerned had hardly any economic resources of their own for the exploration and use of their natural resources. They were in fact dependent on the foreign investors who had not only the necessary economic resources needed for the exploration and use of these resources but also the necessary technical knowledge. One cannot, however, overestimate the impact made by the United Nations, albeit slowly, in the creation of favourable conditions for the already existing States of the Third World, followed by the territories about to gain either autonomy (→ Autonomous Territories) or independence, to become interested in and capable of claiming their respective rights over the natural resources within their territories.

(b) General Assembly Resolutions

After a debate on the exploitation of the natural resources belonging to the → developing States, the → United Nations General Assembly adopted Resolution 523(VI) on January 12, 1952. In an effort to safeguard natural resources, the General Assembly recommended commercial agreements to guarantee the products needed by the developing States and the development of their natural resources. In addition to this it was emphasized that the developing States would always possess the sovereign rights over these resources even under those circumstances where the use of these resources would have to be planned having in mind the needs of international commerce and the expansion of the world economy.

On December 21, 1952 the UN General Assembly adopted Resolution 626(VII) which dealt directly with the right of the developing States to use their natural resources. The Resolution stated that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the United Nations Charter". The permanent sovereignty over natural wealth and resources was established by Resolution 837(IX) adopted by the General Assembly on December 14, 1954. The wording was selected bearing in mind the principle of self-determination which was simultaneously the subject of discussion by the Human Rights Commission.

On December 12, 1958 the General Assembly adopted Resolution 1314(XIII) whereby a Commission on Permanent Sovereignty over Natural Resources was established. On the basis of the report of this Commission, on December 14, 1962 the General Assembly adopted Resolution 1803(XVII) concerning the permanent sovereignty of States over their natural resources. This Resolution contains a Declaration of eight principles in Art. I.

Art. I, para. 1 includes the basic principle in accordance with which "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." Para. 2 provides that the exploration, development and disposition of the natural resources, as well as the import of foreign capital needed for these purposes, should be in conformity with the rules and conditions which are necessary or desirable with regard to the authorization and restriction or prohibition of such activities.

Para. 3 lays down the rule that where the authorization has been granted, the capital imported and the earnings on this capital are to be governed by the terms of the authorization, national legislation in force and international law. An important principle is that the profits must be shared in proportions which have been freely agreed upon between the investors and the recipient State. There is to be no impairment of the recipient State's sovereignty over its natural wealth and resources.

In the fourth paragraph it is provided that → expropriation, nationalization or → requisition should be based on grounds of public utility, security or the national interest. These are said to override individual or private interests, both domestic and foreign. A most important legal principle is adhered to when it is stipulated that in case of a nationalization, expropriation or requisitions, the owner should be paid "adequate 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". In so far as the procedure

is concerned, if there is a question of compensation which gives rise to a dispute, "the national jurisdiction of the State taking such measures shall be exhausted" (→ Local Remedies, Exhaustion of). To this has been added: "However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication" (→ Arbitration; → Judicial Settlement of International Disputes).

Para. 5 stresses the importance of the respect for the sovereign equality of States in so far as the exercise of the sovereignty of peoples and nations over their natural resources is concerned. In accordance with para. 6, international cooperation for the economic development of developing countries is to further their independent national development and to be based upon respect for their sovereignty over their natural wealth and resources. This principle is to govern both public and private capital investments, exchange of goods and services, technical assistance and exchange of scientific information.

In the seventh operative paragraph it is provided that a violation of the rights of peoples and nations to sovereignty over their wealth and resources is against the spirit and principles of the UN Charter, as well as a hinderance of the development of international cooperation and of the maintenance of peace.

Foreign investment agreements which have been freely entered into by or between sovereign States are to be observed in → good faith (para. 8; → Concessions; → Contracts between States and Foreign Private Law Persons). States and international organizations are to respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the Resolution.

While Art. II welcomes the decision of the → International Law Commission to speed up the work on the → codification of the topic of → responsibility of States for consideration by the General Assembly, Art. III requests the → United Nations Secretary-General to continue the study of various aspects of permanent sovereignty over natural resources. The desire of member States to ensure the protection of their sovereign rights while encouraging international cooperation in the field of economic development has to be taken into account in this context.

The Resolution did not become binding on States, but it could be regarded as a clear expression of the common interpretation which had been followed by the developing States since the beginning of the 1960s. After this Resolution came several others which underlined the importance of sovereignty over the natural resources of a State (e.g. Resolutions 2158(XXI), 3016(XXVII) and 3171(XXVIII)).

(c) Declaration on the New International Economic Order

These developments culminated in 1974 when the General Assembly adopted the Declaration on the Establishment of the New International Economic Order (→ International Economic Order). The Declaration confirms the principle that each State has the right to its natural resources and to all economic activity. Each State also has the right to survey its natural resources effectively and to make use of these resources in accordance with its own needs. This includes the right to nationalization and to transfer property rights to its own nationals. This right is based on the full and permanent sovereignty of the State. No economic, political or other coercion is to be directed against any State in order to prevent the exercise of this right (→ Economic Coercion).

On December 10, 1974 the General Assembly adopted the → Charter of Economic Rights and Duties of States. The Charter is intended to strengthen the Declaration mentioned directly above. The problem of nationalization caused special difficulties in the adoption of the Charter, which was not unanimous despite attempts to reach a compromise.

In any case, Art. 2 of the Charter provides that each State is entitled to full and permanent sovereignty over the use of its natural resources and economic activity. On this basis each State is entitled to use its discretion as to foreign investment activity in accordance with its own legislation. No State is bound by a duty to give preferential treatment to foreign investors (→ Foreign Investments). Each State is entitled to direct and regulate the activity of multinational corporations upon its territory. Each State is also entitled to make certain that multinational enter-

prises act in conformity with the legislation of the country concerned and that they follow the economic and social policy of the country concerned (cf. → Codes of Conduct). Multinational corporations have no right to interfere with the internal affairs of the receiving State. All States are bound to cooperate with each other in order to ensure respect for those rights which are based on this provision.

As far as nationalization is concerned, Art. 2(c) confirms the right which each State has to nationalize, expropriate or requisition foreign property (→ Aliens, Property). A State which takes such action should make adequate compensation in accordance with the local laws and statutes and in the light of other relevant circumstances from the point of view of the State concerned. In those cases where the amount of compensation is disputed the issue has to be solved in accordance with the municipal legislation of the confiscating State and by its own courts. The States parties to the case are, however, entitled to agree freely among themselves on the selection of other peaceful means for the settlement of international disputes by respecting the principle of sovereign equality of States.

As to the interpretation of the problems concerning expropriation and nationalization, the developing States have so far succeeded fairly well in establishing the principle that sovereignty over natural resources found in a State's territory belongs to that State. The matter is likely to receive further attention in connection with the future progress of the new international economic order, but so far there has been only limited success in this regard due to the differences of opinion between the developed and the developing States.

3. Law of the Sea Conference

Through the above-mentioned resolutions adopted by the General Assembly, the situation concerning sovereignty over natural resources situated within a State or territory has become satisfactorily settled. But there are other problems connected with natural resources. Natural resources lying outside the → boundaries of individual States have generated great legal interest of late. This is mainly due to the series of events leading to the Third United Nations Conference on the Law of the Sea (UNCLOS III; → Conferences on the Law of the Sea). Sovereignty over natural resources has become a topic of special interest in so far as the legal status of the → sea-bed and subsoil is concerned.

The progress of technology has made the deep sea-bed economically important, especially for the future. The discoveries of mineral nodules on the deep sea-bed resulted in exploration activities by the technically well-advanced States and multinational enterprises. For a while it seemed quite probable that these activities would result in fierce competition and unregulated use of the mineral resources. The States which were not in possession of advanced technology were obviously alarmed by such prospects as it was feared that the powerful States would soon present claims for monopolies over vast deep sea-bed areas.

The Government of Malta raised this issue during the 1967 session of the General Assembly when Ambassador Arvid Pardo spoke of the "common heritage of mankind", suggesting that an international régime would have to be established for the ocean floor beyond the limits of national jurisdiction (→ Common Heritage of Mankind; → Internationalization). It was also suggested that the regulation, supervision and control of all activities on the deep sea-bed should be conducted by an international agency.

When UNCLOS III investigated problems concerning natural resources of the deep sea-bed, it soon became apparent that these questions were among the most difficult issues the Conference faced. The United Nations Convention on the Law of the Sea of December 10, 1982 (UN Doc. A/CONF.62/122 with Corr.), which has not yet entered into force, includes detailed provisions on the natural resources of the deep sea-bed. In general these provisions are based on the principle that the sovereignty of individual States does not entitle them to claim sovereign rights over such natural resources. Instead, it is suggested that the resources of the deep sea-bed are to be explored and exploited both by the proposed International Sea-Bed Authority and by public and private entities which are to operate under contract to the International Sea-Bed Authority (→ International Sea-Bed Area).

However, difficulties are likely if the Law of the Sea Convention does not enter into force in the

foreseeable future and if technologically advanced States and enterprises in the meantime decide to carry out unilateral activities on the deep sea-bed.

In view of the experience gathered during UNCLOS III, the international community of States will probably have to face comparable challenges as regards other natural resources outside the exclusive jurisdiction of States. This applies especially to the polar areas (→ Antarctica), but it may well also apply to the natural resources of outer space and, eventually, the moon (→ Celestial Bodies).

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BENGT BROMS

NEIGHBOUR STATES

A. Good-Neighbourliness in Inter-State Relations

Inter-State relations in the post-World-War-II period are based on observance of the principles of refraining from the threat or → use of force, → peaceful settlement of disputes, → non-intervention, cooperation, equal rights and → self-determination of peoples, sovereign equality of States (→ States, Sovereign Equality) and fulfilment in → good faith of the obligations assumed under international law (→ Friendly Relations Resolution of the → United Nations General Assembly of October 24, 1970).

Violation of these generally accepted principles is particularly dangerous in relations between neighbour States because geographical proximity creates conditions conducive to serious confrontation or even → armed conflict. The direct physical contact of the neighbour States' territories, competences and jurisdictions is, as history shows, a frequent source of irritation. This is particularly true in case of adjacent States belonging to antagonistic political systems. Although those neighbour States keep their common border closed (→ Boundaries), there is a vital necessity to develop normal good-neighbourly relations (see e.g. Art. 1 of the Treaty on The Basis of Relations between the two German States of 1972; → Germany, Federal Republic of, Treaties with Socialist States (1970–1974)). However, even politically similar neighbour States living in traditional friendship are, because of geographical proximity, often confronted with various transfrontier problems, especially those arising out of shared natural resources like air and water (→ Water, International Regulation of the Use of). The increasing risks resulting from the use of the environment shared by neighbour States (→ Transfrontier Pollution; → International Watercourses Pollution) require that the States concerned have due regard to each other's rights and interests protected by international law. These specific conditions of relations between neighbour States support *prima facie* the view that adjacent States have to meet, not only morally, but also under international law, more stringent obligations than States not sharing a common border.

B. Different Concepts of Good-Neighbourliness

1. Political Concept

There is evidence in inter-State practice that the principle of good-neighbourliness is not only used as a legally binding concept, but also as a mere political maxim. A striking example is the declaration of the President of the United States of America Franklin Roosevelt in his first inaugural address on March 4, 1933 that he would dedicate

the American nation "to the policy of the good neighbor – the neighbor who resolutely respects himself and, because he does so, respects the rights of others . . . ". This statement is certainly nothing else than the fixation of a moral-political aim of foreign policy.

The → International Court of Justice (ICJ), in its judgments in the two → Haya de la Torre Cases of 1950 and 1951, qualified good-neighbourliness in the context of the grant of asylum as practiced in Latin America only as an "extra-legal factor" related to courtesy (→ Comity).

On the other hand, there are references to good-neighbourliness in a large number of international treaties, especially bilateral treaties of friendship and neighbourly relations, which cannot be judged so clearly as to the question whether this principle is understood by the parties as a legal or non-legal concept. There is, however, a certain presumption that such references to good-neighbourliness in international treaties must be interpreted as legally binding stipulations, notwithstanding the fact that they are rather vague in substance.

2. Broad Legal Concept

In the → preamble of the → United Nations Charter member States promise "to practice tolerance and live together in peace with one another as good neighbours"; and in Art. 74 members agree "that their policy in respect of the [non-self-governing] territories . . . must be based on the general principle of good-neighbourliness". These references seem to reflect a world-wide consensus on good-neighbourliness as a broad legal concept of rather blurred contours. However, most recently the UN General Assembly began, on the initiative of Romania, to examine the principle of good-neighbourliness between States in order to strengthen and further develop its content, and to find ways and means of enhancing its effectiveness (see UN GA Res. 34/99 of December 14, 1979). The provisional result of this process is a General Assembly Resolution entitled "Development and strengthening of good-neighbourliness between States", adopted on December 17, 1984 (UN GA Res. 39/78). There the General Assembly reaffirms that good-neighbourliness fully conforms with the purposes of the → United Nations and shall be founded upon the strict observance of the principles of the Charter and of the Friendly Relations Resolution of 1970. This resolution of 1984 and the views expressed by States on the meaning of good-neighbourliness in the course of the Assembly's preparatory work suggest that as a final outcome of the current endeavour there will be hardly more than a universal understanding that good-neighbourliness should operate as an overall concept of international law encompassing a broad spectrum of rights and duties of States which exist already.

3. Narrow Legal Concept

The global approach of the UN General Assembly to the phenomenon of good–neighbourly relations contrasts with a narrower concept of good-neighbourliness which seems to have been conceptualized chiefly on the European Continent. This concept comprises all specific rules of conduct which neighbour States have to comply with under general international law in addition to the fundamental principles set forth in the Friendly Relations Resolution. A closer look at this classical principle of good-neighbourliness will elucidate its essence, legal nature and scope as well as the concrete obligations flowing from it.

C. Classical Principle of Good-Neighbourliness

1. Essence

In relations between neighbour States two conflicting principles of international law compete most strikingly against each other: → territorial sovereignty and → territorial integrity. Contrary to the obsolete Harmon doctrine according to which the jurisdiction of every State within its own territory is necessarily exclusive and absolute, today States generally recognize "that territorial sovereign rights in general were correlative and interdependent and were consequently subject to reciprocally operating limitations" (Handl, p. 55; → Interdependence; → Reciprocity). This fundamental acknowledgement is at the root of the principle of good-neighbourliness which provides (1) that a State must not use its territory or allow its territory to be used for acts contrary to the rights of other States, and (2) that States sharing an international watercourse or any other natural resource must consult on their equitable utiliza-

tion. Therefore, the principle of good-neighbourliness reflects the necessity that any exercise of territorial sovereignty is, a priori, subject to certain inherent limitations.

The principle of good-neighbourliness is closely related to the principle *sic utere tuo alienum non laedas* (→ Abuse of Rights) but cannot be fully identified with it, although both concepts often are not distinguished in legal writings and practice. The *sic utere tuo* concept stresses the restrictive aspect of the use of the States' territorial rights, whereas good-neighbourliness means that every State has to abstain from or to impede activities on its own territory which cause appreciable injury within the territory of a neighbour State; from this follows that the neighbour must tolerate minor interferences from outside its territory even if they result from an abuse of rights by the other State. *Sic utere tuo* also differs from good-neighbourliness in so far as the former refers only to the use of existing subjective rights, whereas the latter is to be understood as a source of certain specific rights and duties in relations between neighbour States (see *infra* 3).

The principle of good-neighbourliness establishes reciprocal rules of State conduct only with regard to certain uses of its own territory. Therefore, obligations flowing from this principle can be identified with negative → servitudes; they must be distinguished, however, from positive servitudes which permit a State to perform certain acts on the territory of another State (→ Administrative, Judicial and Legislative Activities on Foreign Territory; → Railway Stations on Foreign Territory).

2. Legal Nature and Scope

According to the predominant view in today's legal writings, good-neighbourliness is not a "general principle of law recognized by civilized nations" (Art. 38 (1)(c) of the ICJ Statute; → General Principles of Law), but a maxim rooted in → customary international law. Numerous international treaties, pronouncements of State organs, as well as decisions of national and international (arbitral) courts, explicitly or implicitly, refer to good-neighbourliness (or to the related *sic utere tuo* principle) as a concept which provides that territorial sovereignty and territorial integrity in relations between neighbour States must be balanced carefully against each other. Good-neighbourliness as a binding customary principle emerged, first of all, in the field of the uses of shared natural resources (→ Natural Resources, Sovereignty over; → International Rivers), and of transfrontier pollution. In both fields there is enough evidence that good-neighbourliness exists as a customary norm, as illustrated in the decision of the Swiss Federal Court in Solothurn v. Aargau of 1900 (Bundesgerichtsentscheidung 26 I 444), the → Donauversinkung Case, decided by the German Staatsgerichtshof in 1927, the → Trail Smelter Arbitration of 1941, the → Lac Lanoux Arbitration of 1957 and Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment of 1972 (UN Doc. A/CONF.48/27). Furthermore, two recent decisions should be noted, one taken by the Administrative Court of Strasbourg on July 27, 1983 (decision analyzed and reprinted in ZaöRV, Vol. 44 (1984) pp. 336–345) and the other by the District Court of Rotterdam on December 12, 1983 (Netherlands Yearbook of International Law, Vol. 15 (1984) p. 471), both dealing with the problem of the increasing salinity of the Rhine waters caused by the French Mines Domaniales de Potasse d'Alsace.

Not only in the past, but also today good-neighbourliness plays a most important role as an underlying principle for the development of rules governing the uses of shared natural resources and solving problems of transfrontier pollution. However, States sharing an international watercourse or concerned by long-range transfrontier pollution are not necessarily adjacent ones. This is the reason why there is a tendency in modern doctrine to enlarge the circle of neighbour States by defining "neighbour State" as including every State which belongs to a certain international watercourse system or the territory of which is exposed to transfrontier pollution in a given case.

Thus, good-neighbourliness is today a well-settled rule of international customary law, although it is a rather abstract principle. Nevertheless, it can become operative as a rule governing the interpretation of a treaty when it is expressly included (→ Interpretation in International Law). Apart from that, it is of importance to concretize this principle by showing that certain substantial rules of conduct flow from it which, for

their part, are rooted in international customary law.

3. *Concrete Obligations*

(a) Substantive obligations

Von der Heydte, followed by some other German-speaking scholars, distinguished between three different types of transfrontier interferences in relations between neighbour States which are forbidden under the principle of good-neighbourliness: political, jurisdictional and material interferences ("politische, jurisdiktionelle und materielle Immissionen").

(i) Political interferences are encroachments of a State on the internal political system of a neighbour State. A State commits an unlawful political interference if it tries to support, directly or indirectly, opposition groups within the territory of the neighbour State the aim of which is to cause riots or even overthrow the established State system. The same is true if a State carries subversive → propaganda into a neighbouring country. There are some doubts, however, whether such unlawful political interferences in relations between neighbour States require the particular protection of the principle of good-neighbourliness since they are already proscribed under the general principle of → non-intervention (→ Intervention).

(ii) Jurisdictional interferences are closely related to political interferences. They are understood as State acts or activities of private persons tolerated by the State which curtail unlawfully the → domestic jurisdiction of the neighbour State. Examples of this category of interferences include: shooting projectiles over the border; enticing of persons from the neighbour State's territory with the intention to arrest them on its own territory; permitting the crossing of the border by unauthorized persons, e.g. partisans, if the State which these persons are leaving is obliged under international law to impede such movements.

(iii) Material interferences are much more relevant in today's relations between neighbour States than the two last-mentioned interferences. They include all activities undertaken or tolerated by a State on its own territory which cause or might cause appreciable injuries on the territory of the neighbour State. The obligation to abstain from or impede such interference is the most significant manifestation of the general rule of good-neighbourliness according to which the exercise of the State's territorial sovereignty is inherently limited by the neighbour State's right to territorial integrity. It becomes operative chiefly in the fields of transfrontier pollution and international watercourses pollution. Prohibited under this particular rule of good-neighbourliness are therefore all activities which entail extraterritorial effects upon neighbour States like e.g. transfrontier intrusions by fumes, dust, gas or radiation (→ Nuclear Energy, Peaceful Uses), as well as alterations of soil and water which endanger human health and harm living resources and ecosystems, provided that these intrusions or alterations are of appreciable consequence.

(b) Procedural obligations

It has been shown that, particularly with regard to transfrontier pollution and the uses of shared natural resources, there are certain substantive rules of conduct flowing from the principle of good-neighbourliness which are rooted in today's customary international law. However, the readiness of neighbour States to come to an understanding with each other about such substantive standards is rather limited. This is the reason why there is a tendency in modern legal writings to deduce not only substantive rules, but also procedural obligations from the principle of good-neighbourliness. As a matter of fact, neighbour States nowadays are more and more inclined to commit themselves by treaty to inform and consult each other, or even to enter into negotiations in view of reaching an agreement about the substantive aspects of a given problem (→ Pactum de contrahendo, pactum de negotiando). Although there is reason to be careful in considering treaty norms as expression of customary international law, it appears that at least the obligation to inform each other, as well as to give warnings in case of emergency, is, particularly in the field of transfrontier pollution, a clearly established norm of customary international neighbourship law. As to → consultation and → negotiation, both are likely to gain acceptance as binding customary instruments for solving transfrontier environmental problems in relations between neighbour States. This conclusion indicates that the principle

of good-neighbourliness is expected to gain more and more importance as a customary norm requiring neighbour States to take positive procedural steps in order to settle controversies by means of confidential cooperation.

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NON-RECOGNITION

1. Notion

Because of the lack of any procedure by which the existence of a new → State can be settled with binding effect for all members of the international community, the institution of → recognition has become of great importance in international law. Where States withhold recognition the position of the new entity remains in doubt, although it may well enjoy a certain position in international law (see → De facto Régime). Recognition is also used to clarify the situation after a revolutionary change of government or where there are competing governments. Again, non-recognition of a revolutionary government may cast certain doubts on its position as the representative of the State concerned. Non-recognition of territorial and

other claims or situations is not infrequent, especially where the lawfulness of a territorial change is in dispute. In addition, the term "de-recognition" was used to describe the situation after the United States had recognized the Government of the People's Republic of China while still keeping some relations with → Taiwan.

2. *Reasons for Non-Recognition*

Non-recognition may be a → sanction for unlawfulness, it may be an indication that some element necessary for arriving at a legal result is lacking, or it may show that a State claims a certain discretion for political reasons not to accept another State or government fully and or on an equal footing. Territorial changes brought about by the → use of force are generally seen to be unlawful and will in most cases not be recognized in present-day international law. Entities claiming to be a State but which lack independence and may amount to "puppet-States" are also frequently not recognized. Governments set up by foreign → intervention may likewise be refused recognition.

3. *Obligations of Non-Recognition*

The International Court of Justice (ICJ) has stated in the advisory opinion of 1971 concerning → Namibia that a "duty of non-recognition" exists as to the administration of the territory by South Africa: "The member States of the United Nations are . . . under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia" (ICJ Reports 1971, p. 3, at p. 54; → South West Africa/Namibia (Advisory Opinions and Judgments)). The United Nations Security Council and the United Nations General Assembly have in several cases called upon States not to recognize newly formed entities as States (Rhodesia, UN SC Res. 216 (1965); Transkei, UN SC Res. 402 (1976); Northern Cyprus, UN SC Res. 541 (1983)). The reason was either that independence was gained by a racist minority régime (Rhodesia) or the régime was seen as established by outside intervention. In all cases the decisions by the Security Council were complied with almost without exception. Whether the resolutions should be seen as binding under Art. 25 of the United Nations Charter depends on whether this consequence is limited to decisions under Chapter VII. According to a draft article on the consequences of an → international crime discussed by the International Law Commission in the context of its work on → responsibility of States, such a crime entails an obligation for every other State "a) not to recognize as legal the situation created by such crime" (YILC (1984 II, Part 2) p. 101). Especially for territorial acquisitions resulting from the threat or use of force an obligation not to recognize their validity is well established as a general principle in international law and United Nations practice (→ Stimson Doctrine; → Nullity in International Law).

4. *Legal Consequences*

The legal consequences of non-recognition may be quite different depending on the object and the reasons for non-recognition. State practice shows that non-recognized entities may nevertheless enjoy a certain position in international law (→ De facto Régime). A non-recognized government which is the effective government of a recognized State has the right to represent the State in international relations. Even States which do not recognize this government have to accept this consequence in the absence of any other competing government. The non-recognition of a government will therefore frequently be identical to the refusal to establish diplomatic relations. The non-recognition of territorial changes will have the consequence that States do not accept the applicability of treaties to the territory in question and will not send official representatives there.

In its advisory opinion on Namibia of 1971 the ICJ discussed in detail the legal consequences to be drawn from non-recognition where there is a duty in that respect. The Court stated that member States are under an obligation to abstain from entering into treaty relations with South Africa concerning Namibia and from intergovernmental cooperation except for humanitarian treaties. They must abstain from sending diplomatic or → special missions and consular agents to Namibia and are under an obligation to withdraw any agents already there (ICJ Reports 1971, p. 3, at pp. 55–56). These consequences of non-recognition may well be extended to other cases of mandatory non-recognition. They would also seem to provide a rather full description of the normal consequences of non-recognition. The

Court remarked in that context that physical control of a territory, and not → sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States (ibid., p. 54). This is true irrespective of non-recognition and means that States may claim compensation even in cases of non-recognition.

5. Legal Effects in Domestic Law

Courts in several countries have made the application of laws and other acts of State dependent on recognition (see → Recognition). Especially in the United States and Great Britain courts have frequently refused the application of the laws and acts of non-recognized States or governments. However, some development has taken place and it would seem that this rule is no longer accepted as a rigid principle. The ICJ has well shown the danger created by any rigid rule of that sort. It has pointed out that non-recognition of South Africa's administration of the territory of Namibia should not result in depriving the people of Namibia of any advantages derived from international cooperation. It continued:

> "In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory" (ICJ Reports 1971, p. 3, at p. 56).

It seems that the Court has described here what should be accepted as a general limit to any policy of non-recognition. No State should cause additional hardship to the population on the basis of non-recognition by not treating as valid legal consequences of the normal administration of a territory. This appears to be the modern tendency in all systems of conflicts of law (→ Recognition of Foreign Legislative and Administrative Acts).

6. Evaluation

As the reverse side of recognition, non-recognition is due to the imperfect nature of international law. Where it is the consequence of unlawful acts by a State it can be an important sanction in international law. The non-recognition of entities claiming to be States mainly raises the question of their position in international law. Non-recognition of effective governments may easily amount to unlawful intervention.

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NON-SELF-GOVERNING TERRITORIES

1. Sources; Historical Background

Non-self-governing territories are dealt with in Chapter XI of the → United Nations Charter, Art. 73 being the primary source of applicable legal rules. All territories which have not yet attained full self-government are included. This status entails specific obligations for the member States of the → United Nations who are charged with administering them.

The concepts concerning this internationally recognized status, as well as the international treatment of the problem of colonial territories, can be traced to proposals made in 1942 by the United States Secretary of State Cordell Hull and by President F.D. Roosevelt. Their proposal for the establishment of the United Nations also included the idea of UN responsibility for the future of colonial territories, so that those dependent peoples desiring to become independent could eventually attain independent status (→ Colonies and Colonial Régime). Although

this idea was discussed at the Cairo, → Tehran and → Yalta Conferences, no agreement was reached among the Allied Powers, primarily because of reservations of British Prime Minister Winston Churchill. It was not until the San Francisco Conference (April to June 1945) that a solution was found for this problem based on a compromise proposed by the British delegation. This formula led to Chapter XI of the UN Charter, entitled Declaration Regarding the Non-Self-Governing Territories, which can be considered a milestone in the attempt to create a new, universal legal order free of racial, ethnic or cultural discrimination.

2. *Objectives*

Chapter XI expresses the responsibility of the → international legal community with respect to dependent territories and stipulates certain rules and obligations for member States of the United Nations that administer such territories. Member States with dependent territories under their jurisdiction "recognize the principle that the interests of the inhabitants of these territories are paramount" (Art. 73). They accept "as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories". These obligations, summarized here, are to protect them from abuse, to treat them fairly, and to develop them, especially with regard to their political, economic, social, scientific, and educational affairs. The political aspirations of the peoples in such territories must be taken into consideration and the free development of their own political institutions should be furthered. Finally, self-government should be developed (Art. 73(a)-(d)). Statistical and other technical information about economic, social and educational matters in the administered territories is to be transmitted regularly to the → United Nations Secretary-General, "subject to such limitations as security and constitutional considerations may require" (Art. 73(e)). The administering States are to respect the principle of good neighbourly relations among themselves, and to respect the interests and the well-being of the other nations of the world (Art. 74).

In contrast to the very brief provisions of Art. 23 in the Covenant of the → League of Nations that only obliged to guarantee "just treatment of the native inhabitants of territories under their control", Chapter XI of the UN Charter delineates detailed objectives in the administration of dependent territories which have the overcoming of the status of non-self-government as their ultimate aim. On the other hand, in contrast to the more elaborate provisions envisaged by the → United Nations Trusteeship System in Arts. 75 to 91 (Chapters XII and XIII), the provisions concerning non-self-governing territories do not stipulate clearly the territories or peoples to which they are applicable, by which criteria it is to be determined whether a people has attained the status of self-government, and whether the competence to decide such questions lies within the organs of the United Nations or with the administering State.

3. *Evolution of Legal Rules*

(a) *Scope of application*

As early as 1946 some UN members administering dependent territories had already begun to shun any form of control by UN organs, whether with regard to duties of transmitting information to the UN Secretary-General, or with regard to more general matters of administration policy. Instead they insisted upon an interpretation of Chapter XI that gave them sole competence in determining non-self-governing status, the applicability of Charter provisions to them and their obligation concerning the transmission of information. The arguments presented to justify such interpretations referred to differences between Charter provisions for non-self-governing territories, on the one hand, and for trusteeship territories on the other and, in addition, to the prohibition of intervention by the United Nations in domestic affairs as expressed in Art. 2(7) of the Charter (→ Domestic Jurisdiction). This interpretation threatened to make Charter obligations meaningless. In response, the → United Nations General Assembly assumed the responsibility of guaranteeing the effectiveness of the regulations provided in Arts. 73 and 74, and of rejecting the powers the administering States had arrogated to themselves by declaring that the task of determining the scope of application of Chapter XI falls "within the responsibility of the General Assembly" (UN GA Res. 334 (IV); as well Res. 748 (XIII) preambular para. 6). In practice, the

General Assembly tried to ensure the efficacy of Charter provisions and their implementation in all territories by means of norm-defining resolutions as well as case-to-case recommendations. This claim to a prerogative in interpretation by the General Assembly has especially been asserted with regard to the obligation to develop and to grant self-government. The main foundation for this subject was laid down in the UN List of Factors in 1953 (Res. 742 (VIII)) and the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 (Res. 1514 (XV)), which was supplemented by Res. 1541 (XV) in 1960 and Res. 2625 (XXV) in 1970 (→ Friendly Relations Resolution).

Only a few positive criteria for determining the meaning of "non-self-governing territory" have been established by the General Assembly's norm-defining and norm-interpreting practice. These criteria can be summed up in the so-called "salt water theory". According to this theory, a territory is considered to be non-self-governing, if it is geographically separate from the administering, metropolitan State and if relations between territory and State are those of colonies with colonial governments. In addition, prima facie criteria include ethnic, cultural, or racial differences between them. Other elements of an administrative, political, juridical, economic or historical nature may also come to bear in the determination of whether the territory has colonial status (Res. 1541 (XV), Annex). Ethnic → enclaves that are integral parts of sovereign States do not fall within the scope of application of Chapter XI. Encompassed in this broad concept of non-self-governing territories, however, are all kinds of international and constitutional dependencies, colonies as well as → protectorates and territories under UN trusteeship.

The main negative criterion for a non-self-governing territory is that its population has not yet exercised the right to → self-determination. The right to self-determination stated in Art. 1 of the Charter has been interpreted by the General Assembly primarily as a procedural right. The colonial peoples must be able to "freely determine their political status and freely pursue their economic, social and cultural development" (Res. 1514 (XV) and Res. 2625 (XXV)) in exercising this right. This choice between different political statuses should be exercised in a democratic way.

In practice, the General Assembly recognizes three main forms of self-determination: emergence as a sovereign independent State; free association with an independent State; and integration within an independent State (Res. 1514 (XV) and Res. 1541 (XV)). In addition, other means of implementing the right to self-determination are possible, when freely chosen by the people (Res. 2625 (XXV) and Res. 742 (VIII), Annex, part 2).

Independent statehood with a full measure of → sovereignty is the most common and normal mode of self-government. To attain this form of self-government it is necessary "to transfer all powers to the people of those territories without any conditions or reservations" (Res. 1514 (XV), para. 5). While the General Assembly generally does not insist on democratic elections or plebiscites in the transition to independent statehood, it is presumed that the mode of attaining self-government by free association with another State "should be the result of free and voluntary choice . . . expressed through informed and democratic processes". The people of a territory so associated "should have the right to determine its internal constitution without outside interference", and to retain "the freedom to modify the status of the territory" i.e., to attain independent statehood later (Res. 1541 (XV), principle 7; see also Res. 742 (VIII) Appendix, part 2). The concept of association here implies, above all, the status of → autonomous territories or so-called commonwealth territories with partial independence with regard to constitutional, administrative or legal affairs.

The most sensitive kind of self-government appears to be the integration within another independent State. This presupposes that the people of the territory act "with full knowledge of the change in their status . . . expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage" (Res. 1541 (XV), principle IX). The United Nations can, if necessary, supervise the process of → decolonization. Integration respecting the right to self-determination of a people requires, as its constitutional prerequisite, that complete equality exist between the people of the former colony and the independent country with which it is now

integrated (see Res. 1541 (XV)). This concept of integration comprises full integration as well as federal forms of integration (→ Federalism in the International Community; → Federal States).

(b) Transmission of information

In its definition of factors and criteria that are applicable in the areas named in Chapter XI of the Charter, the General Assembly also determined the areas in which the administrating States were to be responsible for transmitting information (Res. 742 (VIII) and Res. 1541 (XV)). Although Art. 73(e) refers only to a responsibility to transmit technical information, the General Assembly began as early as its second session to develop a standard form of reporting which included voluntary questions of a political nature (Res. 144(II); Res. 551 (VI); Res. 930 (X)). As a reaction to the resistance by several member nations, the General Assembly emphasized the fact that its responsibility also involved political questions, and that, despite the voluntary nature of relaying political information, it demanded of the administering States the "utmost co-operation in this regard" (Res. 848 (IX)). Corresponding to this standpoint, the General Assembly later empowered its Fourth Committee and in 1961 its Committee on Information, to gather and examine information of both a political as well as of a technical nature (Res. 1700 (XVI)). With the creation of the Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (by Res. 1654 (XVI)), the General Assembly tried to become independent from those member nations unwilling to transmit information. This special committee, better known as the Committee of Twenty-Four, assumed the functions of the Committee on Information in 1963 (Res. 1970 (XVIII)). It was empowered not only to gather information, but also to hear petitioners and to make specific recommendations without restrictions or concern for uncooperative administrating States. The practice of the Committee of Twenty-Four, whose membership is not based upon parity between administering and non-administering States, represents an effective system of international supervision comparable to the UN Trusteeship System.

(c) Other obligations

Other obligations dealt with in Arts. 73 and 74, in particular to promote the economic, social, cultural and political development of the territories, have received increasing attention only in connection with the goals of self-government and self-determination. Thus, the General Assembly did not accept the degree of maturity or development as a criterion or prerequisite for decolonization: "Inadequacy of political, economic, social, and educational preparedness should never serve as a pretext for delaying independence" (Res. 1514 (XV), para. 3). Even the duty to promote international peace (Art. 73(C)) and the principle of good neighbourly relations (Art. 74) were emphasized by the General Assembly only in view of the decolonization process. Hence, the General Assembly condemned armed and repressive measures on the part of the colonial powers as a "serious threat to international peace and security" (Res. 1807 (XVII) and Res. 1913 (XVIII)). The → use of force to deprive a people of its right to self-determination and independence constitutes a violation of international law. People acting against and resisting such forcible action are entitled to seek and to receive support by other UN member States (Res. 2625 (XXV), Annex).

4. Implementation; Current Situation

Since 1961 the Committee of Twenty-Four has developed into the most important apparatus in carrying out the goal of self-determination; it operates by means of making recommendations, accepting petitions, and supervising → plebiscites and elections in non-self-governing territories. In the 1950s the United Nations tended to be more liberal and more considerate of individual cases in judging whether agreed upon constitutional formulas satisfied self-determination criteria than was the case after 1961. This can be illustrated by the example of the recognition of the association of Puerto Rico with the United States in 1953 (Res. 748 (VIII); see also Clark, p. 46). Today, the General Assembly accepts independence as the only form of self-government, unless a given people has consciously chosen a status other than independent statehood, despite the fact that independence was truly a clear and attainable alternative. Moreover, the General Assembly

does not accept the artificial → dismemberment or → secession of a territory in the process of exercising self-determination. In general, the General Assembly assumes that the process of decolonization takes place within boundaries drawn by the administering powers (Res. 3279 (XXII)), in order to avoid the "bantustanization" of the territory. In principle, small territories are just as entitled to self-government by independent statehood as are large ones. However, independence without democratic legitimation does not correspond to the right to self-determination (→ Rhodesia/Zimbabwe).

In the meantime, the process of decolonization has practically come to an end and the majority of colonial peoples have gained independence or have freed themselves from foreign domination by other means (see the articles on Decolonization). However, grave problems remain. There are still conflicts with regard to territories in the Caribbean and the Pacific administrated by France, the United Kingdom and the United States (see → France: Overseas and Dependent Territories; → United Kingdom of Great Britain and Northern Ireland: Dependent Territories; → United States: Dependent Territories). This is shown by the conflicts concerning the → Falkland Islands and the French Overseas Territory of New Caledonia. In Europe, the problem of → Gibraltar remains unsolved. Another – although unique – case is → Namibia.

5. Evaluation

It was the UN Charter that, for the first time, gave non-self-governing territories international status. This was the first step on the path to their emancipation from foreign rule. The deeper motives behind the acceptance, even by the colonial powers, of the Declaration of Chapter XI in 1945 were the convulsions experienced by the colonial system during World War II and the increasing self-confidence of colonial peoples who had been involved in the war with their own troops. Moreover, additional reasons might be traced back to the renaissance of → natural law theory and the criticism of positivistic international law doctrine that began during World War II. In this positivistic doctrine, the peoples concerned had been excluded from the universally valid international legal order, by reason of their being non-Christian and "non-civilized" (→ History of the Law of Nations).

Meanwhile, the programmatic Declaration of Chapter XI can be considered largely a success. Seventy out of the former, nearly eighty, non-self-governing territories have obtained independent statehood, only a few cases resulted in integration (i.e. Mariana Islands, Niue) or association with another independent State (i.e. West Irian, Ifni) (see UN Juridical Yearbook 1980, p. 183). Today only a few countries remain under foreign rule of a colonial kind. The involvement of the General Assembly has been an important factor in this decolonization process.

Controversy remains as to whether the norm-interpretive practice of the General Assembly has binding force in relation to the territories and peoples concerned, since, in general, resolutions of the General Assembly have merely the force of recommendations rather than a binding character. Furthermore, Art. 73 does not transfer to the United Nations any powers of territorial disposition with respect to the territories concerned. However, if this UN practice had no binding interpretative weight, then the provisions of Chapter XI could be threatened with ineffectiveness. In two Advisory Opinions, the → International Court of Justice (ICJ) deemed the norm-interpretative practice of the General Assembly in this area to be a worthy enrichment of the *corpus juris gentium*, which the Court "if it is faithfully to discharge its functions, may not ignore" (ICJ Reports 1971, p. 31; ICJ Reports 1975, p. 32). The Court's treatment of the aforementioned resolutions defining what is a non-self-governing territory have hence served as an element in the development of international law with regard to these territories.

Another matter of controversy is whether or not the General Assembly is authorized to deal with a territory that has been accepted as having exercised its right to self-determination and is no longer on the list of non-self-governing territories. In any case, without express authorization by the General Assembly, no UN committee is competent to deal with the status of such territory or to hear representatives of such peoples (see UN Juridical Yearbook 1981, p. 167). The General Assembly should have the competence to deal repeatedly with a territory which is no longer on the list, if the independent State to which the

territory is integrated or associated unilaterally changes the formerly accepted constitutional status of the territory.

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JOSEF BRINK

ORDRE PUBLIC (PUBLIC ORDER)

1. Notion

Ordre public (public order) denotes the basic values of domestic law. It is a necessary corollary of → sovereignty. Under a written or unwritten special rule of the forum State's rules of → private international law or on conflict of laws in penal or administrative matters, the courts of the forum State will exclude the application of a foreign law which conflicts with such values in a case before them; this will occur in spite of the fact that, otherwise, under the forum State's conflict of law rules, the legal relation concerned should be governed by this foreign law (→ Recognition of Foreign Legislative and Administrative Acts). Public international law recognizes this rule as indispensable in view of the impossibility of foreseeing the exact content of a law declared applicable under the forum State's conflict of law rules. A foreign law, therefore, will be applied only under the condition (*Vorbehaltsklausel*) that in the case concerned the application of this law does not endanger these basic values.

Under these circumstances, non-application of a foreign rule may lead either to the denial of a right (e.g. to a polygamous marriage) or to the ignoring of a prohibition (e.g. of marrying a divorcee).

The notion of *ordre public* must be distinguished from *ordre public interne* and *ordre public international*, terms used in countries belonging to the family of the French Code civil. Any rule of domestic law which may not be set aside by the will of the parties to a contract forms part of the *ordre public interne*. This notion thus has nothing to do with conflict of laws, whereas the rules of *ordre public international* form part of the conflict rules. This term is used for rules of domestic law which are applicable in an absolute manner. They will thus prevail over conflicting rules of a foreign law, which, on principle, should govern the legal relation concerned under the forum State's conflict of laws rules.

This notion, in turn, has to be distinguished from → international public order. G. Jaenicke and this Encyclopedia in general use this term to designate rules belonging to an *ordre public* pursuant to public international law, which would prevent the forum from applying rules of a foreign law, where these rules are in conflict with substantive rules of public international law.

2. Current Legal Situation

Art. 30 of the Introductory Law to the German Civil Code, for example, excludes the application of a foreign law where such application would be "contrary to *bonos mores* or to the purposes of a

German law". This rule is interpreted restrictively as protecting only the basic values of German law. The law of the German Democratic Republic is not considered as foreign law in the Federal Republic of Germany; therefore, in relation to that law, *ordre public* rules are applied only by analogy and *mutatis mutandis* or as far as this is provided in special laws. The Bundesverfassungsgericht (Federal Constitutional Court) held, in the case of a Spanish divorcee, that a foreign law, applicable under German conflict of law rules, should not be applied if this would lead to results incompatible with rights guaranteed by the Basic Law of the Federal Republic of Germany (Decision of May 4, 1971, BVerfGE 31, 58). The Court thus placed the internal harmony of German law above the aim of the German conflict of law rules tending to establish a harmony of decisions on the international level.

German (Federal Republic) and other courts have recourse to *ordre public* rules only where the case concerned has close contact with domestic law which goes beyond that establishing the jurisdiction of the forum. The nature and extent of the contact required stands in inverse relation to the unacceptability of the result to be excluded.

3. *Special Legal Problems*

International agreements, such as the treaty on the → European Economic Community (EEC), establish general rules, subject to exceptions, which may be justified on account of *ordre public*. Parties to such an agreement may have different conceptions of *ordre public*. As a result, the material content of the obligations assumed under the agreement may vary from State to State. For these reasons the → Court of Justice of the European Communities tends to develop a uniform concept of *ordre public* for the EEC member States ("European *ordre public*").

International conventions tend to harmonize the conflict of law rules of several States. Where such conventions render a foreign law applicable, the rules of the convention shall be interpreted as containing an unwritten reservation that such application shall not be contrary to *ordre public*. The more recent of the → Hague Conventions on Private International Law restrict recourse to *ordre public* to cases where application of the law declared applicable by the Convention would be clearly incompatible with the *ordre public* of the forum.

Where a "close contact" with the forum State is required, some courts tend to admit the existence of such contacts only where application of the foreign law would be against the interests of nationals rather than against basic values of the forum State. However, in view of the non-discrimination rules of the EEC, at least the interests of nationals of other EEC member States should be protected in the same way as those of the forum State's nationals. The clauses on equality of treatment with nationals figuring in commercial treaties should probably produce the same result.

Application of a foreign law will be excluded where the result would be contrary to rules of public international law.

Judges from countries following the Code civil are more inclined to have recourse to *ordre public* than Anglo-American judges, who hesitate to mount this "unruly horse". In order to reduce the necessity to act in this way, Anglo-American practice tends to establish special rules exempting certain foreign rules generally considered as unacceptable from the operation of a more general rule which would dictate their application. Thus some courts have avoided recourse to *ordre public* in cases of → expropriations and nationalizations by resort to an alleged rule that the courts of the forum will not apply foreign public law (see also → International Law and Municipal Law: Conflicts and Their Review by Third States).

The basic values protected by recourse to *ordre public* may be economic as well as ethical values. A *tu quoque* plea will not prevent recourse to *ordre public*; thus, for example, the courts of a State having established a currency control law may refuse to apply the currency control law of a foreign State. There exists a tendency to conclude treaties mutually waiving recourse to *ordre public* in such matters (e.g. Art. VIII, Section 2(b) of the Articles of Agreement of the → International Monetary Fund (UNTS, Vol. 2, p. 40); → Waiver).

Where a rule of a foreign law, applicable under the conflict of law rules of the forum, will not be applied because it is contrary to *ordre public*, the resulting gap is to be filled either by reference to other rules of this foreign law or to the relevant substantive rules of the law of the forum.

Where the courts of State A, under their conflict of law rules, apply the law of State B, they should apply it in the same manner as judges in B. Thus, should the law of B, in turn, refer to the law of State C, the judges in A should refuse to apply this latter law if it were contrary to the *ordre public* of State B.

Recourse to *ordre public* arguments is redundant, and even misleading, where the foreign rule concerned is already inapplicable for other reasons, as in the case of a foreign State claiming that its nationalization law should apply to real estate located in the forum State.

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IGNAZ SEIDL-HOHENVELDERN

PAGANI CASE

The Pagani Case concerns the applicability of provisions of a bilateral treaty to nationals of a third State and the relation between an international treaty and national law.

Pagani, an Italian citizen, ran a workshop with due authorization in Belgium. According to Art. 3, para. 3 of the Convention establishing an economic union between Belgium and Grand Duchy of Luxembourg of July 25, 1921 (→ Belgium-Luxembourg Economic Union) such an authorization of one contracting party should be valid in the other. Having performed work in Luxembourg in 1951, Pagani was prosecuted for contravention of a Luxembourg regulation of August 1934 requiring special permission for all commercial and industrial activities in the Grand Duchy. The Cour supérieure de Justice of Luxembourg decided in an action of appeal of March 7, 1953 and in a procedure of *annulement* of July 14, 1954 that Pagani had not violated Luxembourg law by working without the permission required by the said regulation. The Court established that the wording of Art. 3, para. 3 of the Convention gives a right to work within the jurisdiction of either of the contracting parties to all merchants and manufacturers having the due authorization of Belgium or Luxembourg. As this provision is not expressly limited to Belgian or Luxembourg nationals, citizens of third States enjoy the same rights. According to the court the provision of the Convention so construed could not be overruled by later national regulation. The court founded its judgment on the "principle, that international law prevails over national law" (→ International Law and Municipal Law).

International law allows the application of bilateral treaty provisions to other subjects of international law or nationals of a third State. However, as a general rule it establishes that such provisions must be clear, at least where a third State is favoured. The Convention establishing the economic union between Belgium and Luxembourg does not mention that the contracting parties' obligation under Art. 3, para. 3 to recognize each other's authorizations shall favour nationals of a third State, whereas other obligations summed up in the same article are expressly restricted in their application to nationals of the contracting parties. In the present cases the Cour Suprême concluded from the silence of the provision in question that it also applies to nationals of third States. Whether persons are favoured by the provision is not determined by their nationality, but only by their possession of a valid authorization of one of the contracting parties. According to this interpretation the Convention does not aim to favour the nationals of either contracting party, but to attach general validity to measures taken by an individual State within the economic union.

The main importance of the cases under discussion may be found in the judgment, that the principle *lex posterior derogat legi priori* does not govern the relation between international and national law, because the provisions of each of these legal orders are not on the same level. Within a State, agreements under international law may be applicable through a transforming act (cf. → Self-Executing Treaty Provisions), but the meaning of the provision transformed is not established by this act. Such meaning must be found in the concurring will of the contracting parties, which is insulated from unilateral change by one of them. According to the Court, law created by international treaties and incorporated in the national legal order always prevails over national legislation.

It is questionable if this can be called a general principle, as the court seems to suppose. Many States, for example the United States, Great Britain and most of the Commonwealth countries (→ British Commonwealth), the Soviet Union, the Federal Republic of Germany, Belgium and Austria, do not give international law, at least if based on international treaties, primacy over provisions originating in the internal legal order. The constitution of Luxembourg does not contain this rule either. However, several European constitutions, dating from or revised at the time when the Pagani cases were decided, have recognized a general pre-eminence of international law over national legislation or even constitutional law, for example Art. 28 of the French Constitution of 1946 or Arts. 66, 63, para. 1, and 60, para. 3 of the Constitution of the Netherlands amended in 1953. The judgments of the Cour supérieure in the Pagani cases should be seen in the context of a development of a conception favouring international law. This conception signifies an important step towards subordination of national legislation under international law. On this basis, the idea of a supranational order could be developed which was realized in the → European Communities and became the cornerstone of European political integration (→ Van Gend en Loos Case; → Costa v. ENEL).

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PAUL CLERGET v. BANQUE COMMERCIALE POUR L'EUROPE DU NORD ET BANQUE DU COMMERCE EXTERIEUR DU VIETNAM

In the Clerget case the French courts had to rule upon the status of an unrecognized State and delimit the scope of → State immunity with respect to measures of execution. Clerget, a former engineer in the service of the Democratic Republic of (North) Vietnam, had brought an

action against → Vietnam for the payment of salary still due and damages. The Paris Cour d'appel (Court of Appeal) had held that the conclusion of the contract of employment invoked by the plaintiff was not an act *jure imperii* and therefore not covered by immunity from jurisdiction; thereupon the Labour Relations Court of Paris gave judgment in default against Vietnam in May 1965. In enforcement of this judgment, the plaintiff obtained a *saisie-arrêt* (provisional attachment) of the funds held by the Banque commerciale pour l'Europe du Nord for Vietnam or its commercial representation in France. When the plaintiff sought judicial validation of the attachment, the Banque commerciale pour l'Europe du Nord and the Banque du commerce extérieur du Vietnam intervened to oppose the claim. The latter bank was an emanation of the Democratic Republic of Vietnam and held an account at the Banque commerciale pour l'Europe du Nord. Vietnam was not represented in court. Rejecting the plaintiff's argument that the Democratic Republic of Vietnam was not recognized by the French Government, the Tribunal de grande instance de la Seine held that (North) Vietnam was a State enjoying immunity from execution and ordered the suspension of the measures of execution, i.e. the unblocking of the foreign funds (Clunet, Vol. 95 (1968) p. 55). In holding that (North) Vietnam possessed the attributes of a → State, the Court pointed out that the Geneva Accord of 1954 on Vietnam had established two zones, that a delegate of the French Government was accredited to the authorities of the Democratic Republic of Vietnam and that the French Government had agreed to receive a commercial delegation of the Democratic Republic which had later obtained the status of a general representation and certain diplomatic privileges (→ Diplomatic Agents and Missions, Privileges and Immunities). The judgment of the Cour d'appel de Paris of June 7, 1969 (Clunet, Vol. 96 (1969) p. 894) followed the same view. The Cour d'appel held that, as the Democratic Republic of Vietnam was a State, → recognition could only be declaratory of this fact and that immunity from jurisdiction or execution depended on the independence of a State and not on its recognition by the government of the forum. However, the Court went on to establish that in the light of the actual facts, this concept did not collide with the constitutional authority of the domestic Government in foreign affairs. It was held that immunity from execution was distinct from jurisdictional immunity and that the funds of the Democratic Republic could not be seized in execution of a judgment based on an obligation to pay arising from acts *jure gestionis*. By its judgment of November 2, 1971, the Cour de cassation (Court of Cassation) confirmed the decision of the court below (Clunet, Vol. 99 (1972) p. 267). While the Cour d'appel seemed to acknowledge the absolute character of sovereign immunity from execution, the reasoning by the Cour de cassation that the origin and destination of the funds seized were not clearly determined points to a more restrictive view.

The judgments in the Clerget case corroborate the idea that sovereign immunity from execution is not merely the prolongation of immunity from jurisdiction. It is suggested that the decision of the Cour de cassation leaves it open to the plaintiff to argue and to prove that the property at issue does not serve specific State functions, but is for commercial or other non-sovereign purposes and can therefore be seized in execution of an enforceable judgment. Following this interpretation, the Bundesverfassungsgericht (Federal Constitutional Court) of the Federal Republic of Germany has referred to the decision of the Cour de cassation in support of the restrictive view in the → Immunity Case of 1977 (see also BVerfGE 64, 1). The restrictive approach has also been adopted by the Cour de cassation in other cases, where the Court has held that immunity from execution depends on the nature of the objects seized, i.e. on their attribution to sovereign functions. Some uncertainties raised by the jurisprudence of the lower courts (e.g. Tribunal de grande instance de Paris, Procureur de la République v. Société LIAMCO, Clunet, Vol. 106 (1979) p. 857, with annotation by B. Oppetit) have been removed by a recent decision of the Cour de cassation (République islamique d'Iran, O.I.A.E.T.I. et O.E.A.I. v. Sociétés Eurodif et Sofidif, Clunet, Vol. 111 (1984) p. 598, with annotation by B. Oppetit). There, the Court stated that the principle of immunity from execution is subject to exceptions, notably when the property concerned was destined for the commercial activity upon which the claim is

based (see also Cour de cassation, S.O.N.A.-T.R.A.C.H. v. Migeon, Clunet, Vol. 113 (1986) p. 170, with annotation by B. Oppetit).

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PLEDGE OF STATE TERRITORY AND PROPERTY

1. Notion

A pledge is a legal arrangement for transferring possession of goods from one person (pledgor) to another (pledgee) as security for the performance by the former of some obligation. Title to the property remains in the pledgor. The pledgee may not sell the pledged property until the debt or performance is due and denied. On performance possession is to be restored to the pledgor.

2. Historical Evolution of Legal Rules

The application of this essentially private law device in → international law stems from feudal notions prevailing in Europe during the Middle Ages. Under feudal law, the ruler was put in the position of a private owner, and Roman private law analogies were used to describe his power of disposition over State territory. He could therefore pledge territory or State property as guarantee for his performance of an international obligation (→ International Obligations, Means to Secure Performance), such as a public debt or a dowry. Thus, when Robert, Duke of Normandy, needed to finance his participation in the first crusade, he mortgaged his Duchy to his brother William and transferred possession to him.

Taking possession of the pledged territory often meant pacific occupation (→ Occupation, Pacific). In principle, the pledgee State was entitled to full use of and control over the pledged territory or property. All profits accrued to the pledgee State, resulting in a complete or partial exemption from payment of interest on the part of the pledgor. The pledgee State could not, however, fly its own flag (→ Flags of Vessels, → Sovereignty).

Territory was sometimes pledged out of need for military protection. In 1585 England agreed to protect the United Netherlands against the King of Spain, and received as security from the Netherlands the pledge of two towns. This arrangement came to an end in 1616 after a final financial settlement. Likewise, when Genoa could not control insurgents on Corsica in 1768, she agreed to French occupation of a number of Corsican towns and ports as security for costs incurred (Martens R2, Vol. 1, p. 591).

The occasion of princely marriages also gave rise to pledges. In the 15th century the Shetland Islands were pledged by King Christian I of Denmark, Norway and Sweden to King James III of Scotland in lieu of a dowry when his daughter married the Scottish crown prince. The dowry was never paid and the pledge was converted into complete sovereign title.

Sometimes gradual changes occurred in the ties between the original ruler and the pledged territory, resulting eventually in complete transfer of → territorial sovereignty, without any explicit cession or renunciation (→ Territory, Acquisition). This happened in the case of Nijmegen, which was pledged in 1248 to secure a loan granted by the Count of Guelder to Count William of Holland, rival "Emperor" of the Holy Roman Empire (1247–1256). The status of the town underwent a gradual change and it became an integral part of the Netherlands. Legal opinion at that time, however, held that the underlying ground was William's failure to reimburse the loan.

Uncertainties of this kind could be prevented by stipulating fixed dates for repayment. In the 1803 Treaty of Malmö (Martens R2, Vol. 3, p. 489) Sweden pledged the town of Wismar to the

Grand-Duchy of Mecklenburg-Schwerin as security for a loan. The pledge was given for a period of a hundred years. At the time of expiry, an agreement was concluded giving Mecklenburg full sovereignty over Wismar, while Sweden's debt was annulled (Martens NRG2, Vol. 31, p. 574; → State Debts).

3. Current Legal Situation

The pledging of State territory finds no application in present day practice. With the demise of absolutism and the appearance of popular and parliamentary sovereignty, the idea of the monarch enjoying personal power of disposition over State territory has likewise disappeared. Private law notions with regard to territory have been replaced by the doctrine of sovereignty. The ruler is now viewed as agent, and territory as belonging to the State.

4. Evaluation

The pledging of State territory and property was basically intended to provide security for debts. On this basis pledges can be distinguished from leases (→ Territory, Lease).

Throughout the existence of a pledge, territorial sovereignty remained with the pledgor State. The pledgee State obtained possession but enjoyed only rights *in territorio alieno* and was precluded from transferring sovereign title to third parties. Upon fulfilment of the obligation possession was restored to the pledgor, otherwise the pledgee State could obtain complete sovereign title.

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PORTUGUESE TERRITORIES, DECOLONIZATION *see* Decolonization: Portuguese Territories

PRESCRIPTION

1. Notion

Prescription means that lapse of time can lead to the creation or elimination of legal positions. An existing situation can become, through lapse of time, legally cognizable although it was not so originally; or the lapse of time may render a claim obsolete either in substance or by procedurally blocking its assertion in court. Prescription exists and has existed in many domestic legal systems, although the prerequisites differ greatly, in particular with respect to the length of the time-period required in order to bring about prescription. The question whether prescription exists in international public law arose very clearly; one distinguishes here between acquisitive prescription which operates affirmatively and leads to the creation of title to territory (→ Territory, Acquisition) and extinctive prescription which leads to the elimination of an originally existing claim.

2. Acquisitive Prescription

Acquisitive prescription has been the focal point in the debate on prescription in → international law. Whether it exists, what the required time-limits are and how it can be separated from related phenomena such as → acquiescence, → waiver and → estoppel are classical subjects of contention.

In doctrine, important reasons are put forward against the existence of acquisitive prescription in international law. It is pointed out that prescription presupposes an advanced legal system which disposes of established procedures for the creation of rules, acts and legal titles for the transfer of rights, and it is suggested that international law in its present condition has not really achieved the status of such an evolved legal system. The effects of prolonged inactivity and silence on the part of the State whose title to the territory is threatened are equated by some writers with other institutions of international law such as implicit waiver, acquiescence in a new territorial situation or in the creation of a derogatory rule of → customary international law, applicable to the specific situation in question; other writers refer to the estoppel principle. These constructions have in common that they see the decisive element in the behaviour of the State threatened by prescription rather than in the lapse of time as such. The majority of writers, however, seems to accept the existence of acquisitive prescription in international law and for this again different reasons are given. A main argument centres around the stabilizing function of prescription and stresses the need to preserve international order and stability by not permitting,

through inactivity, the prolongation of uncertainty in territorial situations beyond a certain point in time. Also, prescription is based on the theory that a State which has maintained order in a territory and developed it is entitled to → sovereignty over it against the former possessor who had neglected it. It is also stated that inactivity for a determined length of time substitutes for the will to renounce the title.

Review of international practice shows that States have invoked prescription in order to support claims to title over territory, but not consistently and seldom exclusively. Extremely rare are such direct references to prescription as the one contained in Art. IV of the Arbitration Treaty concerning the Boundary Dispute between British-Guyana and Venezuela of February 2, 1897 (Martens NRG2, Vol. 28, p. 328, at p. 330): "Adverse holding or prescription during a period of fifty years shall make a good title" (→ Guyana-Venezuela Boundary Dispute). Likewise, the judicial decisions rendered by international tribunals show some hesitation with respect to a clear affirmation of prescription in international law. In various circumstances international tribunals have circumvented the question of prescription, although it had been raised in the pleadings, and rather based their decisions on other grounds. This is illustrated by the decision in the Arbitration between the United States and Mexico of 1911 (RIAA, Vol. 11 (1961) p. 309) on the territorial status of the Chamizal Tract (→ American-Mexican Boundary Disputes and Cooperation). Although the United States had expressly invoked the argument that it had "acquired a good title by prescription to the tract in dispute", the tribunal concluded (at p. 328) that "the very controversial question as to whether the right of prescription . . . is an accepted principle of the law of nations" need not be discussed. In a number of decisions, international tribunals have based their findings on considerations which came very close to recognition of prescription in international law without, however, mentioning the term "prescription". Typical in this respect is the → Grisbadarna Case of 1909 in which the → Permanent Court of Arbitration expressly invoked the "settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible" (AJIL, Vol. 4 (1910) p. 226, at p. 233), but did not go further. The → International Court of Justice (ICJ) did not pronounce itself on prescription although the United Kingdom had resorted to it in the → Fisheries Case (U.K. v. Norway), or in the → Minquiers and Ecrehos Case, nor did the Court do so in the → Sovereignty over Certain Frontier Land Case (Belgium/Netherlands) or in the → Temple of Preah Vihear Case. It has to be noted, however, that the ICJ has never expressly denied the existence of acquisitive prescription. In the → Palmas Island Arbitration, the arbitrator stated expressly that "practice, as well as doctrine, recognizes – though under different legal formulae and with certain differences as to the conditions required – that the continuous and peaceful display of territorial sovereignty . . . is as good as a title" (RIAA, Vol. 2 (1949) p. 839). Municipal courts, when interpreting and applying international law, have likewise refrained from denying acquisitive prescription; frequently, however, arguments relating to prescription have been mixed with arguments relating to acquiescence.

Those who assume the existence of acquisitive prescription in international law agree that it applies only to territories over which territorial sovereignty had previously been established and continues to be effectively exercised (→ Effectiveness). The acquisition of *terra nullius* is effected exclusively by occupation understood as taking possession of unclaimed territory (→ Occupation, Pacific).

Great divergences of view exist with respect to the length of time which must have elapsed in order to bring about prescription. In order to imply abandonment of title, Grotius deemed silence for a length of time exceeding the memory of man necessary, defined as 100 years or more (De jure belli ac pacis (1625), Book II, chapter 4, section 7, Classics of International Law (1925) p. 224). In the Alaskan boundary dispute a time period of 60 years was invoked as giving right to title (RIAA, Vol. 15 (1966) p. 485), and the Arbitration Treaty between the United Kingdom and Venezuela of 1897 speaks of prescription over a period of 50 years. The United States claimed to have acquired good title to the Chamizal tract by prescription over 43 years and some writers deem 30 years sufficient (P. Fauchille, Droit International Public, Vol. I, (8th ed. by M.H. Bonfils,

1925) p. 754). In more recent times a formula, according to which enough time must have lapsed in order to give rise to the general recognition that the title has passed, has aroused interest (H. Lauterpacht, International Law (8th ed. by L. Oppenheim, 1955), Vol. I, p. 575). Armed → intervention or submission of the matter to an international arbitral tribunal would interrupt prescription, as would the submission of the matter by the displaced State to the → United Nations General Assembly or the → United Nations Security Council. Whether → protest would be sufficient in order to bring about interruption of the prescription depends upon the circumstances of the individual case, according to which it might be necessary to back up the protest by other measures and to repeat it from time to time. It seems doubtful whether non-recognition of the *de facto* situation by third States could block prescription.

Although the absence of fixed rules creates uncertainty and blurs the distinction between acquisitive prescription and related institutions of international law such as acquiescence in particular, it seems appropriate to affirm the existence of acquisitive prescription in international law. There is, however, not enough agreement in doctrine and too little uniform practice in order to conclude that acquisitive prescription corresponds to international custom as evidence of a general practice accepted as law (ICJ Statute, Art. 38(1)(b)). Acquisitive prescription can, however, be recognized as one of the → general principles of law recognized by civilized nations and as such forms part of international law in accordance with Art. 38(1)(c) of the ICJ Statute.

3. Extinctive Prescription

Extinctive prescription is not automatically encompassed by the assertion of the existence of acquisitive prescription in international law. Many of the reasons advanced in doctrine against the existence of acquisitive prescription also militate, however, against the existence of extinctive prescription. But the question was not really addressed until the → Institut de Droit International discussed the matter and adopted a number of resolutions in 1925 (AnnIDI, Vol. 32 (1925) p. 558). According to these resolutions, extinctive prescription is one of the general principles of law recognized by civilized nations. It is to apply to claims between States as well as to claims of a private person against a foreign State if such claims are put forward by way of → diplomatic protection. Nor should it make any difference whether the claim is private, contractual or delictual in character. Earlier, State practice had already accepted that international rights and obligations may be limited by the lapse of time; reference is made in this respect to the not infrequent arbitration agreements which preclude the assertion of claims as a consequence of lapse of time. International tribunals and claims commissions have repeatedly affirmed the existence of extinctive prescription in international law. On the other hand, the Permanent Court of Arbitration refused in the → Pious Fund Arbitration to apply extinctive prescription since it belonged exclusively to the field of private law, thus making clear that domestic rules and statutory limitations cannot simply be transposed into the field of international law as had been argued in that case. In the → Ottoman Debt Arbitration of 1925 the question of extinctive prescription was left open.

There seems to be agreement that the prerequisites for extinctive prescription are tighter in the case of claims of public origin than in the case of claims of private origin, and more exacting for contractual claims than for claims arising out of delicts. Again, there are not fixed rules on the prerequisites of extinctive prescription. This is particularly true for the time period which must have elapsed in order to make extinctive prescription operative: the Institut de Droit International recommended that the decision be left up to the judge or arbitrator in the individual case, who must base his determination on the circumstances prevailing. This makes the distinction between prescription and estoppel difficult in cases in which the belated assertion of a claim entails complications for the furnishing of evidence and the possibility of → abuse of rights arises. The 1974 New York Convention on the Limitation Period in the Sales of Goods (ILM, Vol. 13 (1974) p. 949) which was prepared by the → United Nations Commission on International Trade Law does not establish time periods for extinctive prescription as discussed here; the Convention aims at the harmonization of limitation periods in private law (→ Unification and Harmonization of Laws).

Extinctive prescription can be precluded by submitting the claim in due time to an international tribunal or by asserting it through diplomatic action.

As in the case of acquisitive prescription, doctrine and practice seem to permit the affirmation of extinctive prescription in international law. Since fixed rules are lacking, extinctive prescription must, however, likewise be recognized as one of the general principles of law in the sense of the Art. 38(1)(c) of the ICJ Statute rather than as a rule of customary international law.

4. *Special Exemption*

Quite another aspect of prescription has arisen in international law out of the outrages of World War II. In this respect the application of statutory limitation under domestic legislation in various countries has led to the assertion of an obligation under international law to exempt certain crimes generally from prescription (→ Genocide; → International Crimes). The General Assembly of the United Nations has adopted, on November 26, 1968 the Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which entered into force on November 11, 1970 (UNTS, Vol. 754, p. 73).

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PRIVATE INTERNATIONAL LAW

1. *Function and Concept*

(a) *Function*

In some major languages, the name of the field of law called private international law (*droit international privé, derecho internacional privado*) suggests a close proximity with public international law. While the latter is the legal régime governing relationships between → States, the former was conceived as regulating transborder relationships between individuals. In fact, in the 19th century, private and public international law were regarded by some authors as two equivalent branches of one tree, namely → international law (→ History of the Law of Nations).

The analogy suggested by the similarity of names is, however, of very limited significance under present conditions. It holds true with respect to the regulated set of facts, i.e. the transborder element. However, on the level of legal regulation there are two decisive differences: There is no legal order over and above the various national legal systems governing transborder relationships between individuals, although a few voices have alleged that a "transnational law" can be found with the help of comparative law (→ Comparative Law and International Law). Such transborder relationships must therefore be governed by a specific national legal system. The question can therefore only be, which system should apply among the many existing ones. Since most States do not regard it as adequate that such relationships be governed automatically by their own law, the *lex fori*, they have developed special conflict rules which designate the national law which is to be applied. These conflict rules constitute the core of private international law. However, even these rules are part of the various national legal systems, although in the 19th century some writers following Savigny thought that these rules were an expression of the "community of nations" and therefore had an interna-

tional character (→ International Legal Community). Since every State, therefore, has its own private international law, there are as many bodies of private international law as there are legal systems.

(b) Notion

As may be expected in view of this national compartmentalization, even the term private international law has not quite the same meaning everywhere. There is universal agreement only about its core: This is constituted by the conflict rules mentioned above. Some countries, especially the anglophone and Central European countries, regard conflict of laws (*conflit de lois*) as the proper and almost exclusive province of private international law; to this is frequently added the law of international procedure as covering the procedural aspects of transborder relationships between individuals, although conflict rules are rare in this area. The Socialist countries use functions rather than method as a criterion and consider private international law as extending to conventions creating uniform substantive law, especially in the fields of transportation, sales, and negotiable instruments (→ Unification and Harmonization of Laws). The Romanic countries, while excluding uniform law from the definition of private international law, add two other areas, namely the law of → nationality, as an important connecting factor of conflict rules, and the law of → aliens.

This article follows the narrow concept of private international law since the subjects of unification of law, nationality and aliens are treated in separate entries.

2. Typical Conflict Rules

The typical rules of private international law are conflict rules whose function is to indicate which national legal system is to govern a transborder private law relationship.

It is of course impossible to describe the conflict rules of all countries or even to offer a broad comparative survey of these rules. On the other hand, it is possible to convey a general idea of the contents of certain typical conflict rules.

(a) Personal status of individuals

In order to determine the law governing the many questions involving the personal status of an individual, for example capacity, family status and relationships, as well as succession, the various national systems of private international law use one of two major connecting factors: either the law of the place of domicile or habitual residence, or the law of the nationality or nationalities of the person involved. The nationality principle was suggested by Mancini in the wake of the nationalistic movements of the 19th century and was then quickly adopted by most continental European countries. Its victory was also in keeping with the demographic interests of these countries. Since they experienced heavy emigration, they were interested in applying their national law to their citizens who had gone abroad. England, although adhering to the traditional domicile principle, achieved similar results by distinguishing between domicile of origin, which is difficult to change, and domicile of choice.

Conversely, typical → immigration countries such as the United States applied and still apply the domicile principle, while rejecting the English doctrine of domicile of origin, because this facilitates the legal integration of immigrants. Finally, most South American countries combine the advantages of both systems by applying the domicile principle to foreigners and the nationality principle to their own citizens; however, this eclectic combination is subject to the reproach of inconsistency.

(b) The status of companies

For companies, two different principles for determining the connecting factor also compete: the law at the seat of the company and the law at the place of incorporation. Ironically, although it corresponds to the domicile principle for individuals, the seat principle has been adopted by most continental European countries, whereas the principle of incorporation prevails in anglophone countries.

The law governing a company determines its establishment, internal organization, status as a legal entity, and relations *vis-à-vis* third parties.

(c) Property

Immoveable as well as moveable property is almost universally subjected to the law at its location (*lex rei sitae*). This principle is easy to

apply to immoveables, but difficulties are bound to arise if moveables have changed their *situs*.

In the latter case, the basic rule must be supplemented in two respects. First, it is clear that the *lex rei sitae* applies only to those real rights which were created, or existed, or were changed, while the asset was located at the respective *situs*. Second, it is widely accepted that real rights which were created according to the law of an earlier *situs* are to be recognized, after removal of the asset to another country, by the new *lex rei sitae*, provided they are compatible with the law in effect at the new location. Thus an Anglo-American trust will hardly be compatible with the law of a continental European country.

For particular highly mobile means of transportation, however, the frequent change of the applicable law would run counter to legal certainty. For → ships and → aircraft, therefore, a stable point of reference has been widely adopted, namely the law of the flag State or State of registration.

(d) Contracts

The formation and validity as well as the interpretation and performance of a contract are subject to the proper law of the contract (*lex contractus*). There are two methods to determine this.

In the first place, the parties are free to choose the applicable law. Such a choice of law may be express or implied. In major international contracts the parties usually agree upon a choice of law clause. Such a choice of law is usually binding, even if the law chosen is not connected with either the parties or the subject-matter of the contract. The most important consequence of a choice of law is that even the mandatory rules of a legal system which would have been applicable without the choice no longer apply; instead, the mandatory rules of the chosen legal system become applicable. A choice of law may be implied, for example, from a jurisdiction clause, from an arbitration clause or from other indications in a contract pointing to a specific system of law.

If there is no express or implied choice of law by the parties, the proper law of the contract must be fixed according to objective criteria. There is little consensus as to these criteria. According to modern thought it is necessary to consider the whole transaction and to determine its so-called centre of gravity, or the legal system with which the contract has its closest connection, or it is necessary to look at the law of the party who is to furnish the characteristic performance, which usually is not merely the payment of money. Under older, more mechanical approaches, the law at the place of performance or that at the place of conclusion of the contract was regarded as decisive.

(e) Torts

Delictual obligations are in most countries subjected to the law of the place where the tort was committed (*lex loci delicti commissi*). However, for business torts or for torts between citizens or residents of the same country special rules are sometimes applied.

(f) Renvoi

Although private international law is national law, its object is the regulation of transborder private law relations. In the view of many writers, one of the major objectives of conflict rules is therefore to achieve harmony with the conflict rules of other countries. One avenue for accomplishing this is by utilizing the conflict rules of other countries as a source of inspiration for the creation and interpretation of one's own national conflict rules (→ Comparative Law, Function and Methods).

Even more effective is the special technique of *renvoi* recognized in some major countries. Under this general principle a foreign legal system to which the national conflict rules refer is applied only if, according to the conflict rules of the law referred to, that legal system itself wishes to be applied. Sometimes the legal system referred to would, according to its own conflict rules, apply the law of the country which has made the reference; such a reference back is accepted under the doctrine of *renvoi*. Very rarely, the legal system referred to would, under its conflict rules, apply a third country's law; such a reference-over also is accepted.

By voluntary application of a foreign country's conflict rules it thus becomes possible to achieve a certain coordination of the national systems of private international law.

(g) Public policy

All systems of private international law have a safety valve which serves as a last resort to exclude the application of those foreign rules which are completely unacceptable to the forum State. The intervention of this public policy rule presupposes that according to the conflict rules a foreign legal system is applicable. The application of the rules of that legal system may be denied if they would run counter to a very basic policy of the forum State, for example a fundamental right.

There is general agreement that the public policy rule must be applied very rarely and only in truly exceptional circumstances. Some modern texts express this by demanding that the foreign rule must be "manifestly" contrary to public policy (see also → Ordre public (Public Order)).

3. Basic Issues of International Civil Procedure

(a) Function and method

The rules of international civil procedure deal with the international aspects of proceedings before national courts or before arbitral tribunals in civil or commercial matters. International aspects are present in particular if, for example, the parties reside in or are nationals of different countries, or if the subject-matter of the litigation is connected with another country.

While private international law dealing with substantive rules of law determines the applicable national legal system by means of conflict rules, it is the peculiar feature of international civil procedure that a tribunal proceeds, on principle, according to its own rules, the *lex fori*. Consequently, since foreign provisions of procedure are applied only exceptionally, there are only a very few choice of law rules on procedural matters. On the other hand, the international features of proceedings call for certain special rules of the *lex fori* which differ from those for proceedings in a purely domestic setting. Because of the prevalence of the *lex fori* rule, international agreements are quite frequent.

Since the national provisions and rules on international civil procedure diverge widely, it is impossible in the present context to present even basic rules; instead, merely the basic issues can be indicated here.

(b) Jurisdiction

The rules on the jurisdiction of national courts determine whether these courts are competent to adjudicate in proceedings with international features. Jurisdiction is determined by the rules of the court whose jurisdiction is at issue.

The national rules on jurisdiction are sometimes identical with the rules on the local competence of national courts, for example, at the place of performance of a contract. However, in addition, most countries have also enacted special rules on jurisdiction, for example, for actions by a national of the forum State, or if the defendant has no residence in that State.

Since the rules on jurisdiction are binding only in the forum State and each State has its own rules, it not infrequently happens that several countries claim jurisdiction for a specific controversy. This gives rise to so-called "forum shopping": The plaintiff will select the forum which is most suitable for him in the circumstances.

(c) The course of proceedings

The whole course of proceedings is again prescribed by the procedural provisions of the *lex fori*. These provisions are, as a rule, the same as for any purely domestic proceeding. Occasionally there are special rules for foreign parties; a foreign plaintiff may, for example, be required to furnish security for the cost of the proceedings in order to assist the defendant in easily obtaining compensation for his expenses should the action be dismissed.

If procedural acts must be performed outside of the State of the forum, for example the service of documents or the taking of evidence abroad, two major avenues are open to the court or the parties: judicial or administrative assistance may be requested either from the diplomatic or consular officers of the forum State, within the framework of the relevant national provisions, treaties or conventions, or from foreign courts (→ Legal Assistance between States in Civil Matters). The latter will usually perform the procedural act according to their own procedural provisions.

(d) Recognition and enforcement of foreign decisions

Whether and under what conditions foreign judicial decisions and arbitral awards will be

recognized and enforced in the forum State, is determined by the forum itself. The relevant national provisions and rules differ widely. Typical but by no means universally adopted criteria are the jurisdiction of the foreign court or arbitration tribunal, procedural requirements as to due process, → reciprocity, and the public policy clause (→ Recognition and Execution of Foreign Judgments and Arbitral Awards).

4. Interfaces with Public International Law

Although private and public international law are quite different, these two branches of international law share several points of contact.

(a) Is private international law required by public international law?

Some authors allege that by virtue of public international law every country is obliged to have rules of private international law, or even certain specific rules. It would thus be contrary to international law to apply domestic law to all transborder relationships that come before the courts of the forum State. Historically, the postulated obligation is a reinforcement of the idea developed by Dutch writers in the 17th and 18th centuries and adopted by anglophone writers in the 19th century (especially by Story) that foreign law is applied by virtue of → comity.

Some of the modern theories, although highly refined (such as that inspired by Scelle's idea of *dédoublement fonctionnel*), in essence affirm national sovereignty in deciding upon the creation and the contents of national conflict rules. In this view, the adoption of rules of private international law by almost all States, but usually not by religious systems of law, rests on considerations of civil justice rather than on international obligation. This is also true for those very few conflict rules which have the same contents almost everywhere (e.g., that the *lex rei sitae* governs real rights in immoveables; and that the form of legal transactions is subject, exclusively or alternatively, to the *lex loci actus*).

In the view of other writers, States are not permitted to apply their domestic law to all transborder relationships of individuals brought before their authorities; in other words, rules of private international law are required by public international law. The application of either domestic law or a specific foreign law is, in this view, justified only if there are certain minimal contacts of the underlying facts with the legal system applied; these contacts are derived from the principles of personality (i.e., nationality of the person or persons involved) or of territoriality (a great variety, such as the domicile of the person or persons involved, the place of performance of contracts, etc.).

In the present author's view, the split of opinion among learned writers on this matter and the absence of an *opinio necessitatis juris* to enact conflict rules speak against an international obligation. This is confirmed by the permissive nature of many conflict rules, at least in certain countries, which in effect allows the parties and the courts to apply the *lex fori*, unless foreign law is expressly invoked.

(b) The relevance of recognition of States

Can foreign rules of law enacted by a State which has not been recognized by the forum State be applied? Can judicial decisions emanating from such a State be recognized and enforced by the forum? Formerly, these two questions were answered in the negative by many States because without → recognition such rules were not considered to be "law" and such acts were without legitimation (→ Non-Recognition).

Today, at least on the European continent, foreign law is applied and foreign decisions and other public acts with respect to civil status are recognized, irrespective of the recognition of the foreign State whose law is involved. This emancipation from public international law is justified by the fact that interests of civil justice between individuals are at stake which demand that the realities to which the individuals are exposed be duly respected. In contrast, in principle, the anglophone countries still insist on State recognition as a precondition for applying a State's law and recognizing its judicial decisions; but there is a clear trend to loosen that connection.

(c) Treaties and conventions as sources

In keeping with the national character of private international law, its primary sources are national legislation, court practice and academic writings. However, the transborder relationships involved make it desirable to seek agreement with other

States on uniform conflict rules. In the 19th century, Mancini even regarded this as an international obligation, and he was instrumental in creating the Hague Conference of Private International Law as an instrument for proposing and negotiating multilateral conventions (→ Hague Conventions on Private International Law). Consequently, a considerable number of multilateral conventions are found in this field, especially among continental European countries (elaborated, in particular, by the Hague Conference) and Latin American countries.

A few conventions comprise comprehensive codes of conflict rules, for example the Código Bustamante of 1926, but most deal only with specific aspects such as support, adoption or products liability. Bilateral treaties containing a set of conflict rules are less frequent, except that the Socialist States of Eastern Europe are covered by a complete network of such agreements, and some of these also exist between Eastern and Western European countries.

By contrast, the recognition and enforcement of judicial decisions is often regulated by bilateral treaties. But there are also a number of conventions; thus the member countries of the → European Communities have concluded a comprehensive convention covering both the jurisdiction of their courts and the recognition and enforcement of judicial decisions. Also problems of judicial assistance, in particular service of documents and the taking of evidence abroad, are covered by some multilateral conventions (→ Hague Conventions on Civil Procedure). In the commercially important field of private international → arbitration, several conventions deal with the recognition of arbitration clauses, and the recognition and enforcement of arbitral awards.

The interpretation of these treaties and conventions by the civil courts is, in accordance with the civil law purpose of their "substantive" provisions, dominated by considerations of civil justice. By contrast, tribunals of public international law have only very rarely had occasion to interpret these treaties and conventions.

(d) Citizenship as a connecting point

One of the major connecting points for determining the law governing the personal status of an individual is the nationality or nationalities of the person or persons involved. In determining the nationality of a person, the relevant rules of public international law are adopted. In particular, whether a person has a specific nationality is determined by the law of the State whose nationality is at issue.

Contrary to what has been said above in another context in relation to the relevance of recognition of States, the nationality of a State not recognized by the forum will not be recognized either.

In determining the status of dual nationals the rules of public international law are also followed in general. However, even if one of the nationalities involved is that of the forum State, many writers and some courts prefer to apply the effective nationality in private international law.

It may be mentioned in passing that preliminary questions of a private law nature arising with respect to nationality, for example acquisition by descent or by marriage, may have to be settled by recourse to the conflict rules of the State whose nationality is at issue.

(e) Immunities

Of considerable practical importance in international civil procedure are the immunities of States, State enterprises and subdivisions of States as well as of qualifying natural persons. Unless there is relevant State practice or legislation, the civil courts apply the appropriate rules of public international law (see → Consular Relations; → Diplomatic Agents and Missions, Privileges and Immunities; → International Organizations, Privileges and Immunities; → State Immunity).

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PROTECTORATES

1. Notion

An international protectorate is a legal relationship between a "protector" State and a "protected" State or group of States; the latter is sometimes also called the protectorate. The legal basis is a treaty concluded between the two States, by which the protector is bound to defend the protected State against → aggression and other violations of law.

In a complete protectorate the protected State agrees with the protector to refrain from activities in the matters covered by the treaty, generally foreign relations, and to tolerate that the protector act in these fields in the name and on behalf of the protected State. A restricted protectorate exists if the protected State is still entitled to act in these matters subject to approval by the protector.

Similar to an international protectorate is the "quasi-protectorate". Such a relationship between two States exists if a strong State is entitled by treaty to intervene even by military force in the internal situation of the other State in case of breach of peace in the latter. Such treaties existed from the beginning of this century until the 1930s between the United States and some States in Central America as well as Cuba.

The former "colonial protectorate" is not an international protectorate in the usual sense either, because the establishing treaty is concluded by a State and a tribal leader. The former → mandates system pursuant to Art. 22 of the Covenant of the → League of Nations did not create an international protectorate between the mandatory State and the mandated territory since the mandatory power exercised its administrative duties on behalf of the League of Nations. Moreover, the mandated territory was not a State, and there is no treaty between the mandatory power and its mandated territory. By the same token the → United Nations Trusteeship System in accordance with Chaps. XI to XIII of the → United Nations Charter cannot be the basis of an international protectorate.

The so-called Protektorat Böhmen und Mähren (Protectorate of Bohemia and Moravia) which existed from 1939 to 1945, based on a treaty obtained by threat of force, was made a part of the German Reich; it was not the object of an international protectorate. The treaty establishing this régime was subject to international law; pursuant to the legal opinion of the former German Reich Government, the rules regulating the relations between the German Reich and the "Protectorate" were part of German law.

Mere "protection" rather than a protectorate is involved in cases where a stronger State or a group of States undertakes by treaty to defend the existence or integrity of another independent State, whose international personality, capacity and competence to act according to its own intentions is not restricted by this treaty. In this sense the former Free City of Cracow, a State from 1815 until 1846, was protected by Austria, Prussia and Russia (→ Free Cities). The Republic of → San Marino is still today placed by treaties of 1862, 1897, 1939 and 1953 under the "protecting friendship" of Italy.

2. Historical Background

Among the protectorates existing in early 19th century Europe was that of Great Britain over the newly created State of the Ionian Isles (1815 to 1863). In the time of high colonialism and imperialistic expansion, a great number of protectorates were established (→ Colonies and Colonial Régime). Only some of them need be referred to: Great Britain and its relations to Bahrain (1880 and 1892 to 1971), Tonga (1900 to 1970), Sikkim (1861 to 1947), Brunei (1888 and 1959 to 1983) and Sarawak and Sabah (1888 to 1946). The former British protectorates of Johore, Kedah, Kelantan, Perlis and Terengganu have been member States of Malaysia since 1957.

France also concluded treaties establishing protectorates with Tunisia (1881 to 1956) and Morocco (1912 to 1956). Spain was protector of Spanish Morocco (1912 to 1965), Japan of Korea (1905 until its → annexation by Japan in 1910), India of → Sikkim (1950 until its annexation by India in 1975). India's protectorate over → Bhutan (since 1949; formerly protected by Great Britain) is deemed to have terminated upon the admission of Bhutan to the → United Nations in 1971.

In 1918 a treaty established a restricted protectorate by France over → Monaco. This relation still prevails. In contrast, colonial protectorates have now disappeared along with other institutions of colonialism.

3. Legal Basis

(a) The instrument

The legal basis of an international protectorate generally is a treaty between the two States regulating the rights and duties of the protector and the protected State in their mutual relations.

Formerly the exercise of coercion did not result *ipso jure* in the nullity of a treaty obtained in such a manner; i.e. forced consent could be the legal basis of a valid protectorate. A unilateral act by a strong State could also be the legal basis of a protectorate if the weaker State was unable to defend its independence. Today the threat or the → use of force is forbidden by international law. Therefore, consent obtained by a forced treaty cannot be the legal basis of an international protectorate (→ Vienna Convention on the Law of Treaties, Arts. 51 and 52). Nor can a unilateral act by a powerful State against the will of the weaker State establish an international protectorate.

(b) The fundamental conception of protectorates

In a complete protectorate the protected State must refrain from all activities in foreign relations as far as agreed in the protectorate treaty. Some authors are of the opinion that the capacity of the protected State to enter into treaties is limited (for instance the rapporteurs Brierly, H. Lauterpacht, Fitzmaurice and Waldock in their papers presented to the → International Law Commission). Thus if a protected State concludes a treaty in disregard of the protectorate treaty, it acts *ultra vires* and the treaty is void (→ Treaties, Validity; → Nullity in International Law).

Since the protector may allow the protected State to conclude treaties with third States, in some cases it is probable that the protected State merely assumes an obligation under international law not to make such treaties. Treaties nevertheless concluded with other States by the protected State are not void. Their nullity must be established by construction of the protectorate agreement. Third States having recognized the protectorate have the obligation under international law to observe the rights and duties of the two States resulting from the protectorate treaty.

In cases where a dependent State bound by a restricted protectorate has put into force a treaty made with a third State without the necessary approval of the protector, this treaty is not void, unless a regulation in this respect is included in the protectorate treaty and has been recognized by the third State. If the content of the protectorate treaty is part of the constitutional law of the protected State, this State may be entitled by Art. 46 of the Vienna Convention on the Law of Treaties to avoid such a treaty *vis-à-vis* the third State.

4. Legal Relationship between the Protected State and the Protector

Before and after the establishment of the protectorate, the legal relations between the two States are regulated by international law.

In case of a complete protectorate, generally the protected State has to refrain from all activities in the field of foreign affairs. It is allowed to maintain → diplomatic relations only with its protector, not with other States. The protected State is not entitled to give its nationals → diplomatic protection *vis-à-vis* third States. It must recognize that the protecting State acts in all matters covered in the protectorate agreement in its (the protected State's) name and on its behalf. The protector is entitled to claim the rights resulting from the treaty as its own rights. In return for the restrictions on its competences the protected State has the right to demand protection in case of aggression or infringement of its rights by third States pursuant to the protectorate treaty.

The rights and the duties of the protector correspond to the duties and the rights of the protected State. The head of State and the government of the protected State enjoy all rights of immunity *vis-à-vis* the protector. The → acts of State of the protected State constitute foreign acts pursuant to international law in the view of the protecting State (and vice versa).

In case of restricted protectorates the protected State is usually entitled to manage its own foreign matters. Pursuant to the agreement in the protectorate treaty it may need to seek the approval of the protector for negotiating with other States or for concluding or enforcing a treaty. If an international protectorate has been established by a unilateral act of the protector, the rights and duties of the two States depend upon the rules developed effectively in their mutual relations.

5. *Recognition of Protectorates by Third States*

To be effective in relation to a third State it is necessary that a complete protectorate be recognized by this other State. Only after having obtained such → recognition can the protector rely on the competences resulting to it from the protectorate treaty.

In the view of third States not having recognized the protectorate, the treaty-making competence of the protected State still exists without restriction. Treaties concluded between the protected State and the third State, even if prohibited by the protectorate agreement are not void.

A treaty concluded between the protected State and a third State having recognized a complete protectorate is not void (as some authors say). But the parties to this treaty are not allowed to execute it. The protected State is forbidden to do so by the protectorate treaty; the third State is bound by its recognition not to conclude a treaty with the protected State or, if having nevertheless done so, not to execute such a treaty. The protector may allow the two States to execute their treaty.

Since a restricted protectorate is not based upon a treaty changing the legal status of a State, this kind of protectorate does not need recognition.

6. *Treaties Prior to the Establishment of a Protectorate*

Treaties concluded between two or more States remain valid after the establishment of a protectorate in respect to one of these parties (→ Nationality Decrees in Tunis and Morocco (Advisory Opinion); → United States Nationals in Morocco Case).

In case of a complete protectorate the other party to the treaty is entitled either to insist on the maintenance of direct relations with the now protected State or to demand that the protector should consider itself bound by this treaty. Such a demand, however, implies recognition of the protectorate. If only a restricted protectorate is established, the protected State remains bound to execute its contractual obligation notwithstanding the protectorate agreement.

7. *Legal Status of the Protected State in International Law*

Before and after the establishment of a complete protectorate the protected State is a → State in international law and subject to this legal order (→ Subjects of International Law). Since the protected State transfers to the protector the competence to act in its name in the field of foreign relations, its → sovereignty is restricted. Yet, the protected State is still entitled to exercise territorial jurisdiction over its own territory. Its citizens are neither subject to the legal order of the protecting State nor nationals of this State (→ Nationality). The protected State is entitled to exercise personal jurisdiction as far as it does not act in the field of foreign affairs reserved to the competence of the protector.

In case of → war between the protector and a third State, the protected State is not *ipso jure* an enemy country of the third State, since the protected State has separate international personality. The protector must avoid involving its protected State in a war with other States. If the protector utilizes the territory of the protected State for military purposes, the belligerent adversary may treat this territory as that of an enemy State (→ Enemies and Enemy Subjects).

The principal legal position of a restricted protectorate in its relation to third States does not differ from that of other independent States (→ Neutrality, Concept and General Rules).

8. *Legal Status of the Protector in International Law*

Vis-à-vis third States the protector is liable for damages caused by acts of the protected State in contradiction to international law in so far as it has excluded the protected State from acting in relation to third States in its own name and on its own responsibility (→ Responsibility of States: General Principles).

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PUBLIC ORDER *see* Ordre public (Public Order)

RAILWAY STATIONS ON FOREIGN TERRITORY

1. Historical Evolution of Legal Rules

In order to avoid hinderance and delay to railway traffic crossing State → boundaries, special regulations have been agreed upon (→ Railway Transport, International Regulation). The procedures for the exit and entry of trains, passengers and goods from one State to another are best administered simultaneously by the railway staff and the customs and other frontier officials of both States concerned. This necessitates the presence of officials of one State within the territory of the other. The exercise of acts of → sovereignty on foreign territory is based on international agreement or on → acquiescence of a long-standing practice.

The first international → treaties on this subject, together with arrangements between railway administrations, were agreed upon in the middle of the 19th century. One of the oldest, concluded in 1852 between the Swiss Confederation and the former Grand Duchy of Baden, is still in force. The territorial changes after World War I increased the number of such treaties.

The Geneva Convention on the International Régime of Railways of December 9, 1923 (LNTS, Vol. 47, p. 55) attempted to establish principles for the junction of international lines and working arrangements for international traffic. These provisions, however, were merely guidelines.

2. Current Legal Situation

According to the terminology of the International Railway Union (UIC) in Paris, the term frontier station includes those stations which are near the frontier and involved in international exchanges (→ Neighbour States). There are two categories: exchange stations and joint stations. Exchange stations serve the same section of line crossing the frontier and are situated on both sides of it. Each railway is responsible for the operation of its own exchange station. Joint stations, on the other hand, are distinguished by the fact that international exchange operations, either wholly or in part, are centralized there. They are operated by the railway of the country in which they lie, on its own behalf as well as on behalf of the neighbouring railway. Certain exchange or joint stations are termed "international stations". These are stations where governmental controls are effected (police, customs, etc.) for both the country of entry and the country of exit.

On January 10, 1952, the International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage carried by Rail (UNTS, Vol. 163, p. 3; amendments: UNTS, Vol. 328, p. 319), and the analogous Convention for Goods, were signed in Geneva. According to these conventions the competent authorities of two adjoining countries shall, for every railway line carrying a considerable volume of traffic, examine the possibility of designating by agreement a station close to the frontier at which examinations shall be carried out as required under the legislation of the two countries in respect of the entry and exit of goods, passengers and their baggage. For the latter, this holds good only when examination cannot be satisfactorily carried out while the train is in motion. The International Convention on the Harmonization of Frontier Controls of Goods of October 21, 1982 (British Command Papers, Cmnd. 9188, Misc. 8 (1984); not yet in force) applies to all modes of transport.

Bilateral governmental agreements cover in particular the following questions: a) The legal status of the railway on foreign territory. Notwithstanding special provisions in those treaties, the law of the State where the railway is operated

applies. Very often freedom from taxes and exemption of customs duties for railway materials, free transit of mail, etc. are granted. b) The legal status of railway servants. Usually the law of the sending State applies to service regulations, salaries and allowances, discipline, social security, etc. The treaties may also grant to nationals of the sending State exemption from taxes, from military or other public services, as well as special facilities when crossing the border, etc. c) Cooperation for police and customs examination and other administrative formalities, especially delimitation of the zone inside which the foreign authorities shall be authorized to act. This zone may comprise a specific part of the station, trains or sections of track on which they are standing or even passenger trains travelling between the station and the frontier. In this zone, the foreign authorities are empowered to carry out their duties, such as customs control and the policing of the frontier, in the territory of the other State as if they were acting in the territory of the authority concerned. They have the right to record contraventions, make arrests and confiscations and remove arrested persons – except nationals of the other State – or confiscated luggage, goods or funds to the territory of their sending State. d) Authorization to use an escutcheon, to wear uniform or distinctive badges and to carry arms within the territory of the receiving State. In some cases these latter rights are based on custom.

The operation of frontier stations is further regulated by bilateral or multilateral administrative arrangements between the railways. The International Railway Union produces leaflets containing binding provisions or recommendations. They concern, for example, initial capital expenditure on joint stations, installations which are to be pooled and those which are for the exclusive use of each railway, services to be provided jointly, methods for dividing expenses, maintenance, supplies, operation and safety regulations applicable, technical regulations for vehicles, telephone and telegraph communications, mutual assistance, liability in the event of accidents and → arbitration. The legal character of such agreements is not clearly defined, as they are of international origin but not part of public international law. Their characterization depends on national law.

3. Evaluation

The express grant of sovereign rights on foreign territory with regard to frontier stations and railways, and, as a corollary, restrictions of State → jurisdiction on that territory, may be considered as → servitudes of international law.

Irrespective of the use of this controversial term, the treaties mentioned above create "territorial" rights with effect *erga omnes*. The exercise of treaty rights must be accepted by all States. Each State must, for example, concede that its nationals are subject to examination by the officials of the State authorized. This exercise of rights by a State within the territory of another changes the ordinary scope of jurisdiction without a breach of international law.

The treaties in question attach rights and obligations to a particular territory and are therefore binding *ipso jure* upon a successor State (→ State Succession). It is however difficult to draw definite conclusions from international practice; the favourable attitude of States in the few instances known might be attributable to expediency as well as to legal obligation.

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RECOGNITION

1. Notion. – 2. History. – 3. Recognition of States: (a) Requirements. (b) Modes of recognition. (c) Legal consequences. (d) Legal effects in domestic law. (e) The impact of the United Nations on recognition of States. – 4. Recognition of Governments: (a) Introductory remarks. (b) Requirements. (c) Modes. (d) Legal consequences. (e) Legal effects in domestic law. (f) The impact of the United Nations on recognition of governments. – 5. Other Forms of Recognition: (a) Recognition of provisional situations. (b) Recognition of international organizations. (c) Recognition of territorial changes. – 6. Evaluation.

1. Notion

The importance which the legal notion of recognition has gained in international law is due to the latter's imperfect nature. While there is practically always a judge available to decide disputes under municipal law, it is rare that a legal dispute can be settled by judicial means in international law. The → States as primary → subjects of international law are also in most cases the only entities which decide whether or not the requirements for the applicability of a specific rule are fulfilled or not. The coming into existence of a → new State as a subject of international law was for a long time a most important event for the application of rules of international law. The formalized recognition of States as subjects of international law should be seen against that background. Where a change of → government takes place under circumstances giving rise to doubts a formalized recognition of government is sometimes expressed. The notion of recognition is, however, frequently used in a much wider sense referring to the act by which a State confirms that a specific legal situation or consequence, which may have been in dispute, will not be put into question. In that way recognition of territorial changes etc. may become very important. Recognition is normally a → unilateral act under public international law, but a → declaration of recognition may be included in a treaty.

2. History

The first example of the recognition of new States in international law arose from the declaration of independence by the United Netherlands in 1581. In the treaty of January 30, 1648 Spain declared:

> "Premièrement déclare ledit Seigneur Roi et reconnait que lesdits Seigneurs Etats Généraux des Pays Bas Unis . . . sont libres et Souverains Etats . . . sur lesquels . . . ledit Seigneur Roi ne prétend rien."

When the United States of America declared its independence a famous dispute developed between France and Britain as to the possibility of recognizing the new State as an independent subject of public international law. While Britain argued that revolution or → war could never confer title to a territory without recognition by the former sovereign, France relied on the doctrine of → effectiveness. In the 19th century this became the accepted doctrine.

The recognition of governments has its origin in the tradition of the European States as monarchies. Because of the many overlapping claims to succession which frequently existed, recognition of a new monarch was quite common. When the first republic under Cromwell was formed in England, Spain was the first country to "recognize" the republic by sending an ambassador to England. The principle of effectiveness was finally accepted for the recognition of governments and it was frequently linked to the idea of the democratic theory of the *pouvoir constituant*. As Jefferson stated in 1792 concerning the French revolution: "It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared." In the 19th century are also found the first examples of collective recognition. Art. 7 of the → Paris Peace Treaty (1856) was generally seen as a collective act with regard to admission and recognition of Turkey as a member of the European legal order. The → Berlin Congress (1878) amounted to the collective recognition of territorial changes and the independence of several States formerly under Turkish → sovereignty.

3. Recognition of States

(a) Requirements

It is frequently stated that the recognition of States presupposes the existence of the criteria for statehood, i.e. a fixed territory, a population and an effective government. When the doctrine of recognition of States developed the emphasis was put on cases of forcible separation from the former mother-country. Here, the effectiveness of the separation was seen as the most important criterion. The development of the process of → decolonization after 1945 has shown that recognition of States is a matter of normal routine where there is no dispute with a former mother-country. The many African, Asian and American States becoming independent on the basis of decisions taken by the former colonial powers were recognized immediately by the community of nations. This also happened where their borders were to a great extent in dispute or no effective

government for the whole of the country existed (e.g. the former Congo, 1960).

To establish what States consider to be the essential criteria for statehood it is more appropriate to consider under which circumstances they refuse recognition as a State (→ Non-Recognition). There are two main reasons why States have withheld full recognition although, at least on the face of it, some entity resembling a State existed. The reason most frequently used is lack of independence in relation to some State which for political reasons wants to use the new State which it has helped to come into existence. It is this reason which was advanced for the non-recognition of Manchukuo as a Japanese "puppet-State" or of Croatia as a German creation of that sort. The German Democratic Republic was for a long time not recognized as a sovereign State because it was not considered sufficiently independent *vis-à-vis* the Soviet Union and because no effective splitting-up of the German State was seen as permissible by intervention (→ Germany, Legal Status after World War II). The South African homelands, although formally declared to be sovereign States by South Africa, have not been recognized as such by other States. The prevailing view would seem to be that they lack any real independence (→ South African Bantustan Policy).

A second reason, which was used to withhold recognition in the case of Rhodesia, was the fact that independence had been brought about by a white minority government in a former colonial territory. The clear lack of any act of → self-determination by the whole people was seen as justifying non-recognition. Although democratic structures are not a prerequisite for recognition, this seems to establish that, in the case of States whose independence has not been confirmed by a long history, some act at least tacitly confirmed by the attitude of the population may be required. It should be added here that non-recognition as a State does not mean, as was sometimes thought in early doctrine, that an entity falls outside the sphere of public international law (→ De facto Régime). Many rules of public international law are in fact applicable notwithstanding non-recognition as a State.

(b) Modes of recognition

Recognition may be express, especially after the granting of independence. In addition, it has long been accepted that there may be implied recognition. However, care should be used not to deduce recognition from acts which do not clearly show an intention to that effect. It would seem that there is only one unequivocal act from which full recognition can always be deduced: the establishment of full diplomatic relations. All other forms of contact do not necessarily lead to recognition as a State.

The distinction between *de jure* and *de facto* recognition has always been a source of difficulties. In most cases recognition will not be qualified by either of these terms. Where it is stated that recognition is *de facto*, this implies some hesitation on the part of the recognizing government either as to the coming into existence of the new State or its territorial situation. Probably the last clear example for *de facto* recognition of a State was the recognition of Israel in 1948 by Great Britain (→ Israel: Status, Territory and Occupied Territories). A further difficulty is added by the fact that the notion *de facto* may be used not to qualify the recognition, but to refer to the factual situation being recognized, as in the case of a recognition of a *de facto* government or régime. The view that the *de facto* recognition may be revoked without a change of circumstances would not seem to be confirmed by State practice.

(c) Legal consequences

After recognition it is clear that all rules of public international law governing the relations between sovereign States are applicable *ipso jure*. Without recognition that may be a matter of dispute. Controversy has existed for a long time as to whether recognition has merely a declaratory or a constitutive effect. Anzilotti and Kelsen, in particular, have advanced theoretical reasons why recognition must have a constitutive meaning in a system of law based on the understanding of States as to the legal consequences of a specific factual situation. Lauterpacht has argued that where dispute exists as to the existence of the criteria of statehood, recognition constitutively settles that dispute. He saw a duty for recognition where the criteria are met.

However, it is clear that recognition does not create the State. It only confirms that an entity has reached statehood. As soon as all or practically all States take the same view the matter is settled.

Art. 12 of the OAS Charter states: "The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence." The two theories connected with recognition focus on different problems. In practice they do not help to explain recognition or to clarify the position of entities which are not recognized.

No obligation to establish full diplomatic relations or any other specific links flow from recognition. This is a matter of discretion for the States concerned. Only those rules of international law which do not require a specific relationship apply automatically with recognition.

(d) Legal effects in domestic law

English and American courts have frequently held that they cannot apply the laws of a State or give effect to its sovereign acts if this State is not recognized by their government. The main justification advanced for the rule seems to be the danger that otherwise the State would speak with different tongues. Courts in Switzerland and Germany have never found it difficult to apply the law which is effectively implemented in a given territory even where the latter is not recognized as a State. In the United States there has been a certain tendency to overcome the old rule of non-application of the law of a non-recognized State where the executive expressed the view that this would not be harmful. There are indications that the same change could take place in Great Britain. At least the limits set by the → International Court of Justice (ICJ) in the Namibia advisory opinion for the consequences of non-recognition should be respected also in this context (→ South West Africa/Namibia (Advisory Opinions and Judgments)). According to the Court non-recognition (of the administration) should not extend to "for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory" (ICJ Reports 1971, para. 125). It is quite understandable that non-recognized States or governments should not have the right to sue or claim other rights of a governmental character, but it is hard to see why it should not be possible to apply their laws in a suit between private parties where the application of any other law would do injustice to those concerned (→ Private International Law).

(e) The impact of the United Nations on recognition of States

It has been commented that recognition of a State, although very important in former times, has been substituted to a large extent by admission to the → United Nations (Mosler, The International Society as a Legal Community (1980) p. 44). With the admission to the United Nations all rules of the → United Nations Charter apply to the new member. Although claims of non-recognition have been upheld even after the respective States became UN members (e.g. in the cases of the Arab States with respect to Israel and the Federal Republic of Germany with respect to the German Democratic Republic), it is clear that the quality as State of a UN member cannot be denied. Thus, while non-recognition will have a very specific political meaning, for example underlining the wish to have a change brought about in the future, that change can only be aimed at in full respect of Charter obligations, especially Art. 2(4).

It is of at least equal importance that the United Nations has become the forum to coordinate non-recognition. In several cases the → United Nations Security Council, frequently on the basis of resolutions adopted by the → United Nations General Assembly, has called upon States not to recognize specific entities as States. This was first done when Rhodesia declared its independence in 1965 (UN SC Res. 216 (1965)). The same attitude was adopted after South Africa declared the independence of Transkei as a homeland (UN SC Res. 402 (1976)). When the Turkish Cypriot authorities proclaimed an independent State in northern → Cyprus in 1983, the Security Council called upon all States not to recognize any Cypriot State other than the Republic of Cyprus (UN SC Res. 541 (1983)). In the last two cases the reason for the attitude of the United Nations which was not contested in the Security Council was similar: The lack of independence of the entities in question *vis-à-vis* South Africa or Turkey and some legal defects in their creation. In fact, the independence of the homelands was considered to be part of the → apartheid policy, and independence of northern Cyprus as incompatible with the

treaties of 1960. It is doubtful whether the resolutions of the Security Council in those cases are binding but they are clearly a justification for withholding recognition by all States (→ International Organizations, Resolutions). In fact, in the cases in question non-recognition became the general attitude. Where the Security Council decides on the basis of Chapter VII of the UN Charter the resolution will be binding. The examples show that the United Nations plays an important role in matters of recognition today.

4. *Recognition of Governments*

(a) Introductory remarks

Change of government in a given State is a matter within its domestic sphere and does not concern international law or the international community. This is true whether the procedure is in line with the constitutional rules applicable in the country or not. International law is not concerned with the constitutionality of any such change. This shows that there must be a special reason for the question of recognition of a new government to arise at all. The reason may be an uncertainty as to the effectiveness of the government after a period of revolutionary change, or the existence of two competing governments. There was a time when certain tendencies existed in international law to recognize revolutionary governments only after elections (Tobar doctrine, 1907). However, this was never generally accepted and the Estrada doctrine of 1930 based on the understanding that the change of government is an internal matter for each State, in which other States have no right to intervene, certainly starts from the correct premise. It is quite understandable, therefore, that on the basis of this analysis Estrada, Secretary of Foreign Relations of Mexico, declared on September 27, 1930: " . . . the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice" (M. Whiteman, Digest of International Law, Vol. 2 (1963) p. 85). In 1980 Britain adopted the same position. The Foreign Secretary announced that after a comparison with the practice of partners and allies it had been decided: " . . . that we shall no longer accord recognition to Governments. The British Government recognizes States in accordance with common international doctrine" (BYIL (1980) p. 367).

(b) Requirements

A formal recognition of a new government is permissible only where there is some reason to clarify the situation after a revolutionary change. The first and generally accepted requirement for the recognition of a government is that this government be in control of the territory and the administration of the State. Where this control is unquestionable, no issue will arise. Therefore, this requirement has to be seen in the perspective of the need for the recognition of a government in doubtful circumstances. Effective control means control of at least the larger part of the territory with no real threat for the development in the future. As for the recognition of States, effective control must not be brought about by foreign intervention. Indeed, foreign intervention in a change of government is a typical reason for non-recognition. Where there are still two competing governments, recognition of the revolutionary government as the government of the State is unlawful unless it has established its authority to such an extent that the outcome of the conflict is clear and the former government's authority is reduced to a negligible area. Typical examples of premature and unlawful recognition were the declarations by which Germany and Italy recognized the Franco Government as the government of Spain already at the beginning of the → Spanish Civil War in 1936. Where a conflict exists for a longer time, limited recognition as a *de facto* régime may be extended to the revolutionary government.

Besides effectiveness, it is frequently stated by governments that two criteria may be taken into account for recognition: whether there is consent or at least acquiescence by the people, and whether the new government has indicated its willingness to comply with its obligations under international law (Whiteman, loc. cit., Vol. 2, p. 73). While acquiescence may have some connection to the effective control and stability of the government, it may also refer to democratic legitimacy. It has clearly been used in the latter sense, for instance by taking into account whether elections have been announced by a revolutionary government. Insofar as these two criteria have

nothing to do with the question of effectiveness of the new government, it is doubtful whether they can really be used to withhold recognition in the sense of not treating the new government as the government of the State. The correct view would seem to be that an effective government fully in control of the country must be accepted as the government of the State wherever contacts with that State exist. Since there is no obligation under general international law to establish or continue diplomatic relations, the criteria just discussed may be of importance concerning renewal or continuation of diplomatic relations. It is in this sense that one frequently uses the terminology "diplomatic recognition". However, one must conclude from State practice that States not infrequently justify their decision concerning the recognition of revolutionary governments with reasons going beyond the mere effectiveness of these governments.

(c) Modes

Although recognition may be express in the same way as for States, recognition of governments is more likely to be implied. The continuation of diplomatic relations is in fact the normal way to clarify the situation. It seems that more and more States avoid the label of recognition after revolutionary changes and prefer to take their decision in concrete dealings with the new government. The distinction between *de jure* and *de facto* recognition has apparently also become obsolete for the recognition of governments.

(d) Legal consequences

After recognition a government will be treated in all respects as fully entitled to represent the State concerned. In most instances diplomatic relations will be established or continued although no obligation is created in this respect. As a consequence of recognition, the right of the government concerned to represent its State in all international organizations in which the State is a member cannot subsequently be questioned. This does not mean that the acceptance by the other parties of a non-recognized government as representing its State in an international organization amounts to a full recognition. State practice clearly shows that not infrequently the position of non-recognition has been upheld although the government at issue was accepted as representing its State in the United Nations or other international organizations (e.g. China).

It is frequently stated that the recognition of a government has retroactive effect. However, no rule of international law would seem to require this to be so. Rather, the internal law of States may attach this retroactive effect to recognition, especially as far as the applicability of the law of the formerly non-recognized government may be concerned. On the other hand a rule of international law overlapping with the principle of retroactivity has been applied by arbitral tribunals, according to which States are responsible for acts of revolutionary governments from their very beginning. The idea is that such a government's success proves retroactively that the acts of the revolutionary organs were attributable to the State. However, no automatic effect of this sort is created by recognition.

(e) Legal effects in domestic law

As with the recognition of States, the recognition of governments may have important effects in domestic law if courts act on the basis of the principle that they may not apply or take notice of the law promulgated by a non-recognized government. While such a rule was generally not applied in Germany or Switzerland it prevailed for a long time in England and, to a lesser extent, in the United States. However,it seems that the unjustified effects of that attitude have now been recognized practically everywhere. In the United States several cases have established that the law of unrecognized governments may well be applied under the rules concerning conflicts of law as the effective law in force in a specific territory. One of the changes of the British position as to the recognition of governments would seem to be that there will no longer be such a concept as a non-recognized government. Even earlier the House of Lords had indicated a change of attitude (→ Zeiss Cases).

(f) The impact of the United Nations on recognition of governments

Within international organizations the question whether or not a specific government may represent a State comes up as a matter of the credentials of the delegates. A credentials committee nor-

mally decides whether or not these credentials should be recognized. The final decision is taken by the organ representing all the members. In the United Nations such problems are regularly dealt with by the General Assembly. States which do not recognize a government will normally not accept the credentials of its delegates in the General Assembly. However, this is not necessarily the rule. In the case of China the General Assembly had to vote regularly until 1971 on the question which government should represent China. In Res. 2758 (XXVI) the General Assembly decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations". With that resolution the long lasting dispute as to the recognition of the two Chinese governments was finally settled within the United Nations. The developments within the United Nations certainly influenced many of the States which had not by then recognized the Government of the People's Republic as the government of China.

Where an effective government of a State exists, an international organization such as the United Nations must be held to be under an obligation to recognize it as the government of the member State. The question is more difficult where competing governments exist. Where one of these is in control of the vast majority of the territory and of the population the international organization would seem to be under an obligation to recognize it. This must be the case especially where the last part of the territory is held by the old government on the basis of foreign intervention. Therefore, in the case of China the original position taken by the United Nations, albeit maintained over many years, cannot be used as a lawful precedent.

5. *Other Forms of Recognition*

(a) Recognition of provisional situations

International law has developed forms of recognition to bring into operation some of the rules of public international law to cope with situations of a provisional nature. For the specific effects which a → civil war may have for third parties → recognition of belligerency was used, for instance during the → American Civil War (1861 to 1865). There have been no clear examples for this form of recognition after World War II. The alternative → recognition of insurgency, having no clearly circumscribed consequences in law but giving the recognizing State the possibility to declare some rules of international law applicable, has not been used in recent times either. In several of the conflicts concerning decolonization a recognition of → liberation movements has been used. Such recognition has also been accorded to the → Palestine Liberation Organization. This sort of recognition mainly confirms that some sort of official relations will be or have been established with the movement concerned. Especially where civil wars last for a long time or parts of a State become factually independent without being recognized as State, the status of *de facto* régime has gained acceptance. Sometimes a recognition of the fact that an insurgent government has *de facto* control over a territory is expressed, especially where courts have to be informed of the situation (→ Banco de Bilbao v. Sancha and Rey, (1938) 2 All E.R. 253).

(b) Recognition of international organizations

While international organizations have legal personality upon their creation in relation to member States, this does not apply *vis-à-vis* third States since treaties between the member States and such organizations have no effect for third States under normal circumstances (→ Treaties, Effect on Third States). Third States may, however, accord recognition to international organizations by concluding treaties, etc. (→ International Organizations, General Aspects; → International Organizations, Treaty-Making Power). For the United Nations, the International Court of Justice has accepted that it possesses objective international personality, not being in need of formal recognition by third States (see the article on the United Nations, section E.1.; → Reparation for Injuries Suffered in Service of UN (Advisory Opinion)).

(c) Recognition of territorial changes

Recognition or non-recognition plays an important role in regard to territorial situations whose lawfulness is open to challenge. The → Stimson doctrine has been influential for the adoption by the United Nations of the rule according to which: "No territorial acquisition

resulting from the threat or use of force shall be recognized as legal" (UN GA Res. 2625 (XXV); → Friendly Relations Resolution; → Annexation). As the case of Goa shows, this rule may be open to exceptions where the former sovereign later recognizes the territorial change, but the example of the → Baltic States illustrates a long practice of not recognizing an annexation. United Nations organs have sometimes called upon States not to recognize territorial situations brought about by illegal means or upheld, as in the case of Namibia, against UN decisions. As with the recognition of States or governments, the recognition of a territorial situation may have important consequences for the application of the law valid in the territory concerned by courts of a third State (→ Recognition of Foreign Legislative and Administrative Acts).

6. Evaluation

The importance of recognition in international law is a consequence of the imperfect nature of international law. Since disputes can frequently not be settled by judicial procedures with binding results, the position which is taken by the other subjects of international law becomes crucial in case of doubt. Where the procedure of recognition is used *bona fide* by all members of the international community it will have no detrimental effects. However, where ideological and political motives influence the decision whether or not to recognize a State, a government or a territorial situation, abuse is quite possible. History and State practice clearly provide examples of such abuse (e.g. China; Israel; → Soviet Republics in International Law). Since international law is unable to eliminate such abuse it is of crucial importance that the legal position of non-recognized entities be clarified. Non-recognition must never mean that States are free to use force against an entity which they do not recognize as a State.

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JOCHEN ABR. FROWEIN

RECOGNITION OF FOREIGN LEGISLATIVE AND ADMINISTRATIVE ACTS

1. Definition of Recognition

Recognition of foreign → acts of State is the acceptance by the recognizing State of a legal position created by such acts. For purposes of establishing a clear terminology, recognition should be distinguished from the application of foreign law, a technique common to → private international law but found only rarely in public law matters. In applying foreign legal rules a domestic forum goes through the whole process of finding the law itself in order to reach a result and to create a legal position. Recognition in turn means the acceptance of a foreign act of State without reviewing its underlying application of foreign law and thus the recognition of the legal position already created by this act like the conveyance of a title, the prohibition of certain performance or behaviour or the creation of a legal relationship between persons or persons and matters. Examples are export restrictions, expropriations (→ Expropriation and Nationalization), and grants of divorce. Recognition should also be distinguished from the taking into account of a foreign act of State as a legally relevant fact, which happens, for example, when the impact of an export ban on the ability of the exporter to perform his contractual obligations is considered a discharging impossibility under national law.

Recognition is always a decision of a → State made under its own legal system. This decision can be unilateral or subject to an international treaty obligation. In either event, however, it is the free will of a State that vests foreign acts of State with effect within its domestic legal order. An atypical situation arises between the → European Communities and their member States. The principle of direct effect and immediate applicability of Community law comprises, apart from the duty to apply such law, the duty to recognize sovereign acts of the Communities. However, since the relationship within the Communities is in many respects a unique phenomenon, recognition within this framework should not be dealt with under the heading of recognition in a classical sense.

2. Forms of Recognition

Recognition may occur in several forms. A foreign act of State may for instance be formally recognized by a State organ as establishing a title for domestic execution. This happens mostly in the field of legal assistance in civil procedure, but also with respect to foreign arbitral awards (→ Recognition and Execution of Foreign Judgments and Arbitral Awards). This form of recognition will not be dealt with here. Recognition in this sense is not common in administrative procedure, since presently States still do not enforce foreign public law within their boundaries (→ Administrative Law, International Aspects).

Another form of recognition is the respect for a legal status conveyed under foreign law such as nationality, name, legal capacity, marriage, divorce, academic degree, title, etc. Recognition in this sense means that such foreign acts of State are considered as having the same legal effect as similar domestic acts.

Recognition may also arise in the form of the acknowledgement of a legal position created by a foreign act of State. If for example a foreign State expropriates an owner, grants permission to build a nuclear plant, prohibits export of goods or initiates a bankruptcy proceeding to restrain the

ability of a debtor to dispose of his assets, such acts may be recognized in the forum State in a civil proceeding concerning ownership, lawfulness of an act with respect to torts law, or the right of a creditor to claim payment from the bankrupt debtor. Recognition in this sense is part of conflict of laws rules and, more specifically, represents the extension of such rules beyond the private law to the acts of the State whose law is chosen.

3. International Law Rules concerning Recognition of Legislative and Administrative State Acts

There is some international treaty law concerning recognition, as for example bilateral treaties on the recognition of titles and academic degrees. Apart from this, rules must be found in → customary international law (→ Sources of International Law). A State may only exercise its jurisdiction with respect to such persons or goods with which it has a sufficient link (→ Jurisdiction of States). This is accepted international law, a position warranted by the finding of the → Permanent Court of International Justice (PCIJ) in the → Lotus Case. If a State, however, exercises jurisdiction in violation of this rule, another State is nevertheless free to recognize this sovereign act if no third State's rights are violated. However, if the foreign act of State constitutes a prohibited → intervention in the → domestic jurisdiction of a third State, other States would generally also commit such an intervention by recognizing that act.

Another international law limit to recognition can be found in peremptory norms (→ Jus cogens) such as the prohibition of war and the → use of force as embodied in Art. 2(4) of the → United Nations Charter. Thus, State acts based on such normative violations as, for example, legal and administrative acts concerning illegally occupied territory beyond the level of technical administration, can also be considered internationally illegal. In this case recognition of these acts would also be illegal. This principle emerged as the → Stimson doctrine and later found general acceptance within the community of States. A similar limit to recognition is, for example, reflected in the resolutions of the → United Nations concerning the status of → Namibia. Generally, it is submitted that the violation of a rule of *jus cogens* by a State act prevents other States from recognizing this act.

There is no evidence in international practice that a duty to recognize foreign acts of State exists. The → recognition of a foreign State or government in itself clearly does not entail such a duty. The common law act of State doctrine has not been considered to be required by international law. In non-common-law countries recognition is always conditioned by the national → *ordre public* (public order) and thus by the national will to accept foreign acts of State so long as no domestic basic principle of law or key policy is violated by recognition. The public order exception amounts practically to an absolute freedom of States to recognize or not to recognize foreign acts of State, although → good faith and the prohibition of an → abuse of rights still constitute general limitations to this freedom.

If a State chooses not to recognize a foreign act of State, it is nevertheless not entirely free to regulate the matter itself. No State is allowed under international law to exercise jurisdiction with regard to persons or matters to which it does not have a sufficient link (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). In a situation where no valid point of contact such as territory, nationality, residence, State security, or prevention of harmful effects on the domestic legal order (the so-called effects doctrine) exists, and where only the foreign State has a sufficient link for exercising jurisdiction, non-recognition may be an unlawful intervention into the domestic affairs of the foreign State if it engenders detrimental effects on the legally protected interests of that State. Thus an expropriation effected by a foreign State on its own territory in accordance with international law standards must not be countervailed by a State which itself does not have a sufficient link with the former owner, for instance through nationality or permanent residence, or with the assets involved. But since there is a large margin within which States can assert a sufficient link (see the Lotus Case), such a case will only rarely occur. Thus the rule is that there is no duty under general international law to recognize foreign legislative and administrative acts.

4. National Self-Restraint

States nevertheless frequently do recognize foreign legislative and administrative acts. This is a reflection of the common interests of States. As early as the 18th century such interests found expression in the third axiom of the Praelectiones juris romani, Pars II (liber I tit.III), 4th ed., 1749 by the Dutch scholar Ulricus Huber: "Other States will exercise comity not to countervail the validity of a State's acts on their territory, but without any prejudice to their own sovereignty." Comity constitutes deference to another sovereign, but is also exercised reciprocally on the basis of a mutual interest in warranting the validity of State acts across national borderlines in order to prevent inconsistencies and possible disruptions of legal situations (→ Comity).

Contemporary State practice shows that this axiom is generally heeded in the form of unilateral self-restraint or a treaty obligation. Self-restraint is based on considerations of common interest and → reciprocity, legal security, economic interest and conflict avoidance. Even if two States have sufficient links for both to regulate a matter, the intensity of these links may reveal differences. The State which is connected, affected or interested more loosely may then yield to the State with the stronger interest. This not only serves to avoid clashes or frictions between jurisdictions, but also saves time, money and administrative resources. Considerations of reciprocity lead to the recognition of most foreign legislative and administrative acts of State if they do not contravene the domestic public order and if they concern persons and subjects on the territory of the acting State.

Furthermore, the liberalized flow of persons, goods, services and capital over borders has created a need for legal security, predictability and regulatory consistency. This liberalization is generally economically advantageous to the States affected and they thus have an interest to create an encouraging legal environment. Legal security attracts people and investment across borders and is only guaranteed if legal positions created abroad are not jeopardized or reversed in another State. The harmony of international regulation, which is one of the cornerstones of conflict of laws doctrine is consequently also of utmost importance in this field.

For these reasons there is a widespread State practice of recognizing acts of a foreign State concerning persons and matters on its own territory. However, this practice does not automatically embrace the enforcement of such acts. In fact, such enforcement is rather rare in public law matters and regularly only the result of an international agreement. However, legal positions created on foreign territory are normally recognized if they do not contravene the recognizing State's public order. The continental legal systems have utilized this public order exception flexibly and have, for example, recognized foreign expropriations, even if they were deemed illegal under international law, under the condition that no overriding national interest was affected (→ Chilean Copper Nationalization, Review by Courts of Third States). But since the determination of national public order is exclusively within the discretion of every State, this exception precludes the practice of recognition from becoming the basis of an international customary law duty to recognize generally. However, since all States feel obligated to and, in practice do weigh their own public order or national interest against the foreign State's interest in the effectiveness of its legislative or administrative acts there is at least a duty to balance in good faith the opposing interests and not to refuse arbitrarily the recognition of foreign acts of State in their effect on the acting State's territory.

In the Anglo-American legal systems the approach under the act of State doctrine has been somewhat different. The development of this doctrine in the United States, on the one hand, and the other common law countries, on the other, differed but is presently rather convergent. The particular steps of this development shall not be elaborated upon here, but generally show that the recognition of foreign acts of State was never considered to be mandated by a norm of public international law, as expressly stated in Banco Nacional de Cuba v. Sabbatino (376 U.S. 398 (1964)). While before → Sabbatino the doctrine was based on comity, i.e. national self-restraint in deference to foreign sovereignty, Sabbatino and the ensuing practice relied more on national concerns such as the separation of powers in foreign policy matters. In the United Kingdom, the House of Lords recently adopted a similar

view in Buttes Gas & Oil Co. v. Hammer and others ((1981) 3 All ER 619). Furthermore, the doctrine has been narrowed by excluding foreign acts of State involving essentially commercial transactions from its reach (see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)).

A general evaluation of those cases in which the recognition of a foreign act of State has been questioned or refused shows that in most instances the illegality of expropriations under international law, or the interference of a State by governmental acts with a commercial duty to be performed by the State or an affiliated agency, was at stake. In these matters recognition has been conditioned on application of a flexible public order or national interest approach. In most other cases, recognition has been granted outright.

State practice has been much more reluctant to grant recognition with respect to the extraterritorial reach of foreign acts of States. In the United States, expropriation of assets on United States territory has been recognized when it served national policy goals (United States v. Belmont, 301 U.S. 324 (1937); Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 658 F.2d 903 (2d Cir.1981)). Absent the furthering of such aims, recognition has been refused (Republic of Iraq v. First National City Bank, 241 F.Supp. 567 (S.D.N.Y.), aff'd, 353 F.2d 47 (2d Cir.1965), *cert.* den., 382 U.S. 1927 (1966)). Since a State normally seeks to enforce its own legal order on its territory, recognition of conflicting foreign acts of State can hardly be expected and is not required by international law. The consequence is a rather strict delimitation of the spheres of national territory jurisdiction. In company law this leads in some States to the splitting-up of companies. Shareholders who have been expropriated in a foreign country may be allowed to continue the company in another State with respect to company assets located on this State's territory (Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F.Supp.814 (S.D.N.Y.1961)); in the Federal Republic of Germany the Federal Supreme Court has applied the *Theorie der Spaltgesellschaft* in this sense (see e.g. Entscheidungen des Bundesgerichtshofs in Zivilsachen 56,66, at p. 69; 62,340, at p. 343). A field of law where strict territoriality of rights granted by a State constitutes a basic principle that is only altered by international treaties is the protection of intellectual property.

A different problem arises from the extraterritorial effects of foreign sovereign acts. Even without foreign recognition or enforcement State acts may entail compulsion on persons living or staying abroad. An individual may be caught betweeen two conflicting orders of different States. Such conflicts jeopardize the legal security and predictability and the harmony of legal systems which are required to foster the cross-border flow of goods, services, capital and people. Thus, State practice and legal doctrine are making attempts to develop tools for resolving conflict such as balancing of interest tests in order to provide for a consistent interplay between the national legal orders. These methods are similar to recognition since they provide for States to exercise unilateral self-restraint in order to give way to the interests of other States that are perceived as being more weighty than their own. The rationale for such restraint is, as in the case of recognition, the reciprocal comity of nations.

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WERNER MENG

REPARATION FOR INTERNATIONALLY WRONGFUL ACTS

1. Notion

A → subject of international law which commits an → internationally wrongful act towards another is liable for reparations (Factory at Chorzów, PCIJ Series A, No. 17 (1928), at p. 47; → German Interests in Polish Upper Silesia Cases; → Reparation for Injuries Suffered in Service of UN (Advisory Opinion), ICJ Reports 1949, p. 174; → Responsibility of States: General Principles). This duty to provide reparation is an international obligation resulting from the commission of an internationally wrongful act; it is a new and separate obligation, independent from the primary obligation the breach of which constituted the internationally wrongful act. Its primary purpose is to re-establish the situation which would have prevailed if no breach of an international obligation had occurred (*restitutio in integrum*). To be more specific, reparation may envisage all or some of the following effects: re-establishment of the right injured (→ Restitution), compensation for → damages suffered in the past, and assurance against future breaches of the same obligation.

Whereas material damage does not form a constituent element of an internationally wrongful act, it is relevant with respect to reparation whether and to what extent material damage has occurred. Furthermore, a correlation exists between the significance of the international obligation breached and the reparation owed. Such correlation is governed by the principle of → proportionality (see the wording of Art. 2 of the → International Law Commission's Third Report on State Responsibility as submitted by W. Riphagen; UN Doc. A/CN.4/354 with Add. 1, 2). The concept of *restitutio in integrum* as a new obligation of a subject of international law clearly presupposes a right of another subject affected by the internationally wrongful act. This is the point where the origin of the primary obligation breached becomes relevant. If it has its origin in a bilateral treaty, responsibility only emerges *vis-à-vis* the other party to the treaty. In the case that the obligation breached is contained in a multilateral treaty, not only the party whose material interests have been directly injured but all other parties to the multilateral treaty may ask for reparation, given that the breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. To this end the basic principle contained in Art. 60 of the → Vienna Convention on the Law of Treaties has to be applied.

All States have to be regarded as having been affected if an obligation of → *jus cogens*, for example, has been violated (→ International Crimes; for the definition of the term injured State, see W. Riphagen, Fifth Report on State Responsibility, UN Doc. A/CN.4/380 (Art. 5)).

2. Means of Reparation

The possible means of reparation entail the obligations to stop the breach (to discontinue the act, to release and return the persons and objects held, and to prevent continuing effects of the breach) and to re-establish the situation as it existed before. Such reparation is, in principle, a belated performance of the original obligation. If a belated performance of the original obligation is impossible, a substitute performance of the original obligation is required. This would entail

compensation for material as well as moral damage and a guarantee against a repetition of the breach. The compensation of material damage has to correspond as to its amount to the expenditure required to re-establish the situation as it existed before. Such compensation also embraces the profit lost (*lucrum cessans*) which, however, must not be too remote or speculative. If the internationally wrongful act has been committed by an individual, the amount of compensation owed depends upon whether the act in question is directly attributable to the subject of international law or whether the liability results from its failure to act. In the latter case, compensation is only owed when it results from negligence (see the 1925 case of Laure May Buffington Janes et al. (U.S.A.) v. United Mexican States, RIAA, Vol. 4, p. 82).

Where the internationally wrongful act concerns the treatment of → aliens, whether natural or juridical persons, reparation may only be asked for after the respective national remedies have been invoked or proven to be ineffective (→ Local Remedies, Exhaustion of).

Besides the compensation of material damage, the injured subject of international law may demand the punishment of the persons having committed the internationally wrongful act.

In the case of moral damage, the injured subject may insist on → satisfaction (e.g. → Borchgrave Case). Such satisfaction may already lie in the respective judicial decision (→ Corfu Channel Case).

It is the common element of all these means of reparation that the offender fulfils the primary obligation after it has been breached.

In addition, there are certain measures which may be taken by the injured subject to exert some pressure upon the offender so as to compel him to fulfil his obligation. It may terminate or suspend the performance of its obligations towards the offender if such obligations correspond to, or are directly connected with the obligation breached (principle of → reciprocity). Furthermore, it may, by way of → reprisal, suspend the performance of its other obligations towards the offender. Special rules apply if an obligation has been breached which originated in a multilateral treaty (for details see Arts. 12, 13, 14 of the draft articles proposed within the Fifth Report on State Responsibility presented by W. Riphagen, UN Doc. A/CN.4/380).

In the case where an international crime has been committed, even subjects whose interests have not been directly affected are obliged to take appropriate action. Such obligation entails withholding → recognition of the situation created and not rendering assistance to the subject which has committed such crime in maintaining the situation created (→ Stimson Doctrine).

3. Evaluation

The rules mentioned above are of subsidiary nature only. Parties to an international relationship may provide for a different, specific, set of rules. Such specific rules are, for example, contained in the Convention of International Liability for Damage Caused by Space Objects (→ Space Activities, Liability for). The autonomy of the subjects, however, is limited by the provisions and procedures of the → United Nations Charter relating to the maintenance of international peace and security.

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RÜDIGER WOLFRUM

REPRESENTATIVES OF STATES IN INTERNATIONAL RELATIONS

1. Introduction

Every → State has the right to establish its political and administrative structure as well as its own → government. Generally modern States

provide themselves with a constitution establishing the various State powers, and make laws organizing, mainly, public administration and the judiciary. Within this structure, States create different organs, attributing each with a particular competence. Basically it is the national law that attributes to each organ its respective competence and indicates which organ represents the State in each case as well as the range of its competence, that is to say, how far its acts can be attributed to the State.

In the international field, the State's domestic law determines the character of official State organs and their range of competence. There is, in other words, an authorization to the State or a reference to the domestic law by international law in the sense that domestic law should control as to the appointment of State organs and the extent of their competence. However, there are specific subjects in which international law determines that the acts carried out by a certain official are attributed to the State independent of the State domestic law upon which that official relies. For example, → customary international law concerning the adoption of treaties attributes a specific competence to the minister for foreign affairs or to the commander-in-chief of an army, despite the provisions opposing such competence which the domestic law might contain. In the same way, certain treaties concluded by an unauthorized organ according to domestic law are valid internationally (Art. 46 of the → Vienna Convention on the Law of Treaties). Concerning international responsibility (→ Responsibility of States: General Principles), it is the law of nations which determines when a State is responsible for the behaviour of its officials or the extent to which they may be considered State organs. Thus, for example, the act that gives rise to the question of international responsibility may have been committed by an administrative official, such as a customs official or a policeman, by a legislative organ, or by a court of law. In these cases, it is international law, not domestic law, which determines the circumstances in which the State is internationally responsible. Thus, the capacity of the State organ to incur State liability may exist when officials act illegally as well as when they act legally during their office.

Every case in which the acts of a person are attributed to the State involves a State organ; an organ is such precisely because those acts are attributed to the State. In order to define precisely the competence of State organs one has to bear in mind not only the text of the State's constitution, but the State's practice as well, i.e. the "real constitution". It happens in some States that the constitutional text has been modified by an uninterrupted and consistent practice of certain officials or that certain provisions have fallen into disuse. In this case, the competence of the official in question is determined according to the real constitution. This also applies in those cases in which a State is ruled by a revolutionary government or a *de facto* government (→ De facto Régime).

2. State Organs

Starting from the concept that a State organ, from the international point of view, is an entity whose acts are attributed to the State according to the law of nations, whether directly or indirectly by referring back to domestic law, it can be seen that it is difficult to draw up a complete list of all such organs. Sometimes, the State organ acting on an international level is defined solely as that organ exercising treaty-making power. This is not accurate, since concluding agreements is only one aspect of the international activity of the State; for example, international responsibility and diplomatic relations, among others should also be taken into account. The principle State organs acting at the international level are analyzed in the following sections.

(a) Head of State

States generally have a supreme organ which acts as the head of State. The functions of this organ may be fulfilled by a president, a king or an emperor. In some countries, the supreme organ has a collective character, like the Swiss Federal Council, or, as happened a few years ago in Uruguay, a National Government Council. Notwithstanding the title which the head of State bears – king, prince, president or emperor – the bearers are considered equal for legal or protocol purposes.

In the time of absolutism, monarchs exercised the *jus representationis omnimodae* by virtue of which they represented the State with no limi-

tations whatsoever and obliged it with their sole consent. Since then, constitutional governments have restricted the competence of the head of State who now requires, in general, the consent of parliament or some other organ to oblige the State. Despite this development, the head of State fulfils, to this day, a primary function in the international representation of the State. Owing to the importance of this position of head of State, it is customary to officially notify foreign countries of the succession of a new monarch or the taking of office of a new president.

Heads of State are the main organs of foreign relations. It is they who accredit foreign diplomats, appoint diplomats to be accredited abroad and sign letters of credence. Heads of State also appoint → consuls, sign letters patent and grant exequatur to foreign consuls. They also grant full powers to negotiate international treaties and sign the instruments for ratification. Heads of State formulate the declaration of war and stipulate peace.

The international treaties referring to the treatment of heads of State abroad merely allude to international law in general, for example under Art. 21(1) of the Convention on Special Missions of December 16, 1969 and Art. 50(1) of the → Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of March 14, 1975. These agreements deal with cases in which heads of State authorize a special mission or a delegation to participate in an organization of a universal character. The immunities, inviolability and privileges granted by these conventions do not preclude the existence of a more privileged régime being accorded to the head of State under international law. The first-mentioned convention assimilates the regulations for the head of State to those which international law grants for official visits.

International practice acknowledges and guarantees heads of State inviolability with regard to their persons and residence when they are abroad. This inviolability covers luggage, mail and archives. Their families and retinues enjoy the same inviolability. This privileged status also applies when heads of States travel → incognito. Heads of States enjoy penal immunity abroad. On the other hand, there is no unanimity in case-law or legal theory about immunity from civil jurisdiction. Since the acts that heads of States carry out in their official capacity are State acts, the question of immunity from civil jurisdiction only concerns their private acts, because any complaint against the head of State would constitute a complaint against the State itself. The convention of March 14, 1975 applies to heads of State when they authorize the appearance of a delegation before an organization of universal character, granting it immunity from civil jurisdiction for acts carried out solely in the exercise of official functions (Art. 60(1)). Even with regard to official acts, the immunity from civil jurisdiction does not extend to actions for damages resulting from an accident caused by a vehicle, provided such damages are not covered by insurance (Art. 60(4)). French and Italian jurisprudence tend towards non-recognition of immunity from civil jurisdiction for private acts, whilst British jurisprudence favours recognition. Customs exemptions are also provided for heads of State which allow them to import, without paying duties, whatever they may need during their stay and use for the receptions they offer to their hosts. Finally, it is worth pointing out that the Convention on crimes against internationally protected persons of December 14, 1973 (UNTS, Vol. 1035 (1977) p. 167) establishes a series of measures to be adopted by the contracting States in their domestic law so as to protect certain representatives of States. Art. 1(1) includes heads of State among those representatives.

(b) Head of the government

In States with a parliamentary system, the head of State has a restricted competence and the ruling function of the government is carried out by the head of the government. This official presides over a council of ministers, or cabinet, all of whose members are responsible to parliament. In constitutional monarchies, the competence of the head of State is greatly reduced and, sometimes, merely pertains to protocol.

In parliamentary systems, heads of government are key figures in the execution of the foreign policy of the State. It is they who appoint the minister for foreign affairs and are solely responsible to the parliament. Heads of government do not need full powers to sign an international treaty

on behalf of their State (Art. 7(2)(a) of the Vienna Convention on the Law of Treaties).

Heads of government are owed special treatment when they are abroad on official duties under the Conventions on Special Missions and on the Representation of States in Their Relations with International Organizations of a Universal Character in Arts. 21(2) and 50(2), respectively. According to these provisions the head of government taking part in a special mission or a delegation before an international organization of a universal character enjoys the same facilities, privileges and immunities recognized by customary international law in addition to those granted by the corresponding conventions. But neither convention specifies the treatment appropriate to the head of government under international law. In this matter, the convention on special missions makes a distinction between head of State and head of government. Indeed, it grants the former a treatment similar to that of the head of State on official visits, whilst, to the latter, as has been indicated, it grants the treatment established in customary international law, plus the privileges, facilities and immunities specifically indicated in the 1969 and 1975 conventions. Therefore, in cases not foreseen in these conventions, for example when the head of government travels abroad officially, without taking part in an official mission or a delegation from his own country before an international organization of a universal character, customary international law is applied. In the same manner, customary international law is applicable to any circumstance in which its rules are more beneficial to the head of government than those of the conventions of 1969 and 1975.

When heads of government are officially abroad, the inviolability of their persons, residences, luggage, mail and archives is recognized. They enjoy immunity from jurisdiction, but there are diverse interpretations about their immunity from civil jurisdiction for private acts. Customs exemptions are sometimes granted to heads of government for their luggage and for whatever objects they may need during their mission. The head of government is included in the Convention on crimes against internationally protected persons (1973) in Art. 1(1)(b).

(c) The minister of foreign affairs

This State official is the immediate director of the international policy of the State under the control of the head of State, the head of government or Parliament. Ministers for foreign affairs are the executors of that policy, the officials hierarchically above the diplomatic agents accredited abroad, and the organs of communication and negotiation between their government and the diplomatic agents accredited by their own State. As head of the diplomatic staff, the minister for foreign affairs imparts instructions to all missions accredited abroad. Missions of foreign States with the rank of chargé d'affaires are accredited by the minister, who is presented by their chief officers with *lettres de cabinet*. In the question of international treaties, ministers for foreign affairs play an important role since they may conclude agreements in a simplified form, which through their sole signature oblige the State. Their statements may oblige the State internationally even when domestic law holds otherwise as was decided by the → Permanent Court of International Justice (PCIJ) concerning the well known declaration of the Norwegian minister, Ihlen (→ Eastern Greenland Case; PCIJ, Series A/B No. 53 (1933) at p. 71).

The treatment applicable to the minister for foreign affairs abroad is governed by the same regulations of the conventions of 1969 and 1975 which apply to the head of government. Also, customary international law is applicable to the minister under the same circumstances and according to what has been stated before for the head of government. The minister for foreign affairs is likewise included among internationally protected persons according to the convention of March 14, 1973.

(d) Diplomatic agents

The régime of diplomatic relations and its agents is regulated by the → Vienna Convention on Diplomatic Relations of April 18, 1961 (see → Diplomatic Agents and Missions and → Diplomatic Agents and Missions, Privileges and Immunities). Missions of States before international organizations of a universal character are governed by the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975.

(e) Special missions

This subject is analyzed in the article on special

missions. Special missions of a temporary character are regulated by the convention of December 16, 1969.

(f) Consuls

Under international law consuls do not represent the State; rather their functions are limited to giving assistance to nationals and carrying out certain tasks related to trade. A simple reading of Art. 5 of the → Vienna Convention on Consular Relations (1963) shows that consuls fulfil functions which imply representation of the State, that is to say, that they are organs of the State.

(g) Parliament

The participation of the parliament in the → international relations of the State depends upon the particular constitution. In general, the parliament, or one of its chambers, has competence to approve treaties. Only after this approval has taken place can the head of State ratify the treaty. In these cases, the consent of both the head of State and parliament or of one of its chambers is required, according to constitutional decisions, for the State to give valid consent in obliging itself by means of a treaty. The parliament, or one of its chambers, is, therefore, an organ whose declaration of will is needed to indicate the consent of the State.

The parliament also appears as an organ of the State at the international level in respect of illegal acts. The State is responsible for laws contrary to international law and for the non-adoption of laws necessary to comply with an international treaty. In these cases, the illegal act or omission of the parliament is attributed to the State through parliament as its organ.

(h) Courts of justice

The judgment given by judicial authority is an emanation of an organ of State according to the decision of December 7, 1955 of the Franco-Italian Commission of Conciliation (RIAA, Vol. 13 (1964) p. 422, at p. 438). This decision manifests the international practice according to which the State is internationally responsible for the acts of the judiciary. The cases in which the question of responsibility arises generally concern a → denial of justice or manifest arbitrariness in a sentence. Since the acts of the judiciary are attributed to the State, the judiciary must be seen as a State organ. Courts of law are organs of the State even in those countries in which, according to the constitution, they are entirely independent of the other State powers.

(i) Public administration

The above characterization of diplomatic and consular agents also applies to public administrators. In general, any agent of public administration, such as customs officials, military officials and officials in charge of fisheries, or hygiene, etc., can incur the international responsibility of a State. In → armed conflicts, international law grants competence to the commander-in-chief of an army to negotiate certain international agreements. To the degree an agent of public administration involves the responsibility of the State, the agent is a State organ.

(j) Private persons

In general, the acts of private persons cannot be attributed to the State; they are not State organs. However, there are exceptions. For example, Art. 51 of the Treaty on the River Plate of November 19, 1973 (Politica Internacional, No. 209/ 10, Oct./Nov. 1977, p. 39) and Art. 42 of the Rio Uruguay Statute of September 18, 1975 render States responsible for any damage emerging from pollution caused by private persons residing in their own territory. In these cases the acts of private persons are attributed to the State, that is to say, they are considered State organs by virtue of an international treaty. The responsibility of the State is recognized here independently of the fact that the State may or may not have taken measures to avoid contamination by private persons (→ Responsibility of States for Activities of Private Law Persons). From the point of view of international law, persons who, acting for a country, carry out illegal activities such as kidnapping, are also considered State organs.

3. Organs Common to Several States

Two or more States can agree that the same organ should act in their name. The Vienna Convention on Diplomatic Relations foresees for instance, the establishment of a common embassy (Art. 6). The Vienna Convention on Consular Relations also foresees the hypothetical situation in which one and the same consul is designated by several States (Art. 8). Another case of a common

organ is the President of France, who is also co-prince of → Andorra.

States have the freedom to establish common organs to carry out various functions (justice, hygiene, fishing, etc.). But a conceptual distinction must be made between two situations which may appear in practice. One case is when several States establish a common organ and the acts of such organ are attributed to them. Another case is when several States create an organization to fulfil a certain function. Such an organization is an international legal person unlike a common organ, which lacks this quality (→ Subjects of International Law; → International Organizations, General Aspects).

4. A State Representing Another State

In the handling of international relations, a State may not only make use of its own organs or those established in common with other States, but may also act through the organs of a foreign State. For example, → Liechtenstein has put Switzerland in charge of its diplomatic representation and → San Marino has done the same with Italy; Belgium and the Netherlands represent Luxembourg's political and economic interests. When there is a rupture of diplomatic relations between two countries, each of them may appoint another State to represent it and its interests. The → Geneva Red Cross Conventions (1949) and Protocols (1977) foresee the appointment of → protecting powers by countries at war.

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JULIO A. BARBERIS

RESPONSIBILITY OF STATES: FAULT AND STRICT LIABILITY

1. Notion

In international law, "responsibility" and "liability" – two words where French or Italian use but one – are broadly synonymous, though some authorities consider the latter more appropriate to connote an obligation to provide reparation (→ Reparation for Internationally Wrongful Acts). "Responsibility" remains, however, the usual term in classic doctrines on the subject. "Strict liability" denotes liability without fault and has thus been applied in reference to two forms of causal liability which are distinguished below: objective responsibility in customary law and the liability for injurious consequences.

The problem of the basis and source of a State's international responsibility is one of the most complex in the general theory of international law. For a long time the doctrine remained very sketchy and was largely confined to the treatment of → aliens and the reparation of loss or injuries caused to them. The wider development of "classic" responsibility has been relatively recent, while "liability for risk" (see section 4 *infra*) is a very modern phenomenon (→ Responsibility of States: General Principles).

2. Role of Fault in the Classic Approach

Two main conflicting schools of thought on the matter have existed ever since the beginning of the 20th century. They have, however, at least one point in common, in that they both take as their starting-point the concept of an → internationally wrongful act. But one considers fault on the part

of the State to be the central constituent of such an act whereas the other does not.

In that connection it is necessary to clarify certain notions. First, there is no total equation between the concept of "fault" and that of "breach of an international obligation". When a State commits a fault in the legal sense, there is always a breach of some international obligation. But the reverse is not necessarily true: a State may violate an international obligation without any such fault having been committed by the State itself or any of its organs. Neither is "fault" to be confused with "wrongfulness". A State's act is wrongful if it constitutes the breach of an international obligation, since what is meant by calling it wrongful is that it is not in conformity with law. Hence any such breach constitutes a wrongful act while, conversely, any wrongful act is such in consequence of some such breach. Briefly, wrongfulness is identifiable with the breach of an international obligation but distinct from fault.

The school of "liability for fault" or "subjective responsibility" (Oppenheim, von Liszt, Fauchille, Hershey, Hatschek, Lauterpacht and others) has reverently carried on the legacy of Grotius, who had espoused the theory borrowed from Roman law, whereby the *culpa* is conceived as a subjective fault on the part of the State itself. Many writers (Accioly, Ago, Bourquin, Brierly, Cavaré, Dahm, Morelli, Redslob, Rolin, Salvioli, Sperduti, Verdross) have remained, with various nuances, in favour of the "fault" theory, but some of them place an "objective" construction on fault which brings it close in meaning to the non-observance of an international duty and thus narrows the distance between this school and the next.

The second, the school of "causal liability" or "objective responsibility", was launched in 1902 by Anzilotti, who challenged the Grotian view of the matter and has been followed by such writers as Brownlie, Delbez, Guggenheim, Kelsen, Jiménez de Aréchaga, O'Connell, Sereni and Schwarzenberger. According to them, the responsibility of a State flows "objectively" from the breach of an international obligation caused by an action or omission attributable to that State, without there being any need to resort to fault as an additional subjective factor. In other words, fault is not a precondition for the objective constitution of a wrongful act. Under this "no-fault" theory, negligence on the part of a State, or want of → due diligence, are equated to objective failure to live up to an international obligation, construed as a duty of care or vigilance to be appreciated in the light of a standard of international conduct and constituting a rule of → customary international law.

However, both these schools accept that an internationally wrongful act is made up of two elements, as endorsed by the → International Law Commission (ILC), which nowhere refers to fault in its draft articles on the responsibility of States for internationally wrongful acts (Draft Articles on State Responsibility, Part 1, in: Report of the International Law Commission on the Work of its Thirty-Second Session, 5 May–25 July 1980, UN Doc. A/35/10; YILC (1980 II, Part 2) p. 30). This is how the Commission's draft (Art. 3) has defined such an act:

> "There is an internationally wrongful act of a State when:
>
> (a) conduct consisting of an action or omission is attributable to the State under international law;
>
> and
>
> (b) that conduct constitutes a breach of an international obligation of the State."

The first element in the definition is subjective: it is a question of identifying the State responsible. The second is objective in that it concerns conduct which objectively constitutes a failure to abide by an international duty.

Here a careful distinction has to be made between the attributability and the scope of the responsibility, because it is in the assessment of the degree of liability that fault may be taken into consideration. Hence the element of fault should play an important part in any examination of the consequences (→ reparation, → satisfaction or → sanctions) of the wrongful act, once that act is established and ascribed. It is indeed the almost automatic practice of tribunals, once a breach of obligation has – without preliminary recourse to the concept of fault – been established and attributed to a State, to pass on to a second stage at which they ascertain whether and to what extent the relevant conduct of the State concerned was malicious or wilfully harmful. It is moreover this test which affords doctrine and case-law a logical explanation of the classic instances of exoneration

from responsibility (*force majeure*, fortuitous event).

3. *Modern Forms of Liability*

Today, alongside classic responsibility with its rival theories, some new forms of liability have been emerging which not only ignore the concept of fault as a constituent factor of the internationally wrongful act but do not even enquire whether the act attributable to the State is wrongful. This is the outcome of scientific and technological advances which have obliged international law to adapt itself to new circumstances. Within a few decades, man's power over nature has increased in a spectacular and often frightening degree. These developments have revolutionized living conditions while at the same time they have brought a latent threat to the survival of mankind. More especially, the harnessing of nuclear energy, the conquest of space, the exploitation of the sea-bed, the transport and use of liquid or gaseous hydrocarbons, have drawn humanity into new activities which, though they are for the most part not prohibited, are abnormally dangerous (→ Environment, International Protection; → Nuclear Energy, Peaceful Uses; → Nuclear Research; → Nuclear Ships; → Nuclear Warfare and Weapons; → Sea-Bed and Subsoil; → Space Activities, Liability for).

The modern theory of liability for actions not prohibited by international law has gained ground rapidly owing to the necessity of reconciling the greatest possible freedom of action for States with the justified fear that undisciplined use of technological and industrial power might spell the ruin of mankind. The problem posed by these new activities does not derive from the question whether they are legitimate or wrongful, but from the fact that, even if they are essential or beneficial, they embody an inherent risk of transboundary harm. The new liability problem therefore presents itself in terms of loss or injury suffered in consequence of activities which, however useful, are ultra-hazardous, irrespective of whether the State causing the harm did or did not take every desirable precaution. The new idea is that due diligence affords no exemption from reparation for damage caused.

Thus this theory leaves entirely out of account one of the fundamental elements of an internationally wrongful act, namely the breach of an international obligation, even if some recent writers persist in the belief that a duty of reasonable care is still involved. The focus has in fact shifted from such an obligation, which the "objective" school had already stressed in the field of classic responsibility, to more complex requirements stemming from the common interests and → interdependence of all mankind.

However conscious States might be of the vital nature of the interests at stake, it is only on a conventional basis that it has been possible for them to feel bound by this new, more onerous and stringent form of liability. That is one of the distinctive characteristics of this form of liability as compared with the classic type, which has customary roots. The conventional endorsement of liability for ultra-hazardous activities shows how States are above all concerned with the reparation of loss or injury, and much less with what is in this context the secondary point as to whether the State causing the damage acted in a legitimate or a wrongful way, or exercised reasonable care in carrying on its activities.

Thus the basis of wrongfulness belonging to classic responsibility is here supplanted by the principle of causality. The most common feature of these conventional régimes is the adoption of a rule of absolute responsibility whereby liability results from the very fact of injurious consequences without there being any need to qualify the act that gave rise to them.

4. *Liability for Activities not Prohibited by International Law and for Ultra-Harzardous Activities*

As indicated above, this type of liability is of conventional origin. Scholars have, however, raised the question whether, outside the conventional framework, there exists any rule of international law whereby States have a duty to make reparation for damage caused by their activities which, though not prohibited by international law, are ultra-hazardous in nature. To answer this question, they have investigated the basis of the obligation to make reparation under this particular kind of liability.

This basis certainly cannot be sought in the existence of a wrongful act constituted by the breach of an obligation to observe due diligence,

such as international tribunals laid at the door of the responsible States in the → Corfu Channel Case (ICJ Reports 1949, p. 23) or → Trail Smelter Arbitration (award of April 16, 1938, RIAA, Vol. 3, p. 1911; and award of March 11, 1941, ibid., p. 1938). This much is perfectly clear for the reason broadly referred to above, namely that proof of breach of the obligation of due diligence is not required, since States have preferred to introduce via conventions a principle of "absolute liability" independent of any question of negligence or want of care. It is "absolute" in the sense that, once a causal link has been established between the transboundary harm and the dangerous activity of the State concerned, no ground of exemption from liability (such as *force majeure* or fortuitous event) is accepted. It is also referred to as "strict liability".

For this absolute or strict liability scholars have given various justifications which in one way or another centre on the concept of risk. It could be considered as an extreme form of objective responsibility (i.e. strict liability) in that, while both have no place for the concept of fault, absolute liability goes further by remaining indifferent also to wrongfulness and the duty of care. Quentin-Baxter considers that contemporary international law enshrines an international obligation that constitutes the basis of liability for risk: the "duty to avoid, minimize and provide reparation for transboundary losses or injuries" (Fourth Report to the ILC on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, UN Doc. A/CN.4/373, June 27, 1983). Other writers, such as Philippe Cahier, accept that there is as yet no customary rule of international law in the matter. They nonetheless conclude that there is a general principle of law whereby a liability for hazardous activities exists which is separate from and independent of both fault and wrongful act itself and is predicated on the exceptional risks to which such activities expose innocent victims.

5. *Current Position; Future Prospects*

Quentin-Baxter considers that the situations created by activities which are dangerous though not prohibited have induced the elaboration of a new, exceptional régime of absolute liability which may well be considered as one distinct from but complementary to the classic responsibility of States for wrongful actions or omissions. However, it must be added that activities making use of the latest scientific discoveries and concerned with modern forms of utilization or exploitation of the sea, of space or of nuclear energy are not the only ones to pose such problems. There are also more traditional activities or subject-matters to which such absolute liability might appropriately apply: for example, the use and regulation of rivers that traverse or separate the territories of several States (→ Boundary Waters; → International Rivers); the prevention of damage caused by floods or the melting of the snows; the exploitation of land in border areas; the propagation of fire or explosions across national frontiers; the contamination of human beings, animals or plants by diseases from other countries; the → transfrontier pollution of fresh water.

In such cases, classic responsibility was of little avail whereas the harm could be considerable. But the modern concept of liability has stepped in to fill the gap, untrammelled by notions of fault or want of care, and is gradually giving due weight to the interdependence of peoples and States. Classic responsibility, with its limited field of action, is thus being extended by a nascent liability for risk possessing enormous potential for future development in accordance with the needs of the international community. To some minds, it is not inconceivable that one day such liability may even become applicable in the international economic and financial field, for example in the case of transboundary losses sustained by foreign States or their nationals on account of a State's sovereign decision to devalue its own currency (cf. → Monetary Law, International).

Without yet going to such lengths, one may affirm that, as in the domestic legal order, liability for risk represents substantial progress towards the equitable reparation of losses or injuries sustained by innocent victims. In the international order, it is also a reflection of the interaction of international economic forces, if not yet completely the expression of a living community of interests between peoples ever more acutely conscious of their interdependence. The "objective" theory of strict liability, which even within the classic system treats fault as irrelevant, offers the possibility of eventual harmonization of the two régimes, since

liability for risk is simply an extreme form of objective responsibility.

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RESPONSIBILITY OF STATES: GENERAL PRINCIPLES

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A. Notion

Responsibility of States means that an → internationally wrongful act, committed by one → State against another, entails certain consequences for its author in the form of new obligations towards the victim.

An act is considered internationally wrongful if its author violates an obligation which custom or treaty establishes in favour of another specific State; in that case the author is internationally responsible to the victim and to the victim alone. In its present endeavour to codify the rules of State responsibility (→ Codification of International Law), the → International Law Commission (ILC) is attempting for the first time to determine which duties towards the international community as a whole are so essential for the latter's orderly functioning that their violation would qualify as an → international crime affecting all States and would create new rights and obligations for all of them.

The duty to repair material damage is known as "liability". Since this duty is also one of the consequences of State responsibility, the term liability may be and is occasionally used in this respect synonymously with responsibility. However, "liability" is more frequently employed in a narrow sense, describing the duty to compensate damage caused without wrongdoing.

B. Development of Responsibility

1. *Until World War II*

Compared with the rest of international law, the wealth of arbitral awards and international judicial decisions relating to international responsibility is astounding (→ Arbitration). However, most awards or decisions date from before World War II and were made by bilateral bodies, reflecting the then existing conditions of the international society and the specific relations between the States concerned. Moreover, the bulk of the cases concerns the unlawful treatment of → aliens and thus only a portion of the law of State responsibility. Diplomatic practice relating to responsibility in inter-State relations also reflects the different attitudes which the → Great Powers of the time adopted towards weaker, mostly non-European States on the one hand and their peers on the other hand.

This heterogeneous State practice, which owes so much to the circumstances of each individual case, would by itself have made it difficult to establish a comprehensive body of customary rules covering all aspects of State responsibility (→ Customary International Law). Yet some structural changes in the international society after World War II have added to the difficulty. Thus, as may be seen from the codification exercise of the ILC, legal doctrine plays an important part in combining the relatively narrow areas of convergence into a rational system.

2. *After World War II*

(a) Changing international relations

Among the changes bearing on the subject of responsibility, the most obvious is the enlargement of the international society following → decolonization. This would hardly have led to a qualitative change in → international relations were it not for the existence of world-wide fora of decision-making, which have given → new States an opportunity to voice their complaints on the world stage. In other words, what had hitherto happened back-stage, known only to the initiated or, later, to a few researchers, is now transacted in the market-place. This transformation of international society into a communication society is a qualitative change. Governments, particularly but not only in democratic countries, have come under pressure of public opinion influenced by mass media and can no longer react to violations of international law solely in accordance with reasons of State.

A further transformation was, and is continuously, caused by the increasing → interdependence of States. Socio-economic or strategic necessities have compelled States to undertake or to permit new activities which are perceived by other States as harmful or risky

because their possible damaging effects, particularly in case of an accident, are not, and cannot be limited to the territory of the State undertaking or permitting them. The peaceful uses of outer space (→ Space Law) and the use of nuclear energy for both peaceful and military purposes are pertinent examples (→ Nuclear Energy, Peaceful Uses). Here again public opinion plays an important role. The growing awareness among people of the dangers threatening their environment has, at least in industrialized States, led to strong resistance, sometimes manifesting itself in popular movements, against structural infringements on the quality of life and has raised the question of protection against transboundary and long-range pollution (→ Transfrontier Pollution). Thus, international law is of late confronted with the dilemma whether to restrain certain activities and to impose responsibility on States for breaches of regulations or to create legal liability for acts not prohibited by international law.

(b) The normative response to changing international relations

The international community has responded only haltingly to these changes. Under present circumstances the progressive development and codification of international law is the primary responsibility of the General Assembly of the → United Nations. In 1953 the General Assembly instructed the ILC to study the responsibility of States. That work has not yet been completed. It is, however, sufficiently advanced to allow a review, even if the comments contained in such a review are necessarily provisional.

The challenge of new, risky activities at first provoked only selective reactions in the form of special agreements, such as the Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963 (UNTS, Vol. 1063, p. 265) and the Convention on International Liability for Damage Caused by Space Objects, March 29, 1972 (UNTS, Vol. 961, p. 187; → Space Activities, Liability for).

A more general discussion began with the growing environmental protection movement (→ Environment, International Protection). However, in spite of the well-known awards in the → Trail Smelter Arbitration (United States v. Canada, 1938 and 1941, RIAA, Vol. 3 (1949) p. 1905), the existence of relevant rules of general international law was difficult to establish. Therefore, an attempt was first made to develop a common legal conscience through resolutions, such as Principles 21 and 22 of the 1972 Stockholm Declaration of the Conference of the United Nations on the Human Environment (UN Doc.A/CONF.48/14) and Art. 30 of the → Charter of Economic Rights and Duties of States (1974).

In 1969 the ILC considered the proposal that its study of State responsibility be extended to include general liability and decided against it. However, in 1973 the General Assembly instructed the ILC to study liability for activities not prohibited by international law in a parallel exercise. Thus the necessity to provide a comprehensive solution for the problems was finally recognized but, for various reasons, the work advances rather slowly.

C. Grounds for Responsibility

In accordance with the relativity of international rights and duties, which is one of the characteristics of international law as a decentralized system, responsibility of States arises in response to the violation of a subjective international right of another State. However, with the → United Nations Charter and with the recognition of peremptory norms of international law (→ Jus cogens) in the → Vienna Convention on the Law of Treaties, obligations owed to the international community as a whole began to emerge. From among them the ILC has tried to single out some, like the obligations prohibiting → aggression, → slavery, → genocide, → apartheid, the maintenance by force of colonial domination (→ Colonies and Colonial Régime), or the massive pollution of the atmosphere or the seas, whose violation would qualify as an international crime, giving all States the right to react. However, the determination of these violations suffers from the same problems as the classification of substantive norms of international law as *jus cogens*. In practice the relevance of the concept is therefore more prospective than actual.

In Part I of the Draft Articles on State Responsibility (YILC (1980 II, Part 2) p. 65), provisionally adopted by the ILC, three types of obligations are distinguished:

(i) Obligations requiring the adoption of a

particular conduct. This type of obligation is typical of international custom relating to direct inter-State relations and prescribes a certain behaviour.

(ii) Obligations requiring the achievement of a certain result with means of the State's own choosing. An example are obligations resulting from a non-self-executing treaty which requires incorporation in domestic law for its implementation (→ Self-Executing Treaty Provisions). However, a defective implementation does not by itself cause responsibility of the State, as long as the required result is achieved, for instance by interpreting an inadequate law in conformity with the international obligation. For the same reason the exhaustion of → local remedies is required before → diplomatic protection may be exercised, since it provides an opportunity to redress the wrong with domestic means.

(iii) Obligations to prevent a given event with means of the State's own choosing. This category includes the protection of diplomats as well as of aliens against attacks and the duty of neutrals to prevent violations of their neutrality (→ Neutrality, Concept and General Rules).

According to the ILC, material damage is not a requirement of State responsibility. Even before the ILC began its codification exercise, → international courts and tribunals had considered the violation of a subjective international right as having by itself caused damage to the victim (see the → Corfu Channel Case (Merits), ICJ Reports 1949, p. 4, at p. 35), albeit immaterial damage. Following this understanding, the violation of an obligation and damage are synonymous. Hence the ILC acted consistently when it removed damage from the constituent elements of an internationally wrongful act. That does not exclude damage from the context of responsibility, but shifts its relevance to other areas, for instance in determining the appropriate kind of reparation and in eventually assessing the amount of compensation (→ Damages).

Prejudice resulting from activities which do not violate an international obligation does not normally give rise to State responsibility. For some ultra-hazardous activities, such as the exploration of outer space or some peaceful uses of nuclear energy, special multilateral agreements have established absolute liability. However, no general custom as yet exists which would create liability for harm which is caused to another State either through an accident arising out of an otherwise lawful activity or through aggregated and continuous transboundary or long-range impacts on the environment. The Trail Smelter Arbitration and a few other cases indicate a certain trend but are not numerous or widespread enough to establish a general and uniform practice. Some writers have therefore argued that at least some forms of transboundary harm might be considered as violating the duty to respect the sovereign equality of other States (→ States, Sovereign Equality). Yet they have neither convincingly proved that this principle generates a general duty of prevention, nor could it be realistic to expect that a duty arising under the law of State responsibility and requiring a State to stop a violation would be fulfilled where structural industrial emissions are concerned. The work of the ILC in drafting an applicable general convention is therefore of the utmost importance and urgency.

D. Forms of Responsibility

Following the example of domestic laws, under which fault is the prevailing form of responsibility for offences, international law teachings since Grotius have also proposed fault as a basis for international responsibility. Moreover, international arbitrators and judges, by applying → general principles of law, transformed this proposal into standard practice before World War II, in spite of the absence of adequate procedures to establish fault. Yet when, after World War II, hopes for the general and mandatory judicial settlement of disputes were abandoned, more and more authors suggested that States should be responsible for their actions independently of fault, and State practice took a turn in that direction (cf. → Responsibility of States: Fault and Strict Liability). Increasingly, responsibility for result became the accepted form of responsibility for wrongful actions. For omissions, however, responsibility based upon fault persisted in customary law, because the theoretically subjective element of fault can be determined objectively by measuring the omission against the international standard of → due diligence (see the → Spanish Zone of Morocco Claims, Spain-Great

Britain, 1924, RIAA, Vol. 2 (1949) p. 615, at p. 644).

In the provisionally adopted Part I of its Draft Articles the ILC has nevertheless adopted responsibility for result as the single form of responsibility for actions and omissions alike. Objections that a test based upon unmitigated causality rather than fault would make the duty of prevention absolute were dismissed by the ILC, which believes that the scope of an obligation is determined by the primary norm establishing it. However, when such norms use terms like reasonable or appropriate to characterize the measures required for prevention, they do not themselves set a limit to the required diligence. The terms call for a value judgment for which the due diligence standard, until now part of the law of State responsibility, served as an indicator.

The ILC has tried to attenuate its rigid concept of responsibility through extensive recognition of circumstances precluding wrongfulness. It is common for domestic laws to except certain inevitable events from the grounds upon which responsibility may be established. However, such laws normally distinguish between objective impossibility (e.g. acts of God), which precludes wrongfulness, and subjective necessity (e.g. distress), which precludes fault, though this does not necessarily entail an exemption from the duty to repair damage. By excluding fault from the concept of responsibility, the ILC has, theoretically, also excluded circumstances precluding fault. In fact, however, the Draft Articles recognize all traditional exceptions to responsibility as precluding wrongfulness, including those hitherto considered as excluding only fault.

As a consequence of this approach, the ILC reserves the eventual duty to pay compensation for damage, even when wrongfulness is precluded (Draft Articles, Part I, Art. 35). This solution may lead to confusing results: A wrongful act causing material damage would give rise to the obligation to pay compensation; according to the cited provision, this duty to pay compensation would be unaffected if wrongfulness were precluded. This not very satisfactory result raises the question of the origin of the obligation to pay compensation. The ILC replies in its commentary with a reference to the eventual liability for acts not prohibited by international law, but a limitation to this instance is not apparent from the wording of the rule.

A further softening of the rigid causal approach is worth noting. By defining a "fortuitous event" as an "unforeseen external event beyond its control which made it materially impossible for the State . . . to know that its conduct was not in conformity with that obligation" (Draft Articles, Part I, Art. 31), the international standard of due diligence is reintroduced, albeit through the back door. Whether it was "materially impossible for the State to know" may either be judged subjectively, if the parties engage in judicial proceedings, or else be determined objectively by referring to the normal conduct of States and, thus, to the international standard.

The choice of a form of liability for acts not prohibited by international law has been less complicated. Existing special conventions deal with hazardous activities, such as some peaceful uses of nuclear energy or of outer space, for which domestic laws prescribe strict liability. There has been no difficulty in adopting the same form of liability in such conventions. In its work on the codification of general liability for acts not prohibited by international law, the ILC has followed the same idea, even though domestic laws provide no uniform model for a comprehensive rule.

E. Determination of the Parties Involved

1. Attribution to the Author

It is for the law to determine when a natural person's conduct should be considered as conduct of a juridical person. In international law, which deals with sovereign States as juridical persons, a bifurcated approach is required: It is, on the one hand, not the purpose of international law to determine the internal organization of States; it must accept the latter as a given fact. On the other hand, the principle of → effectiveness requires that all activities which are in fact those of the State are also attributed to it.

(a) Attribution on the basis of the State's domestic law

Accordingly, international law considers the conduct of any State organ as being capable of creating State responsibility, except when the

organ is not acting in that capacity (Draft Articles, Art. 5, Part I).

In conformity with general practice, the provisionally adopted Part I of the ILC's Draft Articles supplements this general rule with some special provisions. One such provision concerns the irrelevance of the position of the organ in the organization of the State (Part I, Art. 6 Draft Articles). This provision invalidates the occasional defence that the conduct of a minor, subordinate organ, like a policeman, could and should not engage the international responsibility of the State (see Roper Case, Mexico-United States, 1927, RIAA, Vol. 4 (1951) p. 145, at p. 147). It applies equally to an act of the legislature which the government is powerless to prevent or to nullify, even though the act violates an international obligation of the State. However, if such a law only makes the violation of an international obligation possible, without generating it directly, State responsibility would result only from its unmitigated implementation (see Mariposa Development Company Case, Panama-United States, 1933, RIAA, Vol. 4 (1951) p. 339, at p. 340).

Another special rule affirms that when an organ has exceeded its competence according to internal law or contravened instructions concerning its activity that fact is irrelevant for the attribution of responsibility (see Différend Dame Mossé, Italy-United States, 1953, RIAA, Vol. 13 (1964) p. 486, at p. 494).

(b) Entities empowered to exercise elements of governmental authority

Independently of the autonomy which they may enjoy under the domestic law of the State concerned, the conduct of territorial governmental entities or communities, whatever their designation (see Heirs of the Duc de Guise Case, France-Italy, 1951, RIAA, Vol. 13 (1964) p. 154, at p. 161), including component states of → federal States which have no proper international personality (see Pellat Case, France-Mexico, 1929, RIAA, Vol. 5 (1952) p. 534, at p. 536; → Subjects of International Law), may engage the international responsibility of the State (Draft Articles, Part I, Art. 7(1)).

The same holds true for organs of an entity that is not part of the formal structure of the State or of a territorial governmental entity, but which is nevertheless empowered by the internal law of that State to exercise elements of governmental authority (Draft Articles, Part I, Art. 7(2)). The most common case of this kind is the collection of direct taxes on employees' salaries by employers.

The rule applies further to organs which have been placed at the disposal of a State by another State or by an international organization, if they exercise elements of the governmental authority of the State at whose disposal they have been placed (Draft Articles, Part I, Art. 9).

(c) Persons acting in fact on behalf of the State

When persons, without being organs of the State or exercising elements of its governmental authority, act nevertheless in fact on its behalf through being hired, instructed or ordered by a State organ, their conduct is attributed to the State (Draft Articles, Part I, Art. 8(a); → Responsibility of States for Activities of Private Law Persons). In practice this concerns mostly cases of → espionage, sabotage, → terrorism or abduction (→ Hostages), of which very few reach the stage of international adjudication (for an exception see Leigh Valley Railroad Company and Others Case (Black Tom and Kingsland Cases), United States-Germany, 1939, RIAA, Vol. 8 (1958) p. 225, at p. 458; see also → United States Diplomatic and Consular Staff in Tehran Case (United States v. Iran), ICJ Reports 1980, p. 3, at p. 35; and Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States (Merits), ICJ Reports 1986, pp. 61–65) (→ Military Activities against Nicaragua Case).

The international responsibility of the State may also be engaged by persons who de facto exercise elements of governmental authority in the absence of the official authorities and in circumstances justifying that exercise (Draft Articles, Part I, Art. 8(b)). Such situations are not uncommon during → wars and civil wars, when governmental officials flee parts of the country in the course of military operations and are replaced by persons chosen by the local population (→ De facto Régime).

A related though not identical case is an insurrectional government which becomes the new government of the State (Draft Articles, Part I, Art. 15(1); see also Bolivar Railway Company

Case, Great Britain-Venezuela, 1903, RIAA, Vol. 9 (1959) p. 445, at p. 453).

(d) Conduct which is not attributable to the State

According to State practice and doctrine the conduct of persons not acting on behalf of the State does not directly engage the latter's responsibility, although responsibility may indirectly result when the State fails to perform an international obligation to prevent the conduct (Draft Articles, Part I, Art. 11; see United States Diplomatic and Consular Staff in Tehran Case, ICJ Reports, 1980, p. 3, at pp. 30–33).

In addition, the following acts are not attributable to the territorial State except indirectly, when it violates a duty of prevention:

(i) The conduct of an organ of another State (Draft Articles, Part I, Art. 12(1)). This includes component states of federal States while acting within the limits of their proper international personality and suzerain States whose conduct in the dependent State is directly attributed to them.

(ii) The conduct of insurrectional movements which do not become the new government of the State; if they possess international personality, their conduct within the limits of that personality may eventually engage their own responsibility (Draft Articles, Part I, Art. 14). When the movement aims at secession and is successful in creating a new State, its conduct is attributed to the latter (Draft Articles, Part I, Art. 15(2)).

(iii) The conduct of an organ of an international organization (Draft Articles, Part I, Art. 13)). Although disputed, the most widely shared opinion denies duties of prevention of the territorial State in this instance.

2. Determination of the Claimant

The State whose subjective primary right has been violated is entitled to present a claim for performance of the secondary obligations arising from State responsibility. An exception arises under multilateral treaties of an objective character, i.e. treaties establishing parallel duties instead of rights corresponding to obligations, because in case of a breach all other contracting parties are injured States for the purpose of claiming responsibility (see Art. 60(2)(a) of the Vienna Convention on the Law of Treaties). International crimes, since they concern the international community as a whole, would be a further exception entitling all other States to take certain special measures against their authors (Arts. 5(a) and 14 proposed by the Special Rapporteur (Riphagen) for inclusion in Part II of the Draft Articles).

An alien whom a State has treated contrary to international law and who cannot obtain redress by exhausting local remedies may pursue a claim on the international level only when an applicable treaty provides for such a right, as does for instance the → European Convention on Human Rights or as did some past treaties establishing claims commissions (→ Mixed Claims Commissions). However, the State of → nationality may eventually exercise its right of diplomatic protection through its espousal of a claim.

According to the prevailing theory, developed by Emer de Vattel (Le droit des gens, 1754) and confirmed by the judgment of the → Permanent Court of International Justice (PCIJ) in the → Mavrommatis Concessions Cases (Greece-United Kingdom, PCIJ, Series A, No. 2 (1924) at p. 12), the State of nationality thereby exercises its own right. This artificial construction leads to an inconsistency: When the right to have its nationals abroad treated according to international law is violated, the State of nationality suffers directly only immaterial damage. Yet it may claim compensation for material damage, calculated to compensate the actual damage which its national has suffered. Those denying the inconsistency (see separate opinion of Judge Gros in the → Barcelona Traction Case, Belgium v. Spain, Second Phase, ICJ Reports 1970, p. 3, at p. 269), on the ground that the damage may affect the economy of the claiming State, tacitly assume that all nationals operate economically out of their State of nationality. This is not always the case, and when the damaged national resides in the offending State, the damage the national has suffered will affect the economy of the State of nationality only marginally, if at all.

F. Consequences of Responsibility

1. International Delicts

The violation of a subjective right of another State creates, for the author of the violation, the following new obligations towards the victim

under the rules of State responsibility (→ Reparation for Internationally Wrongful Acts): (i) The obligation to stop the violation, if it still continues, by establishing the situation required by international law. (ii) The obligation to give appropriate satisfaction when immaterial damage has resulted from the violation. (iii) The obligation to restore the situation as required by international law when material damage has been caused by the violation; or, the obligation to pay adequate compensation when restoration is impossible or excessive.

The obligation to stop a violation that is still continuing most frequently arises from the violation of obligations requiring the achievement of a certain result with means of the State's own choosing. The existence of domestic law which conflicts with such obligations is not a valid defense (see e.g. Art. 27 of the Vienna Convention on the Law of Treaties and Art. 4 of the ILC's Draft Articles, Part I). If necessary, domestic laws must be revised, as must administrative practice, to conform to the customary or treaty obligation. Persons wrongfully detained must be set free; in contrast to the obligation to restore objects which may, in case of material impossibility, be replaced by compensation, this obligation permits no alternative.

The obligation arising from a violation that has caused immaterial damage is the duty to give → satisfaction at least in the form of an acknowledgement of the violation (see → I'm Alone, The (Canada, United States), 1935, RIAA, Vol. 3 (1949) p. 1609, at p. 1618), or, more often, an appropriate communication of regret. Humiliating ritual forms, such as flag parades or special envoys of expiation, have gradually fallen into disuse. Another traditional element of satisfaction, the duty to punish the perpetrator of the violation (see the Gust Adams Case (United States-Panama), 1933, RIAA, Vol. 6 (1955) p. 321, at p. 323), is now highly disputed. The present state of the law is best expressed in the judgment of the ICJ in the → Corfu Channel Case where the Court states that its declaration of a violation of international law is "in itself appropriate satisfaction" (ICJ Reports 1949, p. 4, at p. 36).

With the exception of cases of diplomatic protection, international law does not provide for the material compensation of immaterial damage. Although such compensation is known to have been requested in some instances by a party under the title of punitive damages (e.g. → Lusitania, The (Germany-United States), 1923, RIAA, Vol. 7 (1956) p. 32, at p. 38), international courts and tribunals have refused the request.

Restitutio in integrum stricto sensu is the secondary obligation arising from the violation of a primary obligation having caused material damage. This secondary obligation requires in the first instance the re-establishment of the situation that existed before the violation occurred. When such re-establishment is materially impossible or would require an excessive effort, or in cases concerning aliens (e.g. → expropriation and nationalization of property; see → Expropriated Religious Properties Arbitration (France, U.K., Spain v. Portugal), 1920, RIAA, Vol. 1 (1948) p. 7, at p. 15), compensation may be substituted for → restitution in kind.

The measure of compensation goes, however, beyond mere restitution and includes, as the Permanent Court of International Justice stated in the classic judgment concerning the Chorzów Factory Case (Germany-Poland (Merits), PCIJ, Series A, No. 17 (1928) at p. 47), "damages for loss sustained which would not be covered by restitution in kind or payment in place of it" (→ German Interests in Polish Upper Silesia Cases). This aspect of *lucrum cessans* has become the subject of some controversy in today's pluralistic world. The most recent universally accepted regulation of the matter in Art. XII of the Convention on International Liability for Damages Caused by Space Objects (1972), however, affirms the Chorzów judgment by requiring restoration "to the condition which would have existed if the damage had not occurred".

Yet another problem remains to be solved, namely the problem of delayed damages, *damnum emergens*, which may occur through nuclear accidents. No significant State practice exists in this respect.

2. *International Crimes*

According to the concept developed by the ILC under Art. 14, as proposed by the Special Rapporteur Riphagen for inclusion in Part II of the Draft Articles, international crimes entail the normal consequences of an internationally wrongful act

and, in addition, the obligations of every State towards the international community as a whole: (i) not to recognize as legal a situation created by an international crime; (ii) not to assist the author of an international crime in maintaining the illegal situation; (iii) to assist other States in the implementation of the two obligations aforementioned.

Objections which had been raised against the concept of international crimes because of the disputed legal character of some obligations whose violation would qualify as such crimes were intensified by this proposed establishment of obligations for third States.

G. Implementation of Responsibility

1. Principle

When a State which is internationally responsible for the violation of a primary obligation either denies the wrongdoing or refuses to honour the appropriate secondary obligation or obligations arising from its responsibility, the two sides must try to resolve the issue through diplomatic means (→ Diplomacy). Should these fail to lead to a satisfactory result within a reasonable period of time, three remedies are at the disposal of the victim: institutional procedures in sub-systems, adjudication, and → reprisals.

2. Institutionalized Procedures in Sub-Systems

When the dispute concerns an obligation under a sub-system (i.e. a convention or a constituant instrument of an international organization) which provides for collective decisions concerning its violation and for eventual enforcement, the victim must use this procedure first (see Case concerning the Air Service Agreement of 1946 (United States v. France), 1978, ILR, Vol. 54, p. 304, at p. 340). Should the procedure fail, reprisals may eventually become lawful.

3. Peaceful Settlement

In his 7th Report (1986) the Special Rapporteur of the ILC (Riphagen) convincingly argued that unilateral reaction by the victim may lead to counter-reaction and thus to an escalation of the conflict. He therefore strongly recommended the establishment of mandatory dispute settlement procedures: Disputes involving *jus cogens* or "international crimes" should be referred to the → International Court of Justice while all others should be submitted to conciliation. This is a proposal *de lege ferenda*, not a codification of existing international law. At present, the obligation to settle international disputes peacefully does not extend beyond the wording of Art. 33 of the UN Charter (→ Peaceful Settlement of Disputes), except for those relatively few States which have accepted more stringent obligations through unilateral acts (e.g. declarations under Art. 36(2) of the Statute of the ICJ) or bilateral or multilateral treaties (e.g. → European Convention for the Peaceful Settlement of Disputes). Thus, when no mandatory procedure for the settlement of disputes binds the States concerned and the case is not yet before a tribunal or court, reprisals do not violate the duty under Art. 33 to settle international disputes peacefully (see → France-United States Air Transport Arbitration (1978), ILR, Vol. 54, p. 304, at pp. 337–341).

4. Reprisals

Reprisals are measures of unilateral enforcement. Although they violate another State's rights, the violation is justified by the latter's refusal to honour an obligation which has arisen under the rules of State responsibility (see ILC's Draft Articles, Part I, Art. 30 precluding wrongfulness of countermeasures against internationally wrongful acts). Since reprisals are aimed at coercing the object-State into ceasing the internationally wrongful act, if it still continues, and giving satisfaction or making reparation, as the case may be, they remain lawful only as long as the object-State persists in the refusal to honour its secondary obligation. A reprisal is not a punishment, a notion which, except perhaps in special cases like international crimes, is incompatible with the → sovereignty of States.

Two other countermeasures against violations of subjective international rights must be distinguished from reprisals. The first such measure is known as → retorsion, i.e. an → unfriendly act in answer to an unfriendly act or a violation of international law by the other side. Unless one assumes a legal duty of friendliness, unfriendly acts are not contrary to international law and are thus social, not legal, sanctions. In given circumstances they may, nevertheless, be an effective

tool of law enforcement. This is acknowledged in practice when international conventions sometimes provide for employment of an unfriendly act as a reaction to a breach of obligation (e.g. the severance of diplomatic relations; → Diplomatic Relations, Establishment and Severance), a practice which blurs the distinction between legal and social sanctions. The second type of countermeasure consists of measures of self-protection provided for in a sub-system of primary norms (e.g. a codification convention). Irrespective of whether such measures take the form of for example → self-defence in accordance with Art. 51 of the UN Charter or the suspension or termination of a treaty in conformity with Art. 60 of the Vienna Convention on the Law of Treaties (→ Treaties, Termination), they protect the victim against the necessity of having further to perform obligations which the other side has ceased to perform and, thus, against additional prejudice arising from the breach of the obligation. Hence their primary function is protection and not the enforcement of the correct performance of the obligation by the other party.

(a) Norms protected from reprisals

Subjective rights established by certain norms of international law may not be infringed by reprisals. An important group of such norms are the peremptory norms of international law. According to the definition in Art. 53 of the Vienna Convention on the Law of Treaties, these norms may only be abrogated or changed by the international community as a whole; individual States may not derogate from them, neither *de facto* nor by treaty or consent. It follows logically that they may not be infringed by way of reprisal (Art. 12(b) proposed by the Special Rapporteur (Riphagen) for inclusion in Part II of the Draft Articles).

Thus the principles of non-use of force and of → peaceful settlement of disputes, which are generally considered to be part of *jus cogens*, prohibit the use of force in reprisals. This is confirmed by the definition of the principle of non-use of force in the Friendly Relations Declaration of 1970 which states explicitly: "States have a duty to refrain from acts of reprisals involving the use of force" (→ Friendly Relations Resolution).

A second group consists of norms protecting the person, including → human rights conventions. Some conventions expressly forbid reprisals against persons protected therein (e.g. Art. 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, UNTS, Vol. 75 (1950) p. 287), and Art. 60(5) of the Vienna Convention on the Law of Treaties provides that treaties of a "humanitarian character" may not be suspended or terminated, even as a measure of self-protection. The same must apply *a fortiori* to reprisals.

A third group, consisting of self-contained régimes, has been identified by the ICJ in its judgment in the Tehran Hostage Case (ICJ Reports 1980, p. 3, at p. 40). The notion implies that breaches of obligations within such régime may only be countered by measures provided for by the same régime. While this may be true for the abuse of the diplomatic function and the related remedies, namely the declaration of *persona non grata* or the severance of diplomatic relations, the generality of the Court's statement is misleading. The Court wanted to protect diplomats from reprisals, not the States they represent. The situation is, therefore, similar to that of conventions of a humanitarian character. To suggest that reprisals against offending States are prohibited even if they do not affect the protected person seems unfounded in law. The notion is, furthermore, undefined since the Court failed to indicate criteria which distinguish "self-contained régimes" from other sub-systems of norms.

(b) Limits of reprisals

Reprisals are limited in time. They are legitimate only after a claim to perform the secondary obligation arising from State responsibility has been unsuccessful, and may not be continued when such a claim is honoured.

Reprisals must be limited to the perpetrator of the violation and may not infringe the rights of third States. This requires particular attention in handling the suspension or termination of treaty relations under multilateral conventions.

Reprisals are also limited in scope by the principle of → proportionality, as stated in the → Naulilaa Arbitration (Portugal v. Germany, 1928, RIAA, Vol. 2 (1949) p. 1011, at p. 1028). Proportionality requires that the reaction to a violation should not affect interests more essential

than those violated. This becomes a fluid formula when the reprisal is not a reciprocal measure (→ Reciprocity), sometimes called a retaliation in kind. Reciprocal measures are, however, mostly taken as self-protection, within a particular subsystem of norms, and not as reprisals. In cases not involving reciprocal measures, proportionality is difficult to determine, especially in the absence of a universally shared value system as parameter and mandatory third-party procedures for determination. Further, it seems unfair to deprive a victim of any effective means of enforcement on the ground that the only measure available might not be proportional to the violation. For the protection of essential interests of States, it would seem preferable to enlarge the group of norms which are protected from reprisals and abandon proportionality for the rest, instead of relying for protection on a vague concept which is subject to individual judgment.

H. Evaluation

The central role of State responsibility in the proper functioning of international law and the controversial nature of its essential features make codification imperative. Yet the hitherto discordant reactions of States to this enterprise raise doubts whether the traditional form of codification in a convention requiring ratification is appropriate in this instance. The subject of State responsibility seems rather a classical case for an expository code.

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KARL ZEMANEK

RESPONSIBILITY OF STATES FOR ACTIVITIES OF PRIVATE LAW PERSONS

1. Introduction

From the point of view of international law, actions of private law persons are not directly attributable to the State in whose sphere of jurisdiction they have been accomplished. Yet when these actions are prejudicial to another State or to nationals of another State, the first State may be called upon to answer for them. The category of private law persons consists mainly of individuals, who, however, may enter into various forms of association such as corporate bodies. The position of → individuals in international law in general is treated in depth in a separate article.

The State acts and can act only through human beings. Persons acting in their capacity as officials of the State concerned or under expressly given State orders are not to be considered private law persons in the present sense; they represent the State, and direct State responsibility is involved if the act or omission violates international law. There can be cases where it is doubtful whether a person has acted as a State official or in a private capacity; in such a case, the nature and the form of the relevant act are of importance.

2. General Notions

(a) The "object" theory

Some publicists see the individual in international law merely as an "object". According to this theory, true international interests exist only as interests of the State: an international injury is necessarily an injury inflicted upon a State (→ Responsibility of States: General Principles; see also → Responsibility of States: Fault and Strict Liability). If it is true that, under international law, a State may be obliged to provide reparation for the damage caused to the nationals of a foreign State, it is maintained that such compensation is merely a means of rectifying a wrong suffered by the foreign State. In the same way, it would be improper to speak of international responsibility of the State for acts committed by individuals or other private law persons. In the final analysis, what is involved here is the responsibility of the State for its own conduct, in other words only a facet of the direct international responsibility of the State.

(b) The "subject" theory

According to this theory international law may directly address individuals as → subjects of international law, especially with regard to → human rights. As an example of this, Art. 25 of the → European Convention on Human Rights (1950) gives individuals direct access, by means of complaint, to the → European Commission of Human Rights. But even if international law takes individuals into account, it primarily addresses States obligating them to protect the interests of individuals or to implement provisions regulating their activities. The debate as to whether the international responsibility of States for the acts of individuals is direct or indirect is not justified, since the legal situation involved here does not fall under any of the schemes worked out by general theories.

3. Bases of State Responsibility

(a) Harmful activities of private persons; duty to prosecute perpetrators

According to a broadly shared view,

> "it is generally recognized under principles of international law that a government is not responsible for injuries caused by private persons to aliens unless it can be shown that the respondent government has failed to exercise reasonable care to prevent such injuries in the first instance or it has failed to take suitable steps to punish the offenders" (M.M. Whiteman, Digest of International Law, Vol. 8 (1967) p. 738).

This statement is not fully correct. To some extent, one may understand why the failure to prevent and the failure to punish are placed on the same level: This is because these two different behaviours have the same legal weight. Failure to prevent and failure to punish are attitudes which are both against the same general principle of international law, which requires each State to exercise its authority within the sphere of its jurisdiction to protect the security of persons and assure the peaceful enjoyment of their property. But the principle at issue assumes a different expression according to the case involved. It is one

thing to examine the principle with regard to the failure to exercise reasonable care to prevent, but it is different to examine it with regard to the failure to punish. In the first case, the State would be made internationally responsible for not having prevented harmful acts of private persons; these acts are a condition for the State's responsibility. In the second case, there is a distinct legal situation: here the fact which generates international responsibility of the State is not the original act of the individual but a behaviour of the State itself following the private activity.

(b) Responsibilities of the State

When the State fails to punish, a case of → denial of justice may arise entailing a typical international offence having its own features and producing its own consequences (→ Internationally Wrongful Acts). The State is called upon to answer for an injury that it has itself caused, be this a moral damage which has been inflicted by disregarding the lawful expectation of having the offender punished, or be it an injury arising from a person having been prevented from obtaining from a court a remedy for the damage suffered, as assessable in economic terms. In Restatement of the Law, Second, Foreign Relations Law of the United States (1965), Part IV, by the American Law Institute, the comment on the term "denial of justice" in the section on "Responsibility of States for Injuries to Aliens", pp. 502–503, lists amongst its examples "(4) failure to afford an alien adequate remedy or protection in the administration of justice, (5) failure to prosecute the perpetrator of a crime causing injury to an alien" (→ Aliens; → Minimum Standard). It should be noted, however, that the term "denial of justice" has more recently been used in a more narrow sense referring to the lack of any procedure or the deficiency of existing procedure. Thus, the latest Draft of the Restatement directly refers, in para. 711, to State responsibility for violations of "an internationally recognized human right" and to other rights of aliens "protected by international law" (see Tentative Draft No. 6 of the Restatement of Foreign Relations Law of the United States (Revised) (1985) 495).

On the other hand, in the case of an obligation to prevent, the damaging fact lies outside the organizational structure of the State: it is the action of individuals acting as such.

So, as regards the obligation to prevent and the obligation to prosecute, Roberto Ago was correct in maintaining that the two obligations derive from the same international principle of protection. The → International Law Commission, however, did not mention these two aspects of omissive conduct by the State in its draft articles, part one, on the international responsibility of States that it adopted upon first reading (text in YILC 1975 II, pp. 51–106; cf. also YILC 1980 II, pp. 26–63 and GAOR, 41 Sess., Supp. No. 10, Doc. A/41/10). The report prepared by the Special Rapporteur Ago on Art. 11 (YILC 1972 II, pp. 95–126) is of outstanding value, containing information relating to State practice, international arbitration jurisprudence, and doctrinal opinions.

4. Recent Developments

(a) United States Diplomatic and Consular Staff in Tehran Case

The level of protection afforded by international law is, in relation to certain situations, particularly high, and consequently the responsibility of a State for damaging actions committed by individuals or groups of individuals may prove to be great, as is the case with respect to → diplomatic agents and missions. Besides the provision of protection by general international law, protection is stipulated in bilateral and multilateral treaties including the → Vienna Convention on Diplomatic Relations (1961) and the → Vienna Convention on Consular Relations (1963). In its judgment of May 1980, in the → United States Diplomatic and Consular Staff in Tehran Case (ICJ Reports 1980, p. 28), the → International Court of Justice interpreted the extent of protection envisaged in these conventions and expressed its views on the international responsibility of a State for damaging actions committed by individuals or groups of individuals.

(b) Jurisprudence under the European Convention on Human Rights

Particularly worthy of mention is a trend that is emerging and gaining momentum progressively in the jurisprudence of the European Commission of Human Rights and the → European Court of

Human Rights. Up until the early 1970s, the prevailing position in the jurisprudence of these bodies was that the purpose of the European Convention was only to protect human rights against violations by public authorities. But in two reports adopted on May 27, 1974 (Application No. 4464/70, Belgian National Police Union, European Court of Human Rights, Series B, No. 17, p. 9; and Application No. 5614/72, Swedish Engine Drivers' Union, European Court of Human Rights, Series B, No. 18, p. 8), the Commission expressed the opinion that, under the Convention, while individuals could not themselves be held responsible for acts in breach of the Convention, the State might, under certain circumstances, be held responsible for them. It should be clear that, from the standpoint of international law, human rights demand compliance also in the relations of individuals to each other, but it is incumbent upon the States to exercise their authority and their protective role for this purpose.

In its judgment of August 13, 1981 in the Case of Young, James and Webster, the European Court of Human Rights held that the international responsibility of a State that is party to the Convention may be linked to the fact that its laws allow acts which violate human rights. According to the Court:

> "Under Article 1 of the Convention, each contracting State 'shall secure to everyone within [its] jurisdiction the right and freedoms defined in . . . [the] Convention'; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged" (European Court of Human Rights, Series A, No. 44, at p. 20).

In a decision of March 26, 1985, the same Court stated that the obligations of States under the European Convention on Human Rights "may involve the adoption of measures designed to serve respect for private life in the sphere of the relations of individuals between themselves" (Case of X. and Y. v. the Netherlands, Series A, No. 91, at p. 11).

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RESTITUTION

1. Notion

Restitution is one of the remedies available for injuries resulting from an → internationally wrongful act. The term stems from the Roman law form of redress known as *restituere in integrum* which the *praetor* granted, for example, to rescind a contract which was otherwise valid, although it had been concluded by the → use of force or deceit. Through the annulment of the binding

effect of the contract, the claimant obtained a re-establishment of the situation which existed before its conclusion. The idea that the situation *ex ante* should be re-established is the only remainder of the original concept. Today, the term has various connotations and its meaning is not always clear. In international law, restitution in its broad sense is used as a synonym for → reparation, comprising all measures to make good the injurious consequences of a breach of such law. Restitution in the narrow sense is often called *restitutio in integrum*, meaning a re-establishment in the literal sense, whereby the elimination of all differences between the situation before and after the breach is implied.

It should also be mentioned that in some contexts *restitutio in integrum* describes the whole range of methods of making good, thus overlapping with restitution in its broad sense. Moreover, a claimant's demand for *restitutio in integrum* may also aim at the recovery of an amount of damages representing a specific sum calculated on the basis of the costs of restoration. These discrepancies in usage originate in the varying understandings as to what re-establishment of a given situation means. The actual restoration *in natura* is not the only conceivable possibility and may face practical limitations. Restoration may also be sufficiently achieved by what could be called a monetary approach, i.e. undoing the wrong by paying a certain amount of money. The conceptual differences can be traced back to the different national law systems which realize the idea of restitution in cases of tort, breach of contract, etc. either by permitting a claim for *restitutio in integrum* or for damages as the primary remedy.

This article will deal with restitution in the narrow sense of *restitutio in integrum*, constituting one category within the system of reparations, to be distinguished from → damages and → satisfaction.

In international law, restitution in this sense means that the injured party may request the State which committed an internationally wrongful act to undo the wrong in such a way that the situation *ex ante* is re-established. Thus, in the → Temple of Preah Vihear Case the → International Court of Justice (ICJ) ruled that Cambodia (now Kampuchea) had to leave the unlawfully occupied temple circle in Thailand and to restore all religious objects it might have removed. Similarly, a person kidnapped in violation of another State's territorial → sovereignty must be released, and goods confiscated in contravention of international law must be restored.

The → International Law Commission (ILC) in Art. 6 of part 2 of the draft articles on State responsibility (UN Doc. A/CN.4/380) provides an injured State with the right to require a State which has committed an internationally wrongful act to discontinue the act, to release and return the persons and objects held as a result of such act, to prevent continuing effects of such act and to re-establish the situation as it existed before the act. If the breach concerns the treatment to be accorded by a State to → aliens, the injured State may require the wrongdoing State to pay to it a sum of money corresponding to the value which a re-establishment of the situation *ex ante* would require (Art. 7).

2. *Position within the System of Reparations*

Restitution is a well-recognized remedy in international treaties. The → Versailles Peace Treaty (1919), for example, contained detailed provisions for restitution of specific objects (Arts. 245–247). Restitution also played an important role in the → peace settlements after World War II. The peace treaties with Bulgaria (Art. 13), Romania (Art. 23), Hungary (Art. 24) and Italy (Art. 75) provided for the defeated party's obligation to make restitution, i.e. to return property wrongfully removed from the territory of a member State of the → United Nations in the course of the war (→ Peace Treaties of 1947). Similarly, restitution laws in the Western zones of post-war Germany aimed at the restoration of property which had been confiscated or transferred under force and duress, especially from those persecuted by the Nazi régime. The Convention on the Settlement of Matters Arising out of the War and the Occupation of October 23, 1954 (UNTS, Vol. 332, p. 219) also lays down provisions for "external restitution" concerning property which had been removed from occupied territory.

On the other hand, many treaties explicitly exclude restitution, either because injuries suffered are more easily remedied by payment of damages or because mere restoration is regarded as insufficient.

Until recently, a consensus prevailed in juridical practice and legal writings that *restitutio in integrum* is the normal remedy in the case of an internationally wrongful act, notwithstanding the fact that in reality claims for damages considerably outnumber those for restitution. This priority was deduced from the hierarchy of reparation measures established by the → Permanent Court of International Justice (PCIJ) in the Chorzów Factory Case (→ German Interests in Polish Upper Silesia Cases): "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it" (PCIJ, Series A, No. 17 (1928) at p. 47). It should not be overlooked, however, that in that particular case indemnity, not restitution, was at stake; the dictum was meant to lay down the "principles which should serve to determine the amount of compensation due for an act contrary to international law" (ibid.).

A number of cases are usually quoted and interpreted as examples for the acceptance of restitution as a primary remedy, for example the Walter Fletcher Smith Claim (RIAA, Vol. 2 (1949) p. 913), the → Martini Case, the Rhodope Forest Case (RIAA, Vol. 3 (1950) p. 1406) and the → Mavrommatis Concessions Cases. But only a few of these cases actually use the term restitution. Furthermore, the jurisdiction of international tribunals in any individual case is often limited by → *compromis* which may explicitly exclude the authority to grant restitution. Such tribunals are, moreover, often given discretionary powers to find the most adequate form of reparation.

Specifically with regard to issues of expropriation of alien property, the primacy of *restitutio in integrum* has become controversial in the aftermath of the arbitration awards in the Libyan Oil Concession Cases when Judge Lagergren as sole arbitrator in the → British Petroleum v. Libya Arbitration refused to grant *restitutio in integrum* (→ Expropriation and Nationalization). From the reasons given in the award, it cannot be definitely ascertained whether damages should be regarded as the primary remedy in international law in general, or whether their primacy should be confined to the circumstances of the case at issue. While the actual result of the award gained considerable support, the first interpretation would place the whole concept of restitution in question.

On the other hand, Dupuy as sole arbitrator in the → Libya-Oil Companies Arbitration, which dealt with similar circumstances, came to the opposite result and granted restitution. He held that restitution was the primary remedy in case of an internationally wrongful act. It is still open to speculation whether this controversy will lead to a general revision of the concept of restitution within the system of legal responses to internationally wrongful acts.

3. Limits of the Claim for Restitution

The above-mentioned controversy seems to be connected with another problem: The limits of a claim for restitution are not at all clear. A considerable number of authors would allow the claimant an option with respect to the type of remedy, which must be exercised reasonably. Monetary compensation unquestionably supersedes restitution in the case of material impossibility, i.e. when the situation created by an internationally wrongful act is irreversible, for example, when a wrongfully confiscated ship has been sunk.

Furthermore, it is largely recognized that legal impossibility may limit the remedy to monetary compensation where the breach of international law consists of an act of a legislative body or a judicial decision which is either incompatible with international law or shows a failure to enact legislative provisions which are necessary for the performance of an international obligation. In such cases, the injured State may not demand the revocation or annulment of such an act as *restitutio in integrum*, but must be satisfied with damages.

Legal impossibility as a limit to the claim for *restitutio in integrum* has been recognized in several treaties on the pacific settlement of disputes, for example in Art. 32 of the Geneva → General Act for the Pacific Settlement of International Disputes of September 26, 1928 and April 28, 1949 and in Art. 10 of the German-Swiss Treaty on Arbitration and Conciliation of December 3, 1921 (LNTS, Vol. 12, p. 280). These treaties provided a model for Art. 50 of the → European Convention on Human Rights

(1950) under which an injured party may claim "just satisfaction" before the → European Court of Human Rights if the internal law of the State involved allows only "partial reparation". This provision shows the Court's lack of competence to annul or nullify acts of member States which are in conflict with the Convention. At the same time, such a claim, which in principle only exists between States, acquires an individualized character under the Convention. The Court may also grant damages if restitution is excluded because of the nature of the breach.

Nevertheless an exact definition of legal impossibility is still absent. With regard to Art. 50 of the European Convention on Human Rights, it is doubtful to what extent the Court may control a State's legal possibilities for restitution before granting damages. Here it appears that further criteria for legal impossibility will have to be developed by the organs of the Convention.

Apart from these cases of impossibility, some authors stipulate that restitution may also be refused if it appears unreasonable or disproportionate, or if the claimant's choice was arbitrary. Here, again, a lack of exact criteria for the application of these standards is discernible.

4. *Evaluation*

While restitution is clearly an important remedy within the system of reparations, its position can no longer be determined with certainty. It may be doubted whether a general answer can be given with regard to the controversy about the primacy of restitution. As pointed out above, the existing case material is inconsistent, as is international treaty practice. Here, further evaluation and systematization are clearly necessary.

It appears that in a number of cases *restitutio in integrum* unquestionably remains the only remedy, be it in principle or as an exception, because the mere payment of damages would be regarded as unjust. This is true for cases in which goods, vessels or persons can easily be returned.

On the other hand, the particularities of the Libyan oil cases may be pointed out. Apart from the general question of whether the oil concessions are subject to international law at all, the special régime of expropriation law is involved. It may be questioned whether this involves a further category of legal impossibility. Moreover, a different treatment may follow from the fact that the international wrong in such cases consists of a breach of an economic treaty, and hence if restitution were granted, it would be equivalent to specific or belated performance of the original primary obligation. Essentially, the dispute hinges on what is the principle and what the exception.

It appears that many different factors may determine whether restitution or damages are the appropriate remedy, including, *inter alia*, the character and nature of the breach, its intensity or whether a direct injury to a State or its nationals is involved. A systematic categorization of various groups of cases and their proper treatment remains to be developed. Perhaps the category of legal impossibility deserves special interest. One may hope that codification efforts which have been made, such as those by the ILC, will continue, taking into account the distinctions made above.

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SABINE D. THOMSEN

RIVER BRIDGES

The construction of bridges over rivers which constitute the boundary between two States requires an agreement between the riparians (→ Boundaries; → Boundary Waters) which will usually determine the frontier and the extent of property rights as well as the distribution of costs. According to the prevailing view, the frontier line which intersects a bridge over a navigable river runs, in the absence of particular stipulations,

through the centre of the structure over the river and not along the middle of the main channel (thalweg) (see German Reichsgericht, Decision of January 3, 1884, Rechtsprechung des Reichsgerichts in Strafsachen 9, 370). It is, however, not easy to reconcile this view with the principle that the → territorial sovereignty extends vertically to the air space above the surface. When the boundary lines on the river and on the bridge differ (as e.g. on the → Rhine River between France and Germany), the delimitation of jurisdictions with respect to navigation and navigation accidents is governed by the river line (see Central Commission for the Navigation of the Rhine, Etat français v. "Le Rhin" (1928), in: H. Walther, La Jurisprudence de la Commission Centrale pour la Navigation du Rhin 1832–1939 (1948) p. 80). When the line of demarcation is drawn along the main channel, treaty practice tends to provide that the border on the bridge will not be affected by subsequent changes in the watercourse.

As a general rule, the territorial sovereignty of the riparians and their respective property rights over the bridge will be coextensive. This, however, does not preclude the river States from stipulating that the property of one of them extends to the part of the bridge which is situated on the territory of the → neighbour State. The → Versailles Peace Treaty (1919) provided in Art. 66 that the existing railway and other bridges over the Rhine within the limits of Alsace-Lorraine were to be entirely the property of France, which should be responsible for their upkeep, a clause leading to controversy. According to an executive agreement between France and Germany of 1953, ownership of the Rhine bridges is to be divided at the centre of the structure over the river (Agreement on the Solid Bridges and Ferries over the Rhine on the German-French Frontier of 30 January 1953, German Bundestag Drucksache 8/2437, p. 23; Recueil général des Traités de la France, 1re Série, Vol. V, No. 151, p. 472). Another property régime which may be adopted by agreement is co-ownership by the two States. Finally, a river State can grant → servitudes, involving jurisdictional rights, on that part of a bridge under its → sovereignty to the neighbour State (→ Jurisdiction of States). Thus, the Frontier Delimitation Treaty of 1925 between Germany and France (LNTS, Vol. 75, p. 103) authorized France to exercise certain administrative functions on the German side of the Rhine bridges (Art. 17, et seq.).

Agreements between two river States on the construction of a bridge will regularly contain provisions for rights of passage and the free flow of traffic over the bridges (→ Boundary Traffic). In that case, the obligation of each riparian to maintain the part of the bridge under its jurisdiction in good repair follows from the → good faith principle governing the relations between neighbour States. International agreements usually link the duty of maintenance to the property. In general, the foregoing rules governing bridges over international rivers will also apply to weirs or tunnels.

Bridges over → international rivers may interfere with navigation. Art. 30 of the Revised Rhine Navigation Act of Mannheim (1868) provides that bridges and other structures are not to impede navigation on the Rhine and that ships must be able to pass the bridges without delay (Martens NRG, Vol. 20, p. 355; → Navigation on Rivers and Canals). According to a judgment of the Supreme Court of the Netherlands, this provision does not cover navigation to the sea by ocean steamers built at their shipyards ("De Hoop", Shipbuilders and others v. The State of the Netherlands, Netherlands Yearbook of International Law, Vol. 6 (1975) p. 367). Art. 30 of the Act of Mannheim furthermore prohibits the levy of duties for the opening and closing of bridges. The rule that the construction of bridges must not obstruct navigation seems to be generally applicable to international rivers. The Statute of Barcelona on the Régime of Navigable Waterways of International Concern of 1921 (LNTS, Vol. 7, p. 35) acknowledged the absolute priority of free navigation as a general principle (Art. 10(1)). Less strictly, the Resolution of the → Institut de Droit International on the navigation of international rivers of October 1934 (AnnIDI, Vol. 38 (1934) p. 713) simply states that riparian States of international rivers shall take such measures as are apt to safeguard the interests of navigation with respect to the construction of bridges and other works affecting navigation (Art. 10(1)(b)).

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MATTHIAS HERDEGEN

RIVER DELTAS

A delta refers to a tract of land at the mouth of a river owing its existence to the gradual discharge of sedimentary deposits, such as sand, stones and earth, by the river. The fact that such land is often shaped like the Greek letter delta resulted in the name, the coining of which is credited to the Greek historian Herodotus.

A number of parameters are decisive for the formation of deltas and their defining characteristics, such as discharge, sediment load, wave energy and tidal currents. For example, the sedimentary deposits of the Columbia and St. Lawrence rivers are discharged into the oceans and swept along the shore by relatively strong currents. As a result neither of these rivers has been able to build up a significant deltaic deposit. The Amazon and Congo rivers deposit their sedimentary load in interior basins and the part thereof that reaches the coast is swept away by extremely strong tidal currents. In contrast, the Mississippi, by discharging into the protected Gulf of Mexico with its relatively low-wave energy and negligible tidal range, has been able to deposit an appreciable quantity of sediment which has accumulated and formed a major deltaic deposit. The → Nile River, Niger (→ Niger River Régime) and the Ganges-Brahmaputra (→ Ganges River) also have some deltaic characteristics similar to those of the Mississippi.

The fact that a river has formed and continues to form substantial deltaic deposits indicates that the coastline is continuously moving and, in addition, means that → islands may come into existence. In this connection the following two questions arise: (1) To which State do the formations created by deltaic deposits belong? (2) Do these deltaic formations affect the → baselines from which the → territorial sea (and other maritime zones) is measured and, if so, to what extent?

As regards the first question it is necessary to distinguish between: (a) deltaic formations arising within water areas which are part of the coastal State, i.e. within internal waters and the territorial sea, and (b) deltaic formations arising within water areas adjacent to the coastal State but beyond its territorial jurisdiction. In situation (a) the newly formed land or islands will by definition come under the territorial jurisdiction of the coastal State. In situation (b) two alternatives present themselves. Either the newly created deltaic formation may be considered as *terra nullius* and capable as such of being occupied, or the said formation may be deemed to be part of the coast from which it was formed.

Taking into account that deltaic formations created beyond the territorial sea remain closely linked to the land-mass of the coast from which they are formed, it recommends itself that the said formations should come under the → territorial sovereignty of the coastal State involved. In this connection, attention should be drawn to the Anna Case (C. Robinson's Admiralty Reports, Vol. 5, p. 373).

During the Napoleonic wars a Spanish vessel, the *Anna*, was seized by a British privateer more than three nautical miles from the mainland, but approximately two miles from alluvial islands off the mouth of the Mississippi River. The United States presented a claim for restoration of the vessel, since she was seized within the territorial sea of the United States. Sir William Scott (Lord Stowell) held that, for the purpose of calculating the extent of the territorial sea, the alluvial islands were "the natural appendages of the coast on which they border and from which indeed they were formed" and that "whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend on the soil". As a result the vessel was released to her owners, since the protection of the territory of the coastal State was to be reckoned from the islands which were described as forming a "kind of portico to the mainland". It is worth noticing that in this decision the close natural

connection between the alluvial formation and the coast from which it was formed, rather than the location of the alluvial island, was deemed to be decisive for the legal status of the formation.

As regards the second question referred to above, it deserves consideration that a specific provision dealing in general terms with deltas was laid down in Art. 7(2) of the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF.62/122 with Corr.), whereas any provision referring to this item was lacking in the Geneva Convention on the Territorial Sea and Contiguous Zone, April 29, 1958 (UNTS, Vol. 516, p. 205). Art. 7(2) of the 1982 Convention reads as follows:

> "Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal state in accordance with this Convention."

With respect to the above provision the following observations are made: (1) Deltaic formations may be taken into account in the selection of the appropriate points in applying the straight baselines method, provided that the other provisions governing the application of this method as laid dwon in Art. 7 are respected (see → Bays and Gulfs). (2) In the aforesaid provisions no obligation is imposed on the coastal State to adjust the straight baselines in the event of regression of the low-water line and, in addition, the convention does not contain any provision as to when such adjustment should be made. (3) It may be argued that, if a coastal State has applied the straight baselines method in a certain manner and the appropriate points used in applying the said method are changing because of natural phenomena, such as changes in deltaic formations, the coastal State has in the meantime acquired → historic rights over the waters in question. (4) As a result of the observations made under items (2) and (3) the above provision laid down in Art. 7(2) is rather vague and ambiguous.

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LEO J. BOUCHEZ

SABBATINO CASE

Generally regarded as a landmark opinion confirming the United States Supreme Court's continued adherence to the traditional policy of judicial restraint and deference to the executive in matters affecting the conduct of foreign relations, Banco Nacional de Cuba v. Sabbatino (376 U.S. 398 (1964)) was one of a number of cases brought in the United States as a result of the expropriation of, largely American-owned, property by the Cuban government in the early 1960s.

Initially, American commodity broker Farr, Whitlock & Co. had contracted to purchase sugar from a wholly owned subsidiary of C.A.V., a Cuban corporation owned predominantly by United States residents. Following the expropriation by the Cuban Government of a number of substantially American-owned companies (including C.A.V.), ostensibly in retaliation against a United States reduction of the Cuban sugar import quota, Farr, Whitlock & Co. entered into a further purchase contract with an instrumentality of the Cuban Government in order to secure the necessary permission for the vessel carrying the sugar to leave Cuba.

Subsequently, Farr, Whitlock & Co. were ordered to turn over the funds they had collected from their customers to Sabbatino, a court appointed receiver of C.A.V.'s assets. Banco Nacional de Cuba (another government instrumentality to which the bill of lading had been assigned) thereupon initiated proceedings in New York, seeking to recover the relevant proceeds. The District Court granted summary judgment against the plaintiff, holding that the → act of State doctrine did not apply as the expropriation violated international law in that it had not been motivated by public purpose, had discriminated against American nationals, and had failed to

provide for adequate compensation (→ Expropriation and Nationalization). The decision dismissing the Cuban claim was upheld on appeal.

On certiorari, the United States Supreme Court reversed the judgment below. Quoting the earlier Supreme Court determination in Underhill v. Hernandez (168 U.S. 250 (1897)) that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory", Mr. Justice Harlan pointed out that there had been no retreat from this "classic American statement of the ... doctrine" in subsequent cases.

Addressing the foundations of the doctrine, he accepted that it was compelled neither by the inherent nature of sovereign authority (→ Sovereignty; → States, Sovereign Equality), nor by any principle of international law. While the United States Constitution entrusted the conduct of foreign relations to the executive and legislative branches of government, this did not, in his view, remove from the judiciary the capacity to review the validity of foreign governmental action. Still, while the application of the act of State doctrine was not mandated by specific constitutional provisions, it appeared to have clear constitutional "underpinnings", as it arose out of the basic relationship between different branches of government in a system of separation of powers, and reflected a proper appreciation of the required distribution of functions between the judicial and political arms of government in matters bearing upon foreign relations. Despite the possible repugnancy of a foreign act in the light of local conceptions of justice and fairness (→ Ordre public (Public Order)), and especially in circumstances in which the norm of international law invoked was uncertain or controversial – as was the case in relation to the expropriation of foreign-owned property – it was imperative that the judiciary refrain from pronouncing upon the international legality of the sovereign act of a foreign government so as to avoid the possibility of a judicial determination that differed from the position taken by the executive. Even where the State Department had itself proclaimed the impropriety of certain expropriations, it remained necessary for the courts to exercise restraint, as a judicial finding of international illegality relating to an act performed by a State within its own territory (→ Territorial Sovereignty) was more likely to offend a foreign government and thus to interfere with possible executive efforts intended to seek an accommodation through diplomatic channels (→ Diplomacy).

The choice between alternative strategies for the achievement of desirable foreign policy objectives was seen as involving a difficult assessment of national interests and thus a task which fell within the realm of executive responsibility (→ Foreign Relations Power). In addition, the Court saw little point in promoting a more active role for the judiciary in the enforcement of international legal norms and in the improvement of the degree of protection afforded United States investors abroad. It specifically rejected the suggestion that the act of State doctrine be retained only in situations where the State Department had expressly stipulated its desire to see it applied, an approach which would have reversed the presumption underlying the so-called "Bernstein exception" (→ Bernstein v. Van Heyghen Frères, 163 F.2d 246 (2d Cir. 1947)), which the Court managed to avoid passing judgment upon.

The Court's conclusions that "both the national interest and progress towards the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application" (376 U.S. 398 (1964) at 437) and that, accordingly, "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognised by this country ... even if the complaint alleges that the taking violates customary international law" (376 U.S. 398 (1964) at 428; → Recognition of Foreign Legislative and Administrative Acts), were widely questioned in both academic and political circles in the United States. Most of the criticism centered on the Court's apparent blanket refusal to play a role in the enforcement of international legal norms (though traditionally viewed as part of the law of the land), and on the ready acceptance of the possibility of judicial interference with the executive's conduct of foreign relations. Ultimately Congress intervened, partially overruling the Sabbatino decision

through the Hickenlooper Amendment to the United States Foreign Assistance Act (22 U.S.C. § 2370(e)(2) (Supp. 1966)), at least in relation to "claims of title or other right to property ... based upon a ... taking ... by an act of state in violation of the principles of international law".

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J.P. FONTEYNE

SATISFACTION

1. Notion

When an → internationally wrongful act or omission has occurred, satisfaction may be granted either as an alternative to, or frequently concurrently with, compensation (→ Damages). It involves → reparation for moral, immaterial or non-pecuniary damage caused by a State. This damage may consist either in showing disrespect or in impairing the dignity and honour of the claimant State itself, or in indirect non-pecuniary damage done to that State's nationals. The main purpose of satisfaction is to appease the injured State, and it serves as an expression of regret and acknowledgement of wrongdoing by the responsible State (→ Responsibility of States: General Principles).

2. Historical Evolution

In the past, satisfaction played an important role among the recognized measures of restitution, usually taking the form of a formal apology by way of exchange of diplomatic → notes or of direct exchanges between the governments concerned. Sometimes it required symbolic acts such as salutes to the flag or ceremonial processions of the victim's coffin. Exceptionally, when the damage done was particularly great or outrageous, satisfaction might consist in missions of expiation or atonement. Thus in 1901, following the suppression of the Boxer Rebellion in China by the major powers, China formally recognized her responsibility for the killing of → aliens, amongst them the German ambassador and the Japanese minister. In the Final Protocol ending the crisis, China submitted to the payment of large sums of money as reparation, as well as to measures of satisfaction. These consisted in expiation missions of Chinese princes to Berlin and Tokyo and, furthermore, in the erection of monuments of atonement all over China. In addition, all signatory powers were granted the right to station troops in China for the protection of their nationals and embassies (→ Military Bases on Foreign Territory).

As with other forms of → restitution, it is disputed whether satisfaction for immaterial damage may consist in payment of a penalty. An indication for this view may be found in the → I'm Alone Case (RIAA, Vol. 3, p. 1609), where Canada complained that a United States coastguard vessel (→ State Ships) had sunk a liquor-smuggling boat of Canadian registration outside United States territorial waters but inside an inspection zone provided by a United States-British Liquor Treaty (→ High Seas). While rejecting claims for damages, as the ship was in effect owned by United States nationals, the appointed Commissioners held that the United States "ought formally to acknowledge its illegality, and to apologize ... and further, that as a material amend in respect of the wrong the United States should pay the sum of $ 25 000". Similarly, in the Janes Claim (RIAA, Vol. 4, p. 90), the Commissioners not only awarded damages, but

also a penalty "for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes". But as the fundamental idea of satisfaction and damages is *restitutio ad integrum*, not criminal punishment, the view that satisfaction may consist in payment of a criminal penalty is rightly rejected by most publicists in the field.

3. *Present Significance*

Since World War II cases of satisfaction play an increasingly less important role as compared with other forms of restitution or reparation. Sometimes however – and although this is also disputed – a tribunal's pronouncement that the defendant State has committed an internationally wrongful act in itself may be regarded as a mode of satisfaction, as happened in the → Corfu Channel Case which in this respect followed the decisions in the → Carthage and the Manouba Cases. There the → International Court of Justice assumed the illegality of the British minesweeping operations in Albanian territorial waters, stating "This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction".

Under Art. 50 of the → European Convention on Human Rights the → European Court of Human Rights has occasionally decided in the same sense, but it has also awarded pecuniary satisfaction for non-pecuniary damage. However, this must be seen in the context of the violation of individual → human rights.

Nowadays satisfaction usually takes the form of a formal apology for the damage done, coupled with an undertaking that the wrongdoers will be brought to justice, and a promise that measures will be taken to prevent future repetition of the wrongful acts. In all events, measures of satisfaction must take forms which are not excessive or humiliating, and must be proportional to the actual damage inflicted (→ Proportionality). As such, satisfaction remains one of the recognized means of restitution or reparation in cases of State responsibility.

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EIBE RIEDEL

SECESSION

1. *Notion*

Secession is the separation of part of the territory of a → State carried out by the resident population with the aim of creating a new independent State or acceding to another existing State. Today's prevailing doctrine defines secession as the separation of part of the territory of a State which originally takes place in the absence of consent of the previous sovereign. In the process of → decolonization it was not clear in all cases whether such consent was in fact granted. The colonial powers have often conceded independence to their former colonies at a stage when a secessionist attempt was already well-advanced. Thus, for example the agreement between Portugal and the African Party for the Independence of Guinea-Bissau on the granting of independence to Portuguese Guinea was concluded on August 26, 1974 (Diário de Governo, Series I (1974) p. 977), a year after the Guinean-Bissau Independence Party had declared the independence of Guinea-Bissau, and some days after the → United Nations Security Council had unanimously recommended the admission of Guinea-Bissau to membership in the → United Nations on August 12, 1974 (UN SC Res. 355 (1974)). Formally, such cases constitute secession if the act of granting independence occurred after the secessionist attempt had already led to the Statehood of the new entity. Such cases constitute relinquishment of

territory, however, if the act of granting independence occurred before the secessionist attempt achieved success (→ Territory, Abandonment).

The concept of secession is not limited to the separation of certain kinds of State territory from the mother country, but rather includes the separation of any sort of territory from the remaining territory, whatever its legal status under international law or constitutional law may be. Thus, both the separation of a former dependent territory, that is territory for the international relations of which the predecessor State was responsible before the date of separation (see → Colonies and Colonial Régime, → Mandates, → Protectorates, → United Nations Trusteeship System), and the separation of an integral territorial part of unitary State are secessions.

2. International Legal Rules on Secession

Events leading to the creation of a new State generally entail matters within the → domestic jurisdiction of a State. International law has traditionally acknowledged secession subsequent to a factual state of events which has led to a situation in which the constitutive elements of a State are present rather than stating conditions of its legality. Thus, international law has neither provided for a "right to secession" nor condemned secession aiming at the acquisition of independence. The → International Law Commission (ILC) upheld this approach in its deliberations on Art. 18 of the Draft Declaration on Rights and Duties of States, where the principle of non-recognition of territorial acquisition by illegal force was explicitly limited to acquisition "by another State", thereby excluding the normal case of secession (YILC (1949) pp. 111–113).

The right to secession under national constitutional law, as laid down for example in Art. 72 of the Constitution of the Union of Soviet Socialist Republics of October 7, 1977, as well as in part one of the preamble of the Constitution of Yugoslavia of February 21, 1974, and in Sec. 201 of the Constitution of Burma of September 24, 1947, has not contributed to the development of an international legal standard on the legality of secession. No State practice has yet been based on these provisions.

The legality of secession became a subject of international law only when, and in so far as, the right of peoples pursuing secession became an international legal question. In the course of the rise of nationalism in 19th century Europe, the right of peoples to → self-determination gradually became a political postulate in international relations. However, the legal concept of self-determination in the era of European nationalism was not yet distinct enough to form the basis for a hard and fast rule on the legality of secession.

When the establishment of the self-determination of peoples became one of the purposes of the United Nations, this development did not imply a general revision of the attitude of international law toward the process of secession, but it was implicit in the emerging rules that the right to self-determination entails, under certain circumstances, a right to secession.

An important step towards the determination of the international legality of secession emerging from the right to self-determination of peoples is embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of October 24, 1970 (→ Friendly Relations Resolution, UN GA Res. 2625 (XXV)). Following the statement of the right of all peoples freely to determine their political status and to pursue their economic, social and cultural development, the Declaration establishes three modes of exercising this right:

> "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 a people constitute modes of implementing the right of self-determination by that people".

However, secession as a legal way of reaching the objects described is, for a distinct range of cases, explicitly excluded:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

The Security Council of the United Nations has characterized secessions as illegal, even if the national community involved was pursuing the detachment. Thus, Resolution 169 (1961) on the Congo *inter alia* "strongly deprecate[d] the secessionist activities illegally carried out by the provincial administration of Katanga". The General Assembly Resolution 31/4 of October 21, 1971 denied that the Island of Mayotte had a right to seceed stating that the plebiscite, in which the population of Mayotte had voted in favour of remaining with France, was obtruded and represented a violation of the sovereignty and territorial integrity of the Comores (→ France: Overseas and Dependent Territories). In the case of Southern Rhodesia the Security Council "call(ed) upon all States not to recognize this illegal racist minority regime in South Rhodesia" (UN Security Council Res. 216 (1965), November 12, 1965).

However, the resolutions cited are not based on existing legal rules prohibiting secession. International law does not address secessionist units except to the extent discussed above with regard to "peoples". The "illegality" of secession, as proclaimed in these resolutions, refers either to the municipal illegality, as in the case of the Congo (see debates on UN SC Res. 169 (1961), SCOR 974th meeting, November 15, 1961, p. 9) or, on the international level, to foreign intervention or the threat to international peace and security (→ Peace, Threat to), as in the case of Rhodesia (UN SC Res. 217 (1965)).

An example in which secession was considered as illegitimate is also found in the case of Southern Rhodesia. After November 11, 1965, when a white minority régime declared the independence of Southern Rhodesia, Britain, as a colonial power, despite its territorial title under the Southern Rhodesia Act of 1965, ceased to exercise any State power over Southern Rhodesian territory. Although the minority government of the newly declared State controlled the country in a stable and effective way, Southern Rhodesia was not recognized by any State (Q. Coetzee, The Sovereignty of Rhodesia and the Law of Nations (1970)).

The two most significant examples of secessionist attempts within an independent State in modern history are Katanga and Biafra. In both cases the claim of the secessionist unit to self-determination was not acknowledged by the vast majority of States.

During the secessionist struggle of the province of Katanga in the former Belgian Congo from 1960 to 1963, the Katangan Government exercised predominant control over its territory, although it was strongly supported by external power. Katanga was not recognized by any State. Incidentally, the → International Court of Justice (ICJ) stated in the advisory opinion on → Certain Expenses of the United Nations that Katanga was not a State for the purposes of the Charter (ICJ Reports 1962, p. 151, at p. 177; see the dissenting opinion of Judge Moreno Quintana, p. 239, at p. 246).

During the time Biafra fought for its independence from Nigeria, from May 30, 1967 to January 12, 1970, Biafran forces exercised significant control over the secessionist territory. Nevertheless, the → Organization of African Unity considered the conflict an internal affair of Nigeria (Assembly of Heads of State and Government, Res. 51 (IV) 1967). Most States did not consider Biafra a State and did not recognize it as such.

3. Secession and the Creation of a New State

A new entity which has emerged as a result of secession from a former sovereign State must demonstrate sufficient independence before it may itself be considered a State. On the occasion of the secession of American colonies from Great Britain, State practice for the first time determined the constitutive elements of a State, therewith establishing the prerequisites of independence. Since then, State practice has indicated that a secessionist régime gains sufficient independence if it governs its territory effectively and with lasting stability so that there is no probability of the former sovereign regaining its place (→ Effectiveness). However, modern State practice proves that in cases where the secessionist unit is granted full formal independence by the previous sovereign, the degree of effectiveness of the government does not play a decisive role. In such cases, the new entity is commonly considered a State and recognized as such, even if the degree of actual control does not correspond to the traditional prerequisites of effectiveness.

Furthermore, since 1945 State practice shows that the same degree of effectiveness has not been required for all régimes which have emerged via

secession, but rather a distinction has been made between secessionist units which result in realization of the norm of self-determination and those which have no special legitimizing ground in international law. State practice in respect of the determination of Statehood of former colonies which have seceeded is content with a lower degree of effective control by the secessionist régime than is required under traditional rules of international law.

In the process of decolonization a significant number of cases have occurred in which the Statehood of a former colony which seceeded was widely recognized before its government controlled the State's territory effectively and with sufficient stability (see e.g. the cases of Indonesia: A. Taylor, Indonesian Independence and the United Nations (1960); Algeria: M. Bedjaoui, Law and the Algerian Revolution (1961); Guinea-Bissau: C. Rousseau, Guinée-Bissau, Chronique des Faits, RGDIP, Vol. 78 (1974) pp. 1166–1171; cf. Bangladesh: J.J.A. Salmon, Naissance et reconnaissance du Bangla-Desh, in: Multitudo Legum Ius Unum, Festschrift für Wilhelm Wengler, Vol. 1 (1973) pp. 467–490).

Moreover, the United Nations has provided the decolonization process with impetus by applying rules appropriate for States to former colonies which have seceeded at a time when they were not yet controlled by an effective and stable government. In 1947 the UN Security Council invited Indonesia, pursuant to Art. 32 of the → United Nations Charter, to participate in discussions in which its legal status was the very point in issue (SCOR 181st meeting, August 12, 1947).

4. Secession and Third States

(a) Recognition by the predecessor State

The recognition of secessionist régimes has had varying significance in international law following the different international law doctrines on the creation of States. Former doctrine required a transfer of sovereignty along with an abandonment of sovereign rights by the previous ruler for the attainment of Statehood of a secessionist unit. The recognition of the secessionist unit's newly acquired Statehood by the predecessor State was considered the indispensable expression of such a transfer of sovereignty.

Present doctrine acknowledges the possibility of an original, non-derivative emergence of States as → subjects of international law. The recognition of a secessionist entity's Statehood by the previous sovereign is accordingly regarded only as an ascertainment of sovereignty previously gained.

Historically, the question of what role recognition by the predecessor State plays in the rise to Statehood of a secessionist unit arose in cases where a → *de facto* régime effectively controlled a certain territory which was part of the territory of the predecessor State before the secession and the predecessor State did not recognize the new entity as a State (→ Non-Recognition).

The problem first arose when the Netherlands declared independence from Spain in 1581. Spain refused recognition of the Netherlands until the year 1648. England and France, which both entered into relations with the Netherlands, for example by concluding treaties with her, concurrently refused the recognition of the Netherlands as a sovereign State, assuming that the sovereignty of the Netherlands necessitated an act of transfer by Spain (F.C. Moser, Kleine Schriften zur Erläuterung des Staats- und Völkerrechts, Vol. 2 (1752) p. 246 et seq.).

The dispute broke forth again on the occasion of the French recognition of the United States of America in 1778, long before recognition by the British motherland in 1783. The French recognition was widely regarded as premature and therefore illegal under international law (C. Martens, Causes célèbres du droit des gens, Vol. 3 (2nd ed. 1859)).

The controversy was finally settled in connection with the independence of the former Spanish colonies in South America. The American colonies declared their independence successively from 1809 onwards and maintained independence without being granted any formal recognition by their mother State or any other State for a long time. When the situation reached the point where the secessionist territories were free from any effective Spanish control and were ruled by relatively stable local governments, although Spain still refused to grant recognition, the United States took the initiative and recognized the independence Republic of Colombia in June 1822. In 1825, Great Britain followed, recognizing Argentina, Colombia and [illegible] sovereign

States. Without expressly conceding to having lost her sovereignty over the United States before the renouncement of her rights, Great Britain therewith subscribed to the view that a new State, created by secession, may acquire sovereignty originally and independently, without the necessity of a transfer of sovereignty by the predecessor State (I. Smith, Great Britain and the Law of Nations (1932) p. 151 et seq.).

(b) Recognition by third States

The significance of the recognition of the Statehood of a secessionist unit by third States is controversial in international law. The character of the recognition is disputed among the adherents of the constitutive and declaratory theories. The former regard recognition as a constitutive element of Statehood; the latter conceive Statehood independently from recognition, whereby recognition is only a declaratory act (for details, see the article on → recognition).

5. The Consequences of Secession

In general, the rules on → State succession govern the rights and obligations of a new State. This is also true in case of a new unrecognized State. Third States often maintain a considerable number of relations which are governed by rules of international law with States they do not recognize, for example in the case of joint membership in international governmental organizations. In modern international law, the non-recognition of a secessionist régime which beyond doubt qualifies as a State does not permit the non-recognizing State to ignore the Statehood of the entity in question.

In its codification of the succession of States in respect of → treaties, the International Law Commission distinguishes between former dependent territories (colonies, United Nations Trusteeship System, mandates, protectorates) and former integral parts of a unitary State, and includes only former dependent territory under the designation "newly independent State" (Part I, Art. 2 and Part III of the → Vienna Convention on Succession of States in Respect of Treaties, August 23, 1978, UN Doc. A/CONF.80/31).

In its second codification on the succession of States, the ILC maintained the distinction between the different status of the territories gaining independence. However, besides including provisions on the succession of States in respect of the "newly independent States", it laid down rules concerning the "separation of part or parts of the territory of a State which form a successor State" (Part I, Art. 2 and Part II, sec. 2, Arts. 17, 30, 40 of the → Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts, April 7, 1983 UN Doc. A/CONF.117/14).

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SERVITUDES

1. Concept

The term servitude is borrowed from Roman property law, in which a right enjoyed by the owner of one piece of land, the dominant tenement, over land belonging to another, the servient tenement, was called praedial servitude or easement. The essential feature of servitudes was their association with permanent rights and obligations – that they "ran with the land" – i.e. they persisted irrespective of changes in ownership. In the feudal system, when subject territory was considered to be the property of the feudal lord, the concept of servitude was transferred to comparable rights and restrictions upon the use of land involving foreign territory. In this form the concept was taken up by writers on → international law (→ History of the Law of Nations).

In time the analogy to Roman law was, in varying degrees, dissolved and without the emergence of a generally agreed definition, those restrictions on → territorial sovereignty came to be described as State servitudes connected with territory, being rights and obligations *in rem*, as opposed to rights and obligations *in personam*. The term was also used when such restrictions were temporary or of benefit to the inhabitants of foreign → States (e.g. by granting economic advantages or enhancing their military security) rather than to the foreign territory as such. In addition, a servitude may benefit → subjects of international law not possessing territory, e.g. international organizations (thus the Headquarters Agreement of June 26, 1947 between the United States and the → United Nations, UNTS, Vol. 11, p. 11; → International Organizations, Headquarters). Furthermore, it may serve the interests of a group of States or of all States; this happens, for example, with the → internationalization of waterways (e.g. → Rhine River; → International Rivers) or the → demilitarization of the → Aaland Islands, or the → neutralization of interoceanic → canals. On the other hand, rights granted by a State to foreign individuals or corporations can never constitute State servitudes.

Corresponding to the extent of territorial sovereignty, the following may be objects of servitudes: land, rivers, territorial atmosphere (→ Air, Sovereignty over the), territorial subsoil, → territorial sea and the → continental shelf, excluding *res communis* and *res nullius* (→ High Seas; → Space Law). A servitude may apply to the whole or a part of the territory of a State. It follows from the nature of a servitude as being bound to a specific territory, that only exceptional restrictions on territorial sovereignty are meant, and not those general restrictions on territorial supremacy which, according to certain rules of international law, apply equally to all States.

2. Types

Servitudes may be differentiated on the basis of the manner, content and degree of the restrictions on territorial sovereignty.

(a) Positive (affirmative, active) servitudes permit a State to perform certain acts on the territory of another State (→ Administrative, Judicial and Legislative Activities on Foreign Territory). Negative servitudes oblige the "servient" State to refrain from certain uses of its own territory to the benefit of the "dominant" power. This common distinction is based on Roman law. Other conceivable servitudes include obligations which require a State to perform certain acts on its territory, such as to maintain the navigability of a waterway (thus Arts. 27 and 28 of the Mannheim Convention of 1868 on the Rhine, Martens NRG, Vol. 20, p. 355).

(b) On the basis of content, four groups of servitudes may in essence be distinguished:

(i) Communication régimes, e.g. the right of → transit over foreign territory, in particular the use and maintenance of railway lines, roads, → ports, rivers, canals, → airports and air corridors, the right to place telegraph cables and oil → pipelines, and the maintenance of postal servitudes (→ Polish Postal Service in Danzig (Advisory Opinion)).

(ii) Boundary régimes, e.g. rules pertaining to border stations (→ Railway Stations on Foreign Territory), → border controls, regulation and maintenance of → boundary waters and dams along frontiers, and coastal protection (→ Neighbour States).

(iii) Economic servitudes, e.g. the granting of fishing and mining rights (→ North Atlantic Coast Fisheries Arbitration; treaties of 1939 and 1952 concerning Dutch mines under German soil (LNTS, Vol. 199, p. 239; UNTS, Vol. 179, p. 147); treaty of 1950 regulating Dutch and Belgian mining operations (UNTS, Vol. 136, p. 31)), the establishment of customs-free zones (→ Free Zones of Upper Savoy and Gex Case; the Port of Kehl on the Rhine created in 1920 (LNTS, Vol. 1, p. 367) to implement Art. 65 of the → Versailles Peace Treaty (1919)), and the right to take water for irrigation (e.g. Nile Waters Agreement of 1902, Martens NRG2, Vol. 2, p. 826; → Nile River). Extensive economic rights are granted to contracting parties of the Treaty of Spitzbergen of February 9, 1920 (LNTS, Vol. 2, p. 7).

(iv) Military servitudes, e.g. the establishment of demilitarized and neutralized areas (Aaland Islands; → Spitzbergen/Svalbard; → Suez Canal; → Panama Canal; various Aegean Islands under the → Lausanne Peace Treaty (1923) and the Italian Peace Treaty of 1947 (→ Peace Treaties of 1947)), prohibitions covering the construction of fortifications (Art. III of the Treaty of Paris of 1815 concerning the Alsatian town of Huningue (CTS, Vol. 65, p. 253); Art. 47 of the Italian Peace Treaty of 1947, which prohibits the construction of fortifications with the capacity to fire into French territory or territorial waters), the erection of → military bases on foreign territory, and rights to the passage of troops (Arts. 4 and 5 of the Treaty of Alliance of 1930 between Great Britain and Iraq, LNTS, Vol. 132, p. 363).

In addition to these four groups there are other servitudes, as for example the prohibition covering the construction within the territory surrounding the Vatican City of new buildings which might be higher than the latter, in accordance with Art. 7 of the → Lateran Treaty (1929) (→ Holy See).

(c) The rights and obligations arising from a servitude may vary greatly, extending to the comprehensive exercise of jurisdiction over foreign territory (→ Jurisdiction of States). This is the case when a territory is leased (e.g. the "New Territories" by China to Britain, and which Britain attached to and administered together with the colony of → Hong Kong; → Territory, Lease). Likewise the United States obtained a status as "if it were the sovereign of the territory" in a five-mile strip on either side of the Panama Canal under Art. III of the Hay-Varilla Treaty of 1903 (Martens NRG2, Vol. 31, p. 599). In Art. 3 of the → Peace Treaty with Japan (1951) the United States acquired similar rights on the island group of Okinawa.

3. Effects on Third States

As in the case of praedial servitudes under Roman law, State servitudes too are ascribed a dispositive character with effects *erga omnes* (→ Treaties, Effect on Third States). Consequently, the favoured power alone is responsible for acts it commits on foreign territory, whereas the "servient" State is freed from responsibility to the extent of the servitude (→ Responsibility of States: General Principles). It is often alleged that a servitude, as a restriction inherent in territory, survives a change in → sovereignty (*res transit cum onere suo*, see Art. II of the treaty between Sardinia and France of 1860, CTS, Vol. 122, p. 24; → State Succession). It is a moot point, however, whether military servitudes may be exercised in time of → war by a belligerent if the State with whose territory they are connected remains neutral. Express regulations to this effect are contained in Art. 1 of the Convention of Constantinople of 1888 (Martens NRG2, Vol. 15, p. 557), Art. 390 of the Versailles Peace Treaty (Kiel Canal; → Wimbledon, The), Art. 9 of the treaty between Germany, Poland and → Danzig of 1921 concerning transit through the Polish Corridor (LNTS,

Vol. 12, p. 61), and Art. II of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977 (ILM, Vol. 16 (1977) p. 1040).

However, a general rule according to which servitudes generally possess these effects cannot be demonstrated. The contemporary view is to understand servitudes not as inherent negative attributes of a territory, but as measures regulating the conduct of States in respect of the territory concerned. By attributing effects *erga omnes* to a servitude, nothing less is implied than that individual States possess the legal right to define binding provisions for third States. International law permits such effects only in so far as States are entitled to create them on the basis of territorial sovereignty. Otherwise, the effects on third States with regard to responsibility, neutrality and State succession rest on the express or tacit recognition by these third States of any rule agreed with respect to the territory concerned. Such recognition or → acquiescence is to be affirmed separately in each case.

Concerning changes in sovereignty, the → Vienna Convention on Succession of States in Respect of Treaties now prescribes a rule which also applies to newly-independent States (→ New States and International Law). Accordingly, servitudes laid down by treaty are not affected by State succession if they (i) establish a boundary régime (Art. 11), (ii) are created for the benefit of a territory of a foreign State (Art. 12(1)), or (iii) are created for the benefit of a group of States or of all States (Art. 12(2)). However, the successor State need not tolerate foreign military bases (Art. 12(3)). The principle of permanent sovereignty of every people and every State over its natural resources (→ Natural Resources, Sovereignty over) also prevails over the continued existence of servitudes (Art. 13). In any case, these servitudes do not belong to (ii) above – a fact so far overlooked by legal commentators – because they do not benefit the territory of the "dominant" State, but rather are designed for that State's military or economic advantage. Such servitudes may pass to the successor State only when they create an objective régime for the benefit of a group of States or of all States; for servitudes belonging to (iii) above it is immaterial whether or not the benefit is considered to be attached to the territories of the other States. A further limitation on succession in servitudes is contained in Art. 13 covering natural wealth.

4. *Creation of Servitudes*

Servitudes are usually created by (dispositive, real, localized) treaty, although they may also derive from local custom (→ Right of Passage over Indian Territory Case), or unilateral → declaration (→ Unilateral Acts in International Law). The question is still unresolved whether servitudes may arise from general international law (right of access to → enclaves; right of land-locked States of access to the sea (→ Land-Locked and Geographically Disadvantaged States); undisturbed water-supply (→ Lac Lanoux Arbitration)).

5. *Extinction of Servitudes*

Servitudes may become extinct by the merger of the servient territory with the dominant State (→ Territory, Acquisition), by agreement between the States concerned, by *desuetudo*, by express or tacit renunciation on the part of the power in whose interest they were created, by a renunciation on the part of the servient State which is accepted by the favoured power, by expiry of a time-limit or by termination of a treaty because of its breach or on the grounds of → *clausula rebus sic stantibus*. A servitude may be extinguished on the last-mentioned ground because it is not "naturally" attached to a territory for reasons of its geographical position, as was the underlying idea in Roman law, but rests on an act of will produced under specific circumstances which may be subject to a change. Art. 62 of the → Vienna Convention on the Law of Treaties excludes only boundary treaties from the operation of the *clausula* (cf. Art. 8 of the Treaty concerning the Aaland Islands of 1921, LNTS, Vol. 9, p. 212). Servitudes are not affected by war, but are suspended between belligerent States (→ War, Laws of).

6. *Evaluation*

In State practice the term servitude is rarely used because of its emotive suggestion of dominance and servience. International courts and tribunals have always taken care not to explain the grounds for their decisions with reference to the

concept of servitude (North Atlantic Coast Fisheries Arbitration; *The Wimbledon*; Free Zones of Upper Savoy and Gex Case). Municipal courts have occasionally appealed to it (Supreme Court of Cologne, AJIL, Vol. 8 (1914) p. 907).

In essence the concept is derived from legal doctrine, but the legal relationships defined as servitudes are not uniform in their legal consequences. The expression servitude is no more than an imprecise collective term from which specific legal effects may not be deduced.

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SOCIÉTÉ LEVANT EXPRESS TRANSPORT v. CHEMINS DE FER DU GOUVERNEMENT IRANIEN

This case illustrates the contribution of French jurisprudence to the principles governing the immunity from jurisdiction enjoyed by agencies of a foreign State (→ State Immunity).

In this case, a French company had entrusted an agent, the SOMEPORT company, with the shipment of goods to Iran and later brought an action against SOMEPORT for damages on account of certain losses. The defendant claimed indemnification from the Société Levant Express Transport, an Iranian company whose commercial object was the transport of goods by land between Khorramshar and Tehran. In turn, the Société Levant Express Transport sought indemnification from the Railway Administration of the Iranian government (Chemins de fer du gouvernement iranien), which was joined as a third party but invoked immunity from jurisdiction.

While the court of first instance had accepted the claim of immunity, the Paris Court of Appeal held the Iranian Railway Administration to be amenable to French jurisdiction. Lodging an appeal of cassation, the Iranian Railway Administration argued that it was entitled to sovereign immunity as a branch of the Iranian transport ministry, being an emanation of the central government of Iran and one of its non-commercial operations within the public service. By decision of February 25, 1969 the Cour de Cassation (Court of Cassation) rejected the claim of immunity without denying that the Railway Administration was an organ of the central government of Iran. The Court held that the immunity of foreign States and their agencies is restricted to acts of public authority or to operations in the interest of a public service. The Court underlined that immunity is based on the nature of the activity and not on the status of the responsible entity. The judgment approved the approach of the Court of Appeal, which had pointed out that even under the municipal law of Iran, railway transport must be classified as a commercial activity which does not necessarily imply the exercise of sovereign power.

The jurisprudence of the French Court of Cassation justly applied the same operational criteria to the claim of immunity of foreign States and their agencies, whether these are legally separate bodies or mere emanations of the central government without a legal personality of their own. As in the case of → Gugenheim v. Etat du Vietnam, the Court of Cassation linked the notion of acts of sovereignty closely to the performance of a service on behalf of specific public interests; the exercise of public authority is understood as an alternative (and not a cumulative) criterion. The argument that even the domestic law of the Iranian Railway Administration would place the relevant acts in question on the same footing as the commercial activities of purely private entities seems conclusive. However, this approach does not support the view that the sovereign or commercial character of the activity at issue should be fully determined by the domestic law of the foreign State agency. The relevant foreign law merely provides criteria for defining the scope of specific public services and for refusing the cover

of immunity to bodies whose activities are not distinguished even by their own domestic law from what are clearly commercial and other non-sovereign acts.

For some time the French courts have extended the scope of sovereign immunity beyond the governmental hierarchy to State agencies endowed with a distinct legal personality which are authorized to act as the representative of the central power, such as central banks (Cour de Cassation, Epoux Martin v. Banque d'Espagne, Clunet, Vol. 80 (1953) 654; Revue critique de droit international privé, Vol. 42 (1953) 425 (with annotation by C. Freyria); see also Cour de Cassation, Caisse d'assurance vieillesse des non-salariés (C.A.V.N.O.S.) v. Caisse nationale des barreaux français (C.N.B.F.), Revue critique de droit international privé, Vol. 67 (1978) 532 (with annotation by P. Bourel); Tribunal de grande instance de Paris, Corporación del Cobre v. Société Braden Copper Corporation et Société Le Groupement d'importation des Métaux, Clunet, Vol. 100 (1973) 227 (with annotation by P. Kahn); cf. → Trendtex Banking Corp. v. Central Bank of Nigeria). This jurisprudence corresponds to a modern tendency followed by recent United States legislation, the British State Immunity Act of 1978 and the → European Convention on State Immunity. This approach correctly reduces the importance of administrative technicalities underlying the different degrees of legal autonomy.

The sovereign (or commercial) character of the activity of a State agency does not necessarily depend on the application of the public (or private) law of its domestic legal system. In many legal systems private entities can be vested with governmental authority. This reasoning stands in line with the recent jurisprudence of the French Court of Cassation which affirmed the immunity of the Bank of Japan, legally an autonomous private law organization, on the grounds that the bank had actually acted as the Japanese agency charged with official currency control and thus "by the order and for the account of the Japanese State" (Zavicha Blagojevic v. Banque du Japon, Clunet, Vol. 103 (1976) 687 (with annotation by P. Kahn); Revue critique de droit international privé, Vol. 66 (1977) 359 (with annotation by H. Batiffol)).

The concept that immunity from jurisdiction depends on the nature of the act rather than on the legal status of the body responsible has also been adopted in Belgian jurisprudence, which refused immunity to the Turkish Central Bank with respect to certain currency transfers which fell outside the specific powers allowing the bank to act as the agent of the State and to perform executive acts (Cour d'appel de Bruxelles, Société anonyme "Dhlellemes et Masurel" v. Banque Centrale de la République de Turquie, ILR, Vol. 45 (1972) 85).

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SOUTH AFRICAN BANTUSTAN POLICY

1. Evolution

The Bantustan Policy of the Republic of South Africa, drawn up and implemented since the 1950s, aims at the creation of self-governing, and ultimately independent, "homelands" for the → forced resettlement of the black population of South Africa, where the blacks are able to exercise political rights.

The Union of South Africa was formed in 1910, after the annexation of tribal territories, by the union of the Cape Colony with Natal, the Boer Republics of the Transvaal and the Orange Free State. Native reserves were created which became the nuclei of the so-called homelands, although at first Africans were not prohibited from acquiring land elsewhere. In 1913 the Natives (Bantu) Land Act restricted the proportion of land available for African use to 7.3 per cent of the Union's total territory, raised to 13.7 per cent in 1936 by the Bantu Trust and Land Act. The Representation of

Natives Act of 1936 added the political element by excluding Africans from membership in parliament. The Natives' Representative Council had merely advisory powers.

The emergence of the modern Bantustan Policy is marked by the Bantu Authorities Act, 1951, which abolished the Natives' Representative Council, thus reducing the natives' political voice still further, and manifested an essential shift in philosophy by dealing with black people no longer as a single group but as members of separate linguistic national units. This development was accelerated by the Tomlinson Commission Report in 1954 which proposed a completely separate homeland for each African group. This new concept of → apartheid emerged under Prime Ministers Verwoerd and Vorster and has been implemented step by step. The Promotion of Bantu Self-Government Act (1959) defined eight Bantu national units, later raised to ten homelands (Kwazulu, Transkei, Ciskei, Bophuthatswana, Lebowa, Qwaqwa, Gazankulu, Kangwane, Venda, Kwandebele), and elaborated further the organization and structure of the tribal, regional and territorial authorities already established by the Bantu Authorities Act (1951). The Transkei Constitution Act, 1963, granted to Transkei limited internal self-government (→ Autonomous Territories) and conferred on the Africans apportioned to this homeland a particular Transkeian citizenship beside South African citizenship (→ Nationality). The Bantu Homelands Citizenship Act of 1970 and the Bantu Homelands Constitution Act of 1971 applied the same measures to the other homelands, and since then every African has become a citizen of a homeland whether he lives there or not. In order to obtain more coherent areas inhabited by whites or blacks, a policy of forcible resettlement has relegated over three million black Africans to their designated Bantustans while urban blacks could continue working outside their homelands. Three-fifths of the Tswana people, for example, are domiciled outside Bophuthatswana. In 1986 the South African government announced the suspension of all forced resettlement.

The 1971 Act provided for two stages of self-government, leading ultimately to independence. During the first stage, the powers of the former Territorial Authority were to pass to a newly-proclaimed Homeland Legislature and an Executive Council. In the second stage, after a general election, the Homeland Assemblies were empowered to legislate on certain domestic matters. These included education, but not, for example, foreign affairs (→ Foreign Relations Power) and defence, preservation of peace and security, postal services, currency or banking. The approval of the State President was still required, and apartheid laws continued to apply to non-independent homelands (→ State; → Sovereignty).

While all homelands have now arrived at this second stage, only four of them (Transkei in 1976, Bophuthatswana in 1977, Venda in 1979 and Ciskei 1980) have already accepted independence. Independence is preceded by the elaboration of a constitution by the homeland's legislative assembly established under the 1971 Act and by a South African Act (e.g., Status of the Transkei Act of 1976) providing that the homeland should become an independent State which would no longer form part of the Republic of South Africa and that the Republic would cease to exercise any authority over the territory. According to the process of development, the constitutions and the political structures of the independent homelands show a blending of traditional authority with Western political institutions, but differ remarkably from one another (e.g., Westminster-type constitution or presidential régime, human rights catalogue).

The Bantustan policy has also generally been applied to → Namibia by the Development of Self-Government for Native Nations in South-West Africa Act, 1968, some peculiarities notwithstanding.

2. Legal Issues and International Reaction

The Bantustan policy has raised many political and legal problems and has received widespread international condemnation as a part of the apartheid system. South Africa is accused of squeezing the black Africans, more than 70 per cent of her population, into an area only 13.7 per cent of her total size, in order to attain a State community where the white population outnumbers the remaining ethnic groups (Hindus and Coloureds) who are not directly affected by the

Bantustan policy. In this respect, the nationality issue is predominant, because citizenship of an independent homeland is combined with concomitant loss of South African nationality. This loss causes particular hardship for those urban black Africans to whom the citizenship of a homeland is formally assigned without having a genuine link with it, and who continue to work as permanent residents in the Republic of South Africa. These hardships have, however, been alleviated to some extent by agreements between South Africa and the newly independent governments, entered into under the terms of the Designated Neighbouring Countries Act of 1978. According to these agreements, former South African citizens forfeit none of the rights and privileges they had prior to independence (e.g., concerning residence, employment etc.) except for citizenship. South Africa will issue → passports for travel abroad in case such homelands' documents are not recognized by foreign countries. It is also agreed that under special circumstances a homeland citizen may renounce his citizenship after independence, thus retaining his South African nationality. This trend has been affirmed by the Restoration of South African Citizenship Bill of 1986.

It is open to doubt whether the independent homelands comply with the prerequisites of real statehood. They still appear to be politically dependent on South Africa, an impression which was not seriously troubled by the temporary rupture of diplomatic relations between South Africa and Transkei over a territorial dispute (→ Diplomatic Relations, Establishment and Severance). The doubts are mostly founded on the territorial fragmentation and economic situation of the homelands. Most homelands do not consist of a coherent territory but are fragmented in several areas. The South African Government, by the Bantu Laws Amendment Acts of 1973 to 1976, has made some attempt at territorial consolidation, but no substantial change has occurred. This detracts from the fact that some of the homelands have a much bigger territory and population than some → micro-States represented in the → United Nations. With the possible exception of Bophuthatswana, the economic dependence of the homelands on South Africa weighs still more. South Africa's subventions are strongly needed to balance the homelands' budgets. Quite apart from the urban blacks, a clear majority of the economically active homeland residents are involved in the migrant labour system, earning their money outside the homeland's borders (→ Migrant Workers). White private investment has been encouraged by the South African Government (Promotion of the Economic Development of Bantu Homelands Act of 1968 and Amendment Act of 1977), but this has not changed the situation substantially, partly because vast homeland areas are unsuitable for cultivation.

In view of the existence of other countries that are also not viable economically, the argument that the people concerned are not in favour of forming a nation of their own is more convincing. The participation of citizens in the political affairs of the homeland is very low. For example, less than 4 per cent of the Tswana residents outside Bophuthatswana registered on the voting roll and only 38 per cent of citizens within the territory voted in the original independence referendum. This suggests that most of the population would prefer the exercise of political rights within South Africa. In the beginning, the common attitude of the tribal chiefs was the same, although some later turned to the independence concept, taking the view that there would be no other alternative to prolongation of the former situation. Other African leaders including Chief Buthelezi (Kwazulu) still vehemently reject the idea of separate independence. It has also been argued that the pre-independence agreements between South Africa and the homelands are invalid because of duress by South Africa (→ Treaties, Validity; → Nullity in International Law). Thus the Bantustan policy can hardly be regarded as realizing the right to → self-determination.

The international community, the United Nations and the → Organization of African Unity have condemned the establishment of Bantustans as designed to consolidate the policy of → apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to deprive the African people of their inalienable rights. The → United Nations General Assembly and → United Nations Security Council have declared the proclamations of independent homelands totally invalid and have called upon all governments to deny any form of

→ recognition to them (e.g. UN GA Res. 31/6 A, October 26, 1976; UN Security Council Res. 402 (1976), December 22, 1976). Hitherto no State except South Africa herself has opposed these resolutions, which are not legally binding (→ International Organizations, Resolutions). There are, however, some economic relations between industrialized countries and the independent homelands.

3. Evaluation

The Bantustan policy has succeeded neither on the national nor international level in its objective of removing the racial burden from South Africa by creating several States to which all or at least most black inhabitants are distributed. On the other hand, the so-called Buthelezi Commission's proposal in 1982, based on the concept of a government of consociation, failed to gain the South African Government's approval. South Africa's new constitutional approach to the political participation of the Asian and coloured people might in the long run open new aspects for the black majority, too. But this will imply renunciation of the most essential elements of the Bantustan policy as it stands now.

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SOVEREIGN EQUALITY *see* States, Sovereign Equality

SOVEREIGNTY

A. Introduction

Sovereignty is the most glittering and controversial notion in the history, doctrine and practice of public international law. Its meaning has oscillated throughout the history of law and of the State since medieval times. It has frequently had to serve as a juridical cover to mere → power politics. Its importance must be placed within respective historical contexts and has been intrinsically connected, *inter alia*, with the following: the concepts and politics of the "territorial State" in Europe evolving from the medieval medley of overlapping temporal and ecclesiastical jurisdictions as well as vasselages and feudal allegiances; the States' emancipation from the diarchal claims to universal secular authority by pope and emperor; the struggle within States to establish a central unit of decision-making capable of suppressing intermediate powers (nobility and estates); the fight concerning the freedom of the oceans; the policies of European colonization overseas; the issue of a *ius ad bellum*; the possible → subjects of international law and their equal status, and, ultimately, the binding force of a law of nature and of → international law. The concepts of internal and external sovereignty have constantly reacted upon each other.

The history of the notion of sovereignty in international law is almost identical with the full-scale history of international law itself. As this cannot be pursued here (see → History of the Law of Nations), restriction to such elements which are still pertinent under contemporary international law is imperative. Such elements include the following: whether a political community commanding public power is not, as of law, subject to a higher authority and, thus, independent of foreign authority; whether such a community enjoys, as of law, an equal status with similar communities; whether it possesses, as of law, a comprehensive → jurisdiction over a delimited territory to the exclusion of foreign authorities (→ Territorial Sovereignty; → Maritime Jurisdiction; → Air, Sovereignty over the); whether a comprehensive sphere of self-determination with regard to the political, constitutional, cultural, economic, and social form of a particular community is recognized, as of law; whether and to what extent interventions into such spheres by foreign powers are admissible (→ Intervention); whether a *ius ad bellum* is recognized, limited by justifying causes, or unlimited, which might or might not protect, as of law, such a community from being extinguished as an independent community; whether and to what extent associations with other communities affect its legal status under international law; whether sovereignty means a factual status with respect to power, restrained possibly by the factual power of others, or a legal status under international law protecting a State's freedom of action and → self-determination; whether a political community is bound by international law at all, and if so, what the sources of validity of such law are (→ Sources of International Law); if custom and treaties are the exclusive sources, whether custom can be terminated at discretion and consent to treaties revoked at liberty, thereby terminating any further obligations (→ Treaties, Termination; → Customary International Law).

B. Historical Roots and Meanings of Sovereignty

1. Contemporary concepts of sovereignty have long roots in and are products of European history. Contacts with non-European cultures prior to the Renaissance and the maritime discoveries of the late 15th century did not mature into a legal concept of sovereignty. Political organizations and institutions in medieval Europe

did not correspond to the notion of the State as used since the 17th century, nor did their mutual legal relationships correspond to an international legal order of a plurality of interdependent States. Medieval Christian society considered the ruler to be bound by → natural law based on the divine order (*lex aeterna*) of the world and by the metaphysical idea of justice. Accordingly, it could not conceive of a power unbound by law (*ius*, as distinguished from *lex*), and could accord such power ultimately neither to the prince nor to the people (Brunner). *Plenitudo potestatis* or *summa potestas* in the sense of a *potestas iure soluta* was held neither by pope nor emperor. While superior in rank to their vassals, rulers (lords) were neither the exclusive nor even the principal law-creating institutions. Law, rather, consisted of traditional customs and was widely equated with justice. In fundamental distinction to the modern State, the power to legislate, slowly developing since the 13th century, was bound to the consensus of the *maiores et meliores*. Claims of a *potestas leges condendi* by pope, emperor, or princes did not gain general recognition or, at best, did so only temporarily under Emperor Frederic II. If justice was seriously violated by a ruler, a right of resistance arose, the most mature fruit of medieval political and legal thinking (Kern).

Based upon common faith and societal structures (Church, estates of knights and clergy, cities and their leagues, etc.), and the enduring Roman tradition of one *imperium* and one emperor (revitalized in Western Europe by the coronation of Charlemagne in A.D. 800), Christian political communities considered themselves as living under a common roof of law, i.e., a *communitas communitatum* (Grewe, Part I). This development is documented, *inter alia*, by eight crusades and the conquest of the Holy Land under the leadership of pope and emperor, by institutions like *Gottesfriede* (peace of god) and *Landfrieden* (restriction or prohibition of feuds), *bellum iustum* and legal *feodum*, and a highly developed arbitration practice.

Liens of feudality and of personal allegiance criss-crossed this greater community, militating against the idea of a general status of obedience of the inhabitants towards the ruler within a territory. To the feudal system of Frankish origin, which constituted a major part of the positive legal orders at the time, modern concepts like sovereignty implying a comprehensive public power, supreme as of law, exclusive territorial jurisdiction, non-intervention into domestic affairs, or civil strife were alien. No such qualification as sovereignty was required, for example, to lend the capacity to conclude → treaties or transact foreign relations. Northern Italian cities, for instance, concluded peace treaties with the emperor and treaties of commerce with foreign princes. Neither the pope nor the emperor were considered sovereign in a modern sense. Ambitions and claims to universal secular legal authority, raised at times and supported on the pope's part by canonists and on the emperor's part by legists (Bartolus, 1314–1357; Baldus, 1327–1400), led to serious crises, both between these two groups and between them and the princes, in particular, the French and English rulers. In general they departed more and more from political reality. Claims to universal temporal authority raised by Gregor IX, Innocent IV, and Boniface VIII (bull Unam Sanctam, 1302) could not win the permanent general recognition of a universal legislative or judicial authority. When, for example, in 1298 the kings of England and France submitted their disputes to Boniface for arbitration, they called upon him *tamquam personam privatam*, avoiding recognition of papal jurisdiction *in temporalibus*. England's vasselage with respect to the pope since 1173, when Henry II accepted his kingdom from the pope, with Jone Lackland receiving it again in 1213, as a fiefdom subject to tribute, was of a rather formal nature. Payments were stopped in 1322 and papal overlordship was repudiated in 1366 by the English Parliament. Neither France nor Spain ever acknowledged feudal vasselage with regard to the pope. The emperor was also unable to establish universal legal authority (*potestas directa*), in particular after the *interregnum* of the 13th century. He was *primus inter pares*, but not, outside the *districtus imperii*, *qua* emperor feudal lord over other rulers. The feudal lordship of Henry IV over Sicily, Cyprus, and Armenia was only temporary. England's vasselage since 1194 was terminated a century later by King Edward II. France recognized feudal ties with the emperor for the last time under Otto I (936–973); Spain never did.

While legists like Bartolus proclaimed the em-

peror as *de iure dominus totius orbis* and *rex universalis*, they had to concede that *de facto* a plurality of *principes superiores non recognoscentes* existed, whereby each one, according to Baldus, *in regno sui est Imperator regni sui*.

Acknowledgment of a universal secular authority of the pope came closest with regard to territorial acquisitions. A right to establish title to territory by conquest was not recognized within Christianity, since this conflicted with the required *iusta causa* of *bellum iustum*. Nevertheless, conquests often occurred after which papal recognition of such acquisitions was frequently sought, thus confirming the principle. William the Conqueror, for instance, while refusing to take an oath of homage to the pope, nevertheless asked for confirmation of the conquest of England, which the pope granted. When the pope claimed authority to adjudicate the status of the territories conquered from non-Christians by the crusaders, this was generally accepted by the Christian princes, including even Emperor Frederic II and the French king. In 1179, Alexander III adjudicated Alfonso of Portugal as the rightful possessor of all territories he might conquer from non-Christians. On the basis of this kind of title, Portugal and, later, Spain started their policies of colonial conquest.

The idea of papal universal authority was revived when the pope was approached to delimit the zones of discovery between Spain and Portugal, leading to the Treaty of Tordesillas in 1494. Such authority was not recognized later by France, England or, after their independence, by the Netherlands. Protection of the Church and support of *propaganda fidei* was considered a mandate of Christian rulers, in particular of the emperor since the time of Charlemagne. The pope, whose *curia* maintained a register of treaties, moreover, was considered a custodian over the sanctity of treaties, and *ex officio* provided for mediation and good services for the settlement of disputes (→ Peaceful Settlement of Disputes).

All these factors did not, however, blend into a notion or substantive qualification of pope, emperor, princes or communities as sovereign. The hierarchical order of the Church and of clergy and canonical law, besides criss-crossing secular liens of vasselage and allegiance, permeated each political Christian community, thereby excepting a substantial field from the scope of its jurisdiction. Nor was the combined Christian community considered unrestricted by law with regard to non-Christian powers. Official Church doctrine by patristic (Isidor of Sevilla, A.D. 560–636) and scholastic *doctores* (Thomas Aquinas) conceived of all humanity as a *communitas omnium gentium* based on natural law. Pope, emperor, princes and cities transacted relations with non-Christian powers, and did not consider them outside of the law as was proposed by some canonists in the late Middle Ages.

2. The term "sovereign" and similar terms were already used in ancient times by Aristotle to identify the supreme authority within a community, by Polybius (1st century A.D.) to describe a *liber populus externus qui nullius alterius populi potestati est subiectus*, and by medieval authors when qualifying political communities or rulers as *superiores non recognoscentes* (Quaritsch, p. 79 et seq.; van Kleffens, p. 14 et seq.). Since the late Middle Ages, the term became a political slogan used by territorial princes in their quest to emancipate themselves from or resist the claims to universal temporal jurisdiction (*potestas directa*) made by pope or emperor, to replace the medieval medley of overlapping personal jurisdictions with an exclusive territorial jurisdiction, to curb and eliminate rivalling powers of nobility and estates, and to establish a relationship of immediate obedience between ruler and individual subjects. The ever-increasing importance of this concept of sovereignty signified the decline of the *Sacrum Imperium Romanum* and Charlemagne's one-empire idea, that "greatest attempt of all times" at supranational organization in Europe (van Kleffens, p. 21), i.e. the idea of a Christian *universitas* and a legal *communitas communitatum*, although many links to this common heritage lasted on in Europe for centuries. How strong the idea of an *imperium* was may be revealed from the fact that even as late as 1519 three European kings, i.e. the Kings of France, England, and Spain, were still soliciting for the imperial crown.

In 1552, German territorial princes, taking the Protestant side in the ongoing religious conflict, rebelled against the Catholic emperor. In England the Tudor revolution (Act of Appeals, 1524) eventually led to the establishment of independ-

ence. From the 16th century on, in particular since the confessional division, sealed at Augsburg in 1555, and the religious wars, the idea of a Christian *universitas* was gradually replaced by the concept of a plurality of independent Christian States of equal status. After attempts in the 16th and 17th centuries to re-establish such a *universitas* under Spanish leadership were wrecked by French, Dutch, and English resistance, the political form of Europe was for the next centuries shaped along the lines of this basic political and juridical concept. Sovereignty became the catchword pitted against re-establishment of the papal and imperial order. Nevertheless, it took four centuries until sovereignty was established in the mid–19th century as a fundamental principle of universal international law.

3. The maritime discoveries made since the late 15th century and colonial conquests set free a thrust of power politics of global dimensions, discarding old restraints of the *universitas Christiana*. The new expansion no longer represented a common missionary enterprise of Christianity like the crusades, but rather jealous competition for expansion of individual power. With it the relative balance of power between European political communities became precarious (Grewe, p. 163 et seq.; van Kleffens, p. 40 et seq.)

Until the mid–17th century, France, the Netherlands, and England rebelled against the papal adjudication of the "new" territories and oceans exclusively in favour of Portugal and Spain under the edictum *Inter caetera* by Alexander VI in 1493, leading to the 1494 Treaty of Tordesillas. Liberty of action in regard to territorial acquisition and to trade (→ Territory, Acquisition), unrestrained by papal claims to universal overlordship and adjudication, was then claimed as a substantive attribute of sovereignty. While contemporaneous scholarly doctrine, taking up older concepts (Isidor of Sevilla, Thomas Aquinas), developed the concept of a universal *societas humana* with "nations" bound by natural law out of the moral necessity of coexistence under justice (Vitoria, De Indis, sec. III, paras. 1 and 13) and a universal community of juxtaposed, co-ordinated "States" subject to a *ius inter gentes* (Suarez, De legibus, Book II, Chap. XIX, sec. 5), the colonial policy of the European powers did not respect the rights of conquered territories or native populations in Africa or in the Americas (→ Indigenous Populations, Protection).

Grotius (De iure belli ac pacis, Prol., paras. XXIII and XLIV; Book I, chap. 1, para. XV) adopting the Spanish doctrine argued that Christianity formed a closer community within this universal *mutua gentium inter se societas*. Diplomatic practice, for example in the treaties of Tordesillas, of Cateau-Cambresis (1559), and, in particular, the Peace of → Westphalia (1648) identified the community of international law with Christianity. While manifold relations with non-Christian powers were transacted on the basis of equal status (e.g. the French-Ottoman capitulations treaty of 1535), alliances with non-Christian powers were still considered incompatible with the idea of a closer European community. Thus, when France, after defeat at Pavia against Spain, concluded an alliance with the Sublime Porte, this was considered all over Europe as a betrayal of Christianity. Liberty of action was still restricted by European international law.

When colonial conflicts began to threaten peace in Europe, the concept and practice of "lines of amity" was developed, starting with the Peace Treaty of Crépy-en-Laomois of 1544, demarcating the territorial scope of application of European international law as between European powers. There was no obligation to maintain peace "beyond the line". In ending this régime, the Peace of Westphalia supported, on the one hand, the idea of the territorial limitation of sovereignty as well as its limitations by European international law; on the other hand, it proclaimed unrestrained liberty of action beyond the line as an attribute of sovereignty. This latter idea was fortified when, in the course of colonial policies, discovery and effective occupation eventually replaced papal adjudication as the source of title to "new" territories.

The principle of the territorial limitation of sovereignty was finally established when, in the Peace of Westphalia, the Grotian doctrine of *mare liberum* was accepted, rejecting Spanish and English claims to sovereignty over oceans (*mare clausum*) (see e.g. the English Navigation Act, 1651).

In the 16th century the principle of *bellum iustum* suffered fundamental changes. With papal and imperial authority and arbitral settlement of

disputes in rapid decay, and in close connection with conflicts overseas, the question of *quis iudicabit* became precarious, if not unanswerable. As early as in this period Vitoria had conceived of a subjective *bellum iustum ex utraque parte*. The requirement of *iusta causa* receded to the background, whereas the formal and procedural requirements (i.e. *auctoritas summi principis*, prior declaration of war) were stressed (Gentili; Grotius). This demonstrated the increasing doctrinal importance of sovereignty as a status detached from theological and moral directives which were relegated to the realm of subjective predilections of princes and banned from positive international law. State practice, in spite of numerous armed conflicts, as well as European public opinion for a long time appear not to have been so unequivocal, at least with regard to clearly aggressive wars of conquest within Europe. When, in the 18th century, Frederic II of Prussia conquered Silesia, this was condemned throughout Europe as a breach of international law no less than were the Napoleonic wars of aggression.

Before 1648, non-intervention, a central element of modern sovereignty, had not yet been recognized as a principle of international law. Interventions, such as those by England and France in Scotland over two centuries, were not considered ultimately unlawful; interventions for the protection of religious brethren were considered justified (e.g. by Vitoria, Gentili, Grotius). Not until the Peace of Westphalia, which provided for a limited protection of Christian confessional → minorities, was the admissibility of religious intervention terminated.

While slowly progressing internally towards a modern form, States were not yet as such qualified as sovereign or as subjects of international law. Nor were princes considered to be the exclusive subjects of international law. All estates of the *Sacrum Imperium*, for example, while not sovereign, were considered subjects of international law, notwithstanding their constitutional obligations towards the emperor. The same was true for cities: They transacted diplomatic relations, concluded treaties on their own behalf and participated as such in treaties with princes (e.g. the League of Cambrai, 1508; peace treaties of Münster and Osnabrück).

The necessity, however, to avoid having treaty relations discontinued upon the decease of rulers, met for a long time by the practice of having prior treaties "confirmed" by succeeding princes, became more and more imperative. Thus the State increasingly tended to be qualified as a continuing juridical entity ensuring non-interruption of international rights and obligations. The first attempts to distinguish a moral personality of the State were made by Grotius (De iure belli ac pacis, Book I, chap. 1, para. XIV, and chap. 3, para. VII) and further developed by Vattel (Droit des gens, Prel., secs. 1, 2; Book I, ch. 1). While still concluded, as a rule, by princes in their own names, treaties were, in addition, more and more regarded as binding on the State involved. This interpretation foreshadowed the replacement of princely sovereignty by State sovereignty which was merely to be exercised by the prince, a change which was not realized in constitutional law until the late 18th century. Considerable elements of this development on the international level were influenced by internal events and political developments which cannot be pursued here.

4. Jean Bodin (1530–1596), a French Huguenot deeply engaged in French politics, was the first author to provide a comprehensive concept of sovereignty pregnant with this future development. Under the label of a general theory of *res publica*, Bodin postulated a programme to halt the internal decay of the French monarchy, which was torn apart by serious confessional and social conflicts, and to reject claims of superiority by pope and emperor. Bodin's ideas were strongly influenced by Catholic and Protestant authors of the 15th and 16th centuries (like the monarchomachists, see Dennert, p. 22 et seq.) and, possibly, by Vitoria. For Bodin, *res publica* and sovereignty were complementary inseparable notions: "République est un droit gouvernement . . . avec puissance souveraine"; it is a form of exercising public power. Sovereignty "est la puissance absolue et perpétuelle d'une République . . . " (Six livres, p. 122) and sovereign power is the principal goal of a political community.

The term "absolute", as used by Bodin, in the general understanding of medieval times, and for a long time thereafter, did not mean that a sovereign ruler was not bound by law (i.e. *ius*). Its meaning, rather, was twofold: First, in order to be qualified as sovereign, a ruler had to hold the totality of the

legislative power in the sense of *potestas leges condendi*. Holding such power the ruler was not bound by his own or his predecessor's laws (*leges*) because he could amend or abrogate them. Second, "absolute" sovereignty, moreover, meant that the ruler was not responsible, as of law, for his exercise of public power to a higher secular authority to whom his acts might be appealed. For example, not until the most important of the German territorial princes had been granted *privilegia de non appellando et de non evocando* by the emperor-king, barring at large recourse by their subjects to the imperial courts, were they considered sovereign. Hence, Bodin was quite consistent in maintaining that all princely powers were "subiects aux loix de Dieu, et de nature, et à plusieurs loix humaines communes à tous peuples" (pp. 131, 133, 150); that the prince was bound "aux iustes conuientions et promesses qu'il faictes" (p. 133); that the prince could not abrogate the *leges fundamentales*, such as the *lex Salica* (p. 137), abolish the estates, levy taxes without their advice and consent, except in urgent cases (p. 140), or take the property of his subjects, except where "iuste et raisonnable" for the preservation of the State (p. 156 et seq.).

Bodin's concept of sovereignty did not deny the possibility of the State to be bound by international law or treaties. While he did not develop a theory of sovereignty in international law, this is explicable, in particular, from his reference to natural law as binding upon the prince. The medieval idea that government had to be just still pervaded Bodin's concept of sovereignty. Its principal novelty, however, which distinguished it from medieval formulations of *superiores non recognoscentes*, was the pretended complete detachment of his *res publica* from any Christian or other *universitas* and *societas*, as well as from any religion or ideology, except peace, unity, welfare, and survival of the respective *res publica*, i.e. the basic ideology of the modern State.

The radical break with medieval thought came with Hobbes (1588–1679), who emigrated to and lived from 1640–1651 in France, where he wrote De Cive (1642) and the Leviathan (1651). Starting from a nominalistic theory of recognition (*veritas enim in dicto, non in re consistit*; De corpore, p. 31) and applying the analytical method of mathematics and physics of the time (Gassend, Galilei) to human societies, he concluded that survival, peace and safety of a "multitude" of men could only be established and preserved and the *bellum omnium contra omnes* in the "state of nature" could only be overcome and prevented if, by a covenant of every man with every other man of the particular multitude, all their powers and strength were conferred upon one man or one assembly of men, thereby reducing all their wills into one will. The body politic is thereby established, generating the "great Leviathan", the "Mortall God", which is called sovereign, and every one besides is his subject (Leviathan, p. 89 et seq.).

Having been conferred with all the "rights of governing", whatever the Leviathan does "can be not injury to any of his subjects" (ibid., p. 92); he holds the total power of prescribing good and evil, lawful and unlawful, and all rules for the actions of his subjects (ibid., p. 93). What is just or unjust is no longer determined by metaphysical ideas of justice but by the positive prescriptions of the Leviathan who is not bound by the idea of justice.

The "law of nature", a term used quite inconsistently by Hobbes, ultimately meant only a rule of reason (ibid., p. 66), no longer a binding metaphysical idea. Writing at a time when Europe was shaken by fundamental religious conflicts, Hobbes saw only this kind of Leviathan as being capable of guaranteeing external survival, internal unity, peace and safety. As States have no Leviathan above them, but are in a "state of nature" warring against each other, no superior law or legal order would appear to be binding upon them. Sovereignty does not define or delimit mutual spheres of freedom of action of States, or of unlawful intervention as between States, because law does not govern their relations. With Hobbes the theoretical difficulties in finding a rational basis for the binding force and validity of international law began. According to Hobbes, only a man or an assembly of men could be sovereign, because he saw sovereignty primarily as a status with respect to power, a factual (psychic) relationship between will (command) and obedience, a relationship which only exists between men. With Hobbes, sovereignty became "absolute" in a radical sense, whereby external sovereignty was a factual *potestas iure gentium soluta*. The same holds true for Spinoza (1632–1677) who viewed States in rela-

tion to each other as living in the "state of nature" where no international law exists limiting normatively their factual power. Hobbes and Spinoza are the true fathers of the theory of absolute sovereignty.

Religious divisions and wars, the Renaissance and the Enlightenment brought about a plurality of value systems and social changes which threatened the capability of political communities to maintain internal and external peace and survival, as shown, for example, in the devastating Thirty Years War (1618–1648) which decimated large parts of the population and almost completely destroyed the economic basis of life for the surviving part. Sovereignty along the lines of Bodin's concept was felt all over Europe to guarantee a minimum order of still common values, required to restore and maintain internal peace and external survival, and to accomplish the necessary changes in society. Medieval procedures of decision-making, based on the principle of consensus, had proved inadequate.

5. The Peace of Westphalia (1648) sealed the decay of a diarchal temporal authority of pope and emperor over the *universitas Christiana*, which, as it had developed, was far removed from political reality. Since then it was slowly replaced by a plurality of relatively independent States. These States considered themselves as a society of sovereign Christian European States living under a common European international public law, i.e. the "droit public de l'Europe". Diplomatic practice frequently referred to the *bonum commune* of Christianity (e.g. Treaties of Utrecht, 1713; Paris, 1763; Vienna, 1815). The external sovereignty of these States was considered to be not absolute in the Hobbesian sense but bound by that international law. From the Peace of Westphalia until the settlement of Vienna (→ Vienna Congress (1815)) this law substantially permeated also activities, such as succession to thrones, which from the mid–19th century onwards would qualify as domestic affairs.

After hegemonic ambitions by France under Louis XIV had been defeated, the idea of a European → balance of power, going back to the settlement of the Peace of Westphalia and its deep-seated concern to preserve religious identities, became established as a fundamental principle of the "droit public de l'Europe" (Grewe, p. 327 et seq.). The *iustum potentiae aequilibrum* was expressly referred to in the peace treaties of Utrecht (1713), Rastatt und Baden (1714) which distributed the Spanish inheritance and provided that Spain and France should never be united. With constantly changing power constellations, including, for example, the loss of France's North American colonies to Great Britain and Russia's entry under Peter the Great into the European scene, its rationale was to outlaw attempts to establish a hegemonic position by one power over Europe.

While non-intervention now became acknowledged as a legal principle pertaining to sovereignty, it was subject to considerable exceptions. Aside from rights to intervene arising under treaties, such as Art. XVII of the Treaty of Osnabrück (1648), the most important such exception was the right to intervene in order to maintain the European balance of power. This exception was relied upon, for example, in the frequent "wars of succession" and by the "European coalition" against revolutionary France. Religious intervention, on the other hand, was no longer considered justified, and was replaced by provisions which allowed for the protection of Christian confessional minorities (Peace of Westphalia; treaties of Nymwegen, 1678; Rykswijk, 1679; Utrecht, 1713; Paris, 1763; Hubertusburg, 1763; Warsaw, 1773; the Vienna Protocol of June 24, 1814, extending the latter protection to non-Christians as the United States-Prussian Treaty on Friendship and Commerce of 1785 had already done). Recognition of a political entity as a State, or of governments, became more and more detached from criteria of legality or monarchical legitimacy, such as papal or imperial approbation. When the Stuarts were dislodged from the throne in 1649, monarchical Spain and France were the first to recognize the republican form of English government. The United States was recognized in 1778, over British protest, by monarchical France, the first European power to do so. Vattel derived the principle of → effectiveness from "true sovereignty" (Droit des gens, Book I, chap. 1, para. 4).

During the 17th and 18th centuries the principle of exclusive territorial jurisdiction was developed, eliminating the medieval medley of overlapping layers of jurisdiction in favour of territorial

delimitations, for example with regard to territorial waters, for which a three-mile zone was seen as a minimum standard.

The internal sovereignty of States in Europe started developing along the lines of Bodin's concept during this period, although at varying rates. With the exceptions of England, France, Spain, Austria and Prussia, this development, in general, was not completed until the mid-19th century. Even in France it was not until Richelieu that the "puissance souveraine" was successfully asserted against the Fronde, which had its source in the nobility and Calvinist separatism (Quaritsch, p. 396 et seq.). State sovereignty now meant a State's general independence from and legal impermeability in relation to foreign powers, and the State's exclusive jurisdiction and supremacy of governmental powers over the State's territory and inhabitants. Such supremacy was seen as entailing a monopoly over fundamental political decisions, as well as over legislative, executive, and judicial powers, based on consolidated, durable institutional, organizational, economic and financial means and structures capable, as a rule, of maintaining law and order and providing the ways and means for the external assertion of liberty of action indispensable for acceptance as a structurally reliable entity of an international legal order.

The sovereign State became the normal subject of international law. The legitimacy of this State was considered to be no longer religious but secular, its *ratio essendi* being self-assertion and survival. In Europe, this development was conditioned by a multitude of factors, in particular, by the curbing of the privileges of the nobility and traditional estates, by capitalist forms of economy, new monetary systems, industrialization, the elimination of intermediate levels of obedience between State and subjects, and an increasing trend towards egalitarian political and economic status through which "subjects" were turned into "citizens" (e.g. the American and French Revolutions). Founded on the contention of independence and equality as of law, the existence of a plurality of sovereign States interrelated as they indeed are, provided the political basis for the concept of universal international law in the 19th century.

6. The Vienna Declaration against slave trade (1814) for the first time spoke of "civilized nations" announcing the extension of international law to universal scope, which took place during the 19th century. With international political and economic relations and means of communications intensifying rapidly, as the greater part of the Americas became independent, as Britain consolidated its rule over seven oceans and one quarter of the globe's territory, as Turkey entered the "domaine commun de l'Europe" in 1856, as Japan ended its isolation under the Meiji and as the United States reached out to the Pacific, as the "open door" régimes were established (Congo Act of Berlin, 1885; the treaty with China, 1900; Final Act of Algeciras, 1906), international law became a universal order (Grewe, Part 4).

European international law during the 19th century still preserved some particular and regional features affecting the sovereignty of European States. Its most important feature, after the short-lived → Holy Alliance of 1815 between Russia, Austria and Prussia, to which France acceded later, was the establishment of the Concert of Europe, a collective diplomatic effort by Great Britain, Russia, France, Austria and Prussia to maintain the political idea and legal principle of a European balance of power. The Concert of Europe claimed authority to collectively adjudicate over affairs and territories within the "domaine commun de l'Europe". Such authority was practiced, for example, with respect to the → Paris Peace Treaty of 1856 which neutralized the → Black Sea and the → Aaland Islands (→ Neutralization), barred the → Dardanelles to war-ships and established the principality of Rumania; at the → Berlin Congress of 1878 which, likewise, adjudicated territories and borders and also established constitutional guarantees in the Balkans; and with respect to the independence of Belgium (1831) and Luxembourg (1867) and the settlement of the Danish question (1852). Even if not partners to the Concert of Europe, States concerned and third States, as a rule, recognized or tacitly accepted these regulations of status. The Concert of Europe documented that in an age that has been called the age of classical, supposedly "absolute" sovereignty, such sovereignty, nevertheless, in State practice was considered limited by international law (backed by corresponding power).

Beyond this particular development in respect of the Concert of Europe, the principle of the sovereign equality of States gained universal recognition (see *Le Louis* Case and *The Antilope* Case) and ceased to be restricted to Christian political communities. The same became true with regard to the principle of non-intervention, in particular with respect to constitutional or governmental changes, whether or not revolutionary, as practiced, for example, with the recognition of Latin American States by European powers and the United States. The attempt by the Holy Alliance to claim a collective right of intervention in order to restore or maintain monarchical legitimacy as a constitutional form, to which the United States responded with the → Monroe Doctrine, eventually proved abortive. The principle of non-intervention expressed the notion that self-determination by the State concerning its political identity, constitutional form, and domestic affairs was a principal attribute of sovereignty protected by international law. Aside from treaty rights to intervene (e.g., under the German Confederation Act of 1815, as put into practice in Kur-Hesse in 1850) the most important, though controversial, exception to the non-intervention principle was → humanitarian intervention. Humanitarian intervention was frequently practiced, in some cases with armed force, for example by France and Great Britain in Sicily, 1856; in Syria, 1860; Creta, 1866; Bosnia 1875; Bulgaria, 1877; Macedonia, 1887; with regard to Russia by several European States during the Polish uprisings; in Romania, 1867 to 1872, concerning the treatment of Jews; Morocco, 1909; with respect to Belgium concerning the Congo State, 1906 to 1909; and Peru, 1912 to 1913 (Grewe, p. 575 et seq.). While the doctrine lent itself to abuse, it kept alive, amidst 19th century philosophical relativism and theoretical positivism, the susceptibility of international law and society for prepositive values of law above sovereignty. Such values are referred to in the Preamble of the Hague Convention on Land Warfare, 1899, as principles of law resulting "des usages établis entre nations civilisées, des lois de l'humanité, et des exigences de la conscience publique" ("from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience", J.B. Scott, ed., The Hague Conventions and Declarations of 1899 and 1907 (1915), pp. 101–102; see → Martens' Clause).

Beginning in the 18th century, diplomatic practice and legal doctrine referred to "half-sovereign" States which were considered not sovereign but limited subjects of international law (see J.J. Moser, Versuch des neuesten Europäischen Völker-Rechts, Vol. 1 (1777) Ch. 1, sec. 4). The limitation depended on the particular extent of their dependence on the legal authority of a sovereign State or its instrumentalities such as colonial companies, which, at times, were also considered subjects of international law, or on international régimes to which they had not, or not voluntarily, consented, such as the "open door" régime. With the application of these criteria having been not very consistent in State practice, the designation faded away at least with respect to European States since the Vienna Congress. Outside Europe it was applied mainly to principalities in India and colonial protected States. Colonial territories were not considered as sovereign States even where they had been accorded a special territorial status, such as that of a → protectorate or protected State. This meant that the colonial power did not consider such territory as its own but rather reserved the right to exclude any other State from activities within it (→ Colonies and Colonial Régime). J.S. Mill's dictum that "barbarians have no rights as a nation" stated the practice of colonial powers. Territory of the former was considered *res nullius*; its → conquest was not a violation of international law.

The member States of → confederations, such as the German Confederation of 1815, which allowed substantial rights of intervention into the constitutional affairs of individual members and excluded a right of → secession, were considered sovereign (e.g. the cantons of the Swiss Confederation called themselves "sovereign"). The creation of → federal States (United States, 1787; Switzerland, 1848; see also the abortive German constitution of 1848/1849, as well as German constitutions of 1867 and 1871, with regard to the North German Confederation and the German Reich, respectively), however, raised the question of the sovereignty, under international law, of the members constitutionally designated as "states". Notwithstanding differing internal terminology,

such as "dual" sovereignty under the United States Constitution and a covenant of "sovereign princes and free cities" under the German Constitution of 1871, the member states of federal States were not considered sovereign under international law, regardless of whether or not they were authorized to conduct limited international relations under their particular constitutive instruments (→ Federalism in the International Community).

While the educated strata of European society for centuries had thought of themselves as cosmopolitan and considered themselves to be part of a spiritual "république de lettres", the French Revolution gave birth to the ideas of the nation-State and of national self-determination. These ideas were to determine the political form of Europe and elsewhere for the next two centuries. In the course of time these notions rejected the change of territorial sovereignty by mere dynastic inheritance, and the treatment of territory as *dominium* of the prince, although cession, exchange or sale of territory (e.g. Alaska, 1867) were still accomplished, with very few exceptions, without consultation of the people concerned, and the acquisition of colonial territories required merely effective occupation and public notification (Art. 34, Congo Act, 1885).

The relationship between the idea of national self-determination, constantly becoming stronger, and the concept of sovereignty was twofold. On the one hand, national self-determination contained the idea that self-determination by the State in respect of its political form was a principal attribute of sovereignty; and on the other hand, self-determination was bound to seriously threaten existing sovereign States where an identity of State and nation had not been realized, as in considerable parts of Europe, in particular in Italy, Germany, and in the Habsburg, Tsarist, and Ottoman Empires. While the notion was to substantially shape the political map of Europe in the 20th century, it was strongly asserted already in the 19th century, for instance during the unification of Italy, the political movement for national unification in Germany (1848–1849), as well as the centrifugal movements within the Habsburg monarchy.

In spite of specific conduct to the contrary, no less frequent than at present, States and their rulers, in general, did not publicly claim that they were principally not bound by international law, or might break treaties because of their sovereignty. Exceptions to this were rare. One such exception was voiced by Frederic II of Prussia who announced that if mandated by the imperative weal of the State a ruler might break treaties or wage wars of conquest; he considered international law a mere "phantom" (see Antimachiavell, 1739; Geschichte meiner Zeit, 1756; and his instructions to law professors of 1765). Others may have been less outspoken, but thought similarly.

The revival of international → arbitration since the → Jay Treaty (1794) led to hundreds of arbitral decisions up until 1914 on questions concerning, for example, State borders, violations of neutrality (→ *Alabama* arbitration, 1872) or the life, liberty or property of foreigners. Limited though it was, it documented the principal commitment of States concerned to the binding force of international law, notwithstanding the reservations of "vital interests and honour" in arbitral instruments.

The 19th century has been rightly called an age of the sanctity of treaties. If it is, nevertheless, justified to call the period from the mid–18th century up to World War I an age of "absolute" concepts of sovereignty, it is for two main reasons.

(a) The closest approach in State practice to a concept of absolute sovereignty in the sense of State power ultimately unrestrained by international law was with regard to an almost unlimited *ius ad bellum*, "la liberté de guerre". With Vattel, Bynkershoek and others having eliminated the requirement of *iusta causa*, prevailing doctrine in continental Europe alleged such a "right" to war (see Wheaton, Eléments du droit international, p. 274; Politis, Les nouvelles tendances du droit international, p. 101). Anglo-Saxon doctrine, however, still tended to require at least an injury suffered or a right to be asserted or vindicated (see, e.g., Phillimore, Commentaries, III, para. 49); in practice, States were hardly ever at a loss to claim such an injury.

"Liberté de guerre" as an alleged attribute of sovereignty is a fundamental contradiction to the very idea of a society of States sharing → sovereign equality under an order of international law because it constantly threatens to abolish this society. Contemporaneous doctrine, nevertheless, considered such "liberté" as forming

part of positive international law, and not as producing a Hobbesian "state of nature", culminating in theorems such as victory proving rightfulness (E. Kaufmann). But the life of international law, too, has not been logic. The principle of a balance of power in Europe meant only a partial limitation of "liberté de guerre". Efforts to limit *ius ad bellum* at the Hague Peace Conferences (1899, 1907) were abortive when, owing to the outbreak of World War I, a planned third conference did not convene. The passionate discussion in the aftermath of World War I concerning the question of "war guilt", nevertheless, showed how precarious the concept of an unlimited *ius ad bellum* of necessity must be in regard to the idea of international law. This doctrine had practical importance with regard to colonial conquests: The secularized State of the 19th century could no longer attempt to show religious reasons (i.e. protection of *propaganda fidei*) as *iusta causa*. Nor did the new concept of "civilized nations" provide such a justification. The latter concept required, in practice, primarily sufficient guarantees for the security of life, liberty and property of foreigners; it served mainly the interests of foreign investors and hardly operated as a barrier to colonial acquisitions.

(b) Under the Spanish school, international law had been part of natural law resulting ontologically from the objective order of things (Vitoria, De Indis, sec. III, paras. 1 and 13; Arriaga: *etsi non daretur deus*), or deriving its basic validity from natural law while its positive contents were determined not by way of conclusion but by way of determination through treaties or custom if congruent with justice (Suarez, De legibus, Book II, chap. XIX, sec. 5); international law, however, did not exclusively derive from the arbitrary free will of States. Under the influence of Hobbesian nominalism, with roots in medieval nominalism (Duns Scotus; William of Occam), and as a result of the empiristic theory of recognition (Berkeley, David Hume), denying any possibility of recognition of non-empiric, *a priori* metaphysical ideas, such as the ideas of moral good or of justice, European philosophy had arrived at a crossroad. Philosophical relativism and the theory of positivism gained vast ground in international law doctrine too. While Grotius remained within the tradition of the Spanish school, C. Wolff within the Grotian tradition, and Leibniz within the Platonic tradition of "innate ideas", Spinoza, Pufendorf, Richard Zouch, Vattel, Samuel Rachel, Thomasius, Samuel von Cocceji, Heineccius, J.H. Boehmer, Cumberland, Bynkershoek, J.J. Moser, with individual variations, eventually arrived at a positivist theory of the validity of international law. According to this theory the sole source of the validity of international law is secular factual power, i.e. the power of States, resting upon their free will.

Philosophical and theoretical controversy reached its zenith in the 19th century. According to positivist doctrine, due to the co-existence of a plurality of States international law could only be generated by a consensus of States as expressed in treaties or custom accompanied by the necessary *opinio iuris*. Since international law lacked a centralized machinery for enforcement, John Austin denied even its normative quality and relegated it to the sphere of subjective morality. The inescapable question was whether such consensus was voluntarily revocable, which cannot be denied unless reference is made to a pre-positive rule such as *pacta sunt servanda*. Ingenious constructions were developed to avoid this consequence, such as Jellinek's theory of concordant auto-limitation, or Triepel's theory of a binding "common will", its binding force still remaining inexplicable. The positivist doctrine, in essence, led to a denial of the obligatory quality of international law; sovereignty ultimately was unrestricted by international law and was in the last analysis "absolute". The problem was only evaded by Kelsen's theory, which declared international law, and not States, which he perceived as mere personifications of constitutional legal orders, to be "sovereign", as Krabbe had done before. In supposedly banning all substantive content of law from his "scientific" method (although in fact it constantly re-entered his theory through the backdoor under the label of legal "order", a concept representing a very substantive ideology of "peace"), Kelsen had to postulate the validity of international law by way of a mere hypothesis: the basic norm. This hypothesis, however, may or may not, or may no longer, be accepted at will again.

7. The pre-World-War-I society of States and its concept of sovereignty ultimately did not meet the basic test of the fundamental ideas of a universal international legal order, that is, to maintain international peace under justice. World War I,

the result of imperialist ambitions on various sides, made this apparent. By including the "liberté de guerre", its concept of sovereignty proved to be antagonistic.

Establishment of the → League of Nations in 1919 was intended as the first global undertaking to secure international peace and security by a collective effort in the form of a permanent universal international organization. If implemented *bona fide*, the solely procedural rather than substantive restrictions of the Covenant on the "liberté de guerre" would have meant substantial progress towards this goal. While the attempt by the → Geneva Protocol for the Pacific Settlement of International Disputes of 1924 to bring about a substantive prohibition of wars of aggression combined with obligations to settle disputes by peaceful means could not overcome the resistance of Great Britain and its Dominions, the → Kellogg-Briand Pact of 1928, ratified by the very great majority of the then existing States, although not without some sweeping reservations by Great Britain, brought about the first multilateral substantive prohibitions of aggressive war as a means of foreign policy. Efforts within the League to define → aggression and to promote disarmament, however, were not successful. With war of aggression outlawed, the idea of the lawfulness of collective sanctions against an aggressor, that is a concept of *bellum legale*, including individual or collective → self-defence, gained ground. Within the numerous bilateral and regional instruments between World Wars I and II preceding and culminating in Art. 2(4) and Chaps. VII and VIII of the → United Nations Charter of 1945, the prohibition of the use or threat of force is the most conspicuous difference to pre-World-War-I international law, eliminating the "liberté de guerre" that had previously been considered a primary attribute of sovereignty (→ Use of Force).

C. The Principle of Sovereignty in Contemporary Public International Law

1. The Contemporary Principle

Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law. Sovereignty implies the immediateness of a State's relationship to public international law, i.e. its status as a "direct subject" of general international law (as to this terminology see → Reparation for Injuries Suffered in Service of UN (Advisory Opinion)).

(a) Sovereignty is a legal status within but not above public international law. To rely on sovereignty does not exempt from international law either in the form of general international law or in the form of treaty obligations. Such obligations may, and frequently do, restrict a State's freedom of action and thereby the exercise of its sovereignty, but they do not diminish or deprive it of its sovereignty as a legal status (see → Wimbledon, The).

(b) With the historical exception of the → Holy See, which maintains diplomatic relations with more than 100 States, in contemporary international law only States as distinguished from international organizations or other subjects of international law are accorded sovereignty. Constitutive units of federal States are not sovereign notwithstanding the fact that they may be qualified under a particular constitutional law as States or may engage in limited international relations, such as is the case with respect to the member states of the United States of America or the Federal Republic of Germany.

(c) A State's sovereignty is absorbed by the sovereignty of a new or existing sovereign State when, for example in performance of a treaty, a transfer of the essence of its State functions to the new or other State has been effected. There are no clear-cut, generally recognized criteria for determining which attributes constitute the essence of State functions in this context. Not unlike the scope of "domestic affairs", these criteria may vary, and have varied, in the course of time, depending on what the contemporaneous international society of States has generally considered to be indispensable as a State function. Compared to former centuries, the 20th century has witnessed a tremendous intensification of international relations and is experiencing a constant increase in international cooperation and interdependence of States.

Matters which had formerly been considered

indispensable exclusive State functions are presently accomplished by virtue of international cooperation in its various instrumental modes and forms (international organizations; multilateral instruments; integrated communities) without this being considered as eliminating a State's sovereignty as a legal status. Currently it would appear that a political entity lacks the essence of State functions when it has actually lost, irrevocably as of law, in favour of a new entity or another existing sovereign State, the legal powers to make fundamental political decisions on its own behalf. At issue here are foreign policy and treaty-making powers in regard to decisions over war and peace, recognition of foreign States and governments, diplomatic relations, military alliances, membership in international political organizations, and fundamental economic, fiscal and budgetary policies (for a controversial case see → Customs Régime between Germany and Austria (Advisory Opinion), PCIJ, Series A/B, No. 41, p. 45, at p. 77). Placing armed forces within a military alliance under a joint supreme command, whether in peacetime or during armed conflict, or conferring central banking functions upon one member's central bank within a common currency arrangement have not been considered as depriving member States of their sovereignty.

(d) The → European Communities do not at present qualify as a State. While the treaties establishing the Communities and their implementation have brought about considerable restrictions in the exercise of the member States' individual sovereignties, these States were not thereby deprived of their sovereign status under international law.

The Communities are provided with institutions legally distinct from the member States and exercise limited legislative, executive and judicial functions with direct legal effects upon private individuals within their territorial scope. However, the powers transferred to the Communities, although unprecedented in scope and intensity, are still restricted to the economic sphere. The Communities do not have territorial sovereignty over the member States or general personal jurisdiction over the citizens of these States. They possess neither executive forces (police, military), nor a unified currency and monetary system with central banking functions (currency arrangements presently are not based upon community law but on resolutions by the European Council), nor financial resources independent of the member States. They have not been accorded a general competence in the sense of competence to enlarge their scope of jurisdiction (cf. Art. 235, → European Economic Community Treaty; in spite of this article's broad use the integration of currency policies, for example, was not considered to be covered by it; see the Single European Act). Implied powers of the Communities are restricted by implied limitations as well. The Community has neither a mandate nor the authority to alter the particular political, economic or monetary systems of the member States (e.g. their systems of private, State, or mixed economy or of property ownership) but is bound to act within a system based principally on free market economy as established by the treaties between the member States.

The powers conferred upon the Communities, for example over foreign trade (Arts. 113, 114, EEC Treaty) or treaties of association (Art. 238, EEC Treaty), undoubtedly have political implications, as demonstrated, for example, by the economic sanctions versus Iran during the Iran → hostages crisis and versus Argentina during the → Falkland conflict. The fact that membership in the Communities, with the exception of Ireland, has been restricted to European members of the → North Atlantic Treaty Organization (NATO) reveals their political dimension. Member States, nevertheless, continue to possess legal powers in respect of fundamental decisions over foreign policy, military alliances and defence as well as central monetary, fiscal, and budgetary policies, interdependent as these have increasingly become with the subject-matters under the jurisdiction of the Communities. Cooperation by the member States in the sphere of general foreign policy is to take place within the framework of Title III of the Single European Act which does not impede closer cooperation within the framework of NATO or the → Western European Union. The basic goal of the European Communities is not to replace member States or to deprive them of their individual statehood or sovereignty. The member States, and not the Communities, are still the masters of the treaties establishing the Communities. While the Communities certainly pos-

sess some features of federal and confederate structures, their final political form at present is still open and undetermined. This form will hardly be comparable to that of States or associations of States known from history.

(e) The exercise of sovereignty by a State is suspended when, in the course of an *occupatio bellica* by enemy forces (→ Occupation, Belligerent), its governmental institutions no longer operate or are subject to the orders of the occupying power. Exile governments may be capable of a continued exercise of their State's sovereignty depending on the effectiveness of such exercise in the specific circumstances (→ Government-in-Exile).

(f) Whether the status of sovereignty is acquired by a political entity as soon as it qualifies as a State in the sense of international law, or whether such status depends in addition, in relation to other States, on its → recognition as a State, is still controversial. The sovereignty of a State ends when its quality as a State in the sense of international law has actually ceased. If a State has factually become subjected to another State to the extent that its essential State functions no longer can be considered to be exercised autochtonously and its governmental system qualifies as a puppet régime (see the case of Manchuko), it must be deemed, at least temporarily, that its sovereignty has been lost or suspended.

(g) The principle of sovereignty forms part of the fundamental principles of general international law. It protects the existence and the freedom of action of States, as limited by international law, in their international relations as well as with respect to their internal affairs. In particular, it protects their freedom of self-determination over their political, constitutional, and socio-economic systems and cultural identity, their territorial integrity and exclusive jurisdiction over their territory (land, maritime and air space), their personal jurisdiction over their citizens and juridical (legal) persons established under their jurisdiction as well as over matters with transfrontier connections which have reasonably close links with or effects upon the State's territory. The principle of sovereignty is thus supported by a whole range of corollary principles and rules of public international law which can be dealt with here only selectively in brief outline.

2. Sovereignty and the Prohibition of Armed Force

(a) The threat or use of force against the territorial integrity or political independence of a State is prohibited by Art. 2(4) of the UN Charter as well as by a corresponding general rule of universal customary international law. Use of armed force is justified in the exercise of the inherent right of individual or → collective self-defence under Art. 51 of the UN Charter, or under the authority of the competent organs of the → United Nations acting on the basis of Chap. VII or VIII of the UN Charter. Indirect forms of aggression, such as the sending of "volunteer" armed forces into foreign territory, are covered by this prohibition, while armed intervention for humanitarian reasons, such as Israel's intervention at Entebbe, are still controversial. Preventive forceful measures in the absence of an imminent armed attack in order to maintain a balance of power or spheres of influence, such as the "quarantine" around Cuba by the United States in 1962 (→ Cuban Quarantine), do not constitute a justified deviation from the prohibition. Coercive interference by measures short of armed force, while it may violate the principle of non-intervention, does not fall under the scope of the prohibition of the threat or use of force (→ Economic Coercion).

The → Stimson Doctrine, which precluded the recognition of *faits accomplis* brought about by unlawful force, controversial for some time, after World War II eventually became universally acknowledged (see UN GA Res. 2625(XXV) of October 24, 1970; 3314(XXIX) of December 14, 1974) though not always respected in actual State practice. A serious open question, moreover, exists with regard to the still not outlawed "invited interventions" into foreign civil wars, which entail an inherent risk of expanding such conflicts into international conflicts.

The most serious threat to the concept of sovereignty in contemporary international law and State practice consists of the Soviet Union's claim, relied upon in the armed interventions in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1980), that interventions into the internal affairs of a State belonging to the "Socialist Commonwealth" by other members of this com-

monwealth in order to defend against "counter-revolutions" is justified (the so-called Breshnev Doctrine). Contemporary international law does not recognize as justified such intervention into the right and freedom of any State to determine by its own decision its political form and constitutional system as protected by the principle of sovereignty. Soviet intervention in Afghanistan was condemned in the → United Nations General Assembly as a violation of international law by close to two-thirds of the member States; the interventions in Hungary and Czechoslovakia were condemned by a considerable number of States.

(b) Corresponding to the "liberté de guerre" before World War I, a general obligation of States to seek peaceful settlement of disputes that might endanger international peace and security was not previously recognized, aside from specific treaty obligations. Such a substantive obligation has been established after 1945 as a functional corollary to the prohibition of the threat or use of force (Art. 2(3), UN Charter; UN GA Res. 2625(XXV)). The UN system, nevertheless, still lacks compulsory means for such settlement, thereby rendering the present system of collective security almost *lex imperfecta*. Serious conflicts entailing the inherent danger of a direct military confrontation between the superpowers, as in the cases of the Berlin blockade of 1948 or the → Vietnam conflict, have been handled mainly outside the UN system, thus demonstrating its shortcomings.

3. *Sovereignty and the Principle of Non-Intervention*

The prohibition of intervention into the exclusively internal affairs of a State has been firmly established as a principle of general international law as well as of UN law (see UN GA Res. 2625(XXV)), although some aspects of its scope are still controversial. Thus, encouraging revolutions or corrupting members of the parliament or government of another State are violations of the principle of non-intervention. The exercise of economic or political pressure, unless covered by legitimate aims of the foreign State to assert or defend its rights or interests (e.g. by requiring a reduction of inflation as a prerequisite to financial aid), may transgress the limits of → non-intervention, depending on the adequacy of the goals and means concerned. Borderlines between admissible economic penetration and unlawful coercive interference are still unsettled.

Aside from special reservations in instruments of submission to the jurisdiction of international courts, the scope of "domestic affairs", in general, is determined by international law. Most important in this context has been the expansion of the scope of international law to the field of fundamental → human rights, not only of aliens but also of its citizens within the jurisdiction of a State. Human rights are no longer considered an exclusively domestic affair, as before World War I, and have led to frequent diplomatic interventions by States or → protests by international organizations which no longer can be blocked by the State concerned with the shield of domestic affairs. A comparable trend is emerging with regard to uses of the environment (i.e. hydrological systems, coastal waters, oceans, air, space) which involve adverse transfrontier effects or adverse effects on "common provinces of mankind".

4. *Sovereignty and Equality of States*

Firmly established, too, is the principle of sovereign equality of States (→ States, Sovereign Equality). The 19th century distinctions between non-civilized, semi-civilized, and fully civilized States have been eliminated or have faded away as has the category of "half-sovereign" States. Sovereign equality means that States enjoy an equal juridical status under general international law. It designates the juridical capability to hold principally all rights and obligations possible under general international law, notwithstanding differences of a political, military, cultural, socio-economic or other nature. It reflects the basic structure of international law as a legal order of co-ordinated, juxtaposed political entities, as distinguished from a *civitas maxima* or a world State order.

Rapidly increasing world-wide — interdependence of States and economies constitutes the basic fact of contemporary international society. Such interdependence is unprecedented in extent and intensity, with respect to military alliances, economic and financial relations, communications, environmental perils, scientific and technological developments. With the possible exception of the

so-called superpowers, no State is capable, for instance, of providing by its own means for its external security. Nuclear weapons and modern arms technology have fundamentally affected former structures of political power. Crystallizing around superpowers, transcontinental military alliances of States adhering to similar political value systems denote this change. Beyond the basic factual requirements for stabilized statehood, sovereignty in the sense of international law, nevertheless, is not and never has been bound to military or economic autonomy or autarchy. It denotes a juridical status of States, not a quantitative scale of factual power beyond.

Decolonization combined with the ideology of the nation-State generated a considerable number of small States after World War II hardly possessing the economic means to provide for stable government, thereby resulting in political, military and economic dependencies, as well as cultural dependencies (e.g. with respect to foreign media influences). While this may in the long run undermine the factual basis of their statehood, it does not, as long as they remain States, diminish their sovereign status.

Voluntarily agreed deviations from equal membership status within international organizations or multilateral instruments, in such forms as permanent seating and "veto-powers" (Art. 27, UN Charter as well as → weighted voting in certain international organizations (mainly financial)) are not qualified as violations of the principle of equality, although they may be politically controversial and in some cases have been questioned *de lege ferenda*, for instance by India with regard to the → United Nations Security Council. A most conspicuous example of deviation from the principle of equal rights and obligations is the treaty on non-proliferation of nuclear weapons of 1968 (→ Non-Proliferation Treaty). While this treaty cannot abridge the inherent right of non-nuclear powers to effective individual and collective self-defence, which is a rule of → *jus cogens*, it also has not been qualified as a violation of the principle of sovereign equality, because it was voluntarily consented to by the parties concerned. Political pressure to do so did not transgress the limits of general international law as expressed in Art. 52 of the → Vienna Convention on the Law of Treaties.

While the constellation of powers since World War II has undoubtedly led to hegemonic structures in the political and military spheres (United States; Soviet Union), general international law does not accord hegemonic powers a privileged legal authority over their spheres of political influence, whether in the form of a "police power" or an adjudicative authority (→ Hegemony).

5. Sovereignty and Self-Determination

The principle of self-determination by States with respect to their political, constitutional, socio-economic system and cultural identity has become a central element of sovereignty (UN GA Res. 2625(XXV)). Attempts by the United States prior to World War II to make recognition of governments in Latin America dependent on their democratic legitimacy did not mature into a universal standard. They were contradicted by other States (Estrada Doctrine) and laid to rest when the United States recognized the Soviet Union and failed to deny recognition to the German Government after 1933. A certain trend to deviate from the principle of effectiveness involves efforts to isolate governments from international cooperation on the basis of their disregard of fundamental human rights (e.g. South Africa). Quite unevenly practiced, it has not developed into a general legal standard mandating non-recognition.

Self-determination of peoples as a principle of international law pertaining to sovereignty, though not consistently practiced and respected in individual cases, was supported by the policies of → decolonization after World War II. It cannot be restricted to peoples under colonial rule. Establishment of a sovereign State as well as free association or integration with a sovereign State constitute modes of implementing this principle. It does not authorize, however, → dismemberment of the → territorial integrity or political unity of an existing State if that State possesses a government representing the whole people without discrimination as to race, creed or colour and respects fundamental human rights (→ Racial and Religious Discrimination).

Self-determination by States with regard to their socio-economic system as a central attribute of sovereignty includes their permanent sovereignty over natural resources within their territorial

jurisdiction (→ Natural Resources, Sovereignty over). Already under traditional international law, → expropriation and nationalization of → alien property, if performed without discrimination and accompanied by due compensation, was not considered an act in violation of international law. A number of problems have arisen in this area under contemporary international law such as whether in view of resolutions of the UN General Assembly investment contracts, licences or → concessions with private foreign investors, in particular, protective clauses, review and settlement provisions, as well as questions of compensation are matters exclusively subject to the jurisdiction of the host State or are also governed by principles and standards of public international law, including the right of → diplomatic protection (see, in particular, UN GA Res. 1803(XVII) of 14 December 1962; Art. 2 of the → Charter of Economic Rights and Duties of States, UN GA Res. 3281(XXIX) of 12 December 1974). It has been argued that sovereignty over natural resources, forming part of *jus cogens* in this context, might absolve from any obligations resulting from international law. Such a doctrine, however, would appear unacceptable and not confirmed by contemporary State practice.

6. *Extraterritorial Effects of State Acts*

Exclusivity of jurisdiction of States over their respective territories is a central attribute of sovereignty. While this rule prohibits a State from engaging in public acts on the territory of another State without the latter's permission, it does not as such prohibit a State from attaching legal consequences within its territory to a situation or occurrence outside its territory, provided it can show a reasonable contact to the situation or occurrence. Such sufficiently close contacts may be found, for example, in the citizenship of a natural person or the nationality of a legal person of the attaching State, in the not inconsiderable effects upon the State's political or socio-economic system, or in universally outlawed conduct (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts; → International Crimes).

The exercise of jurisdiction by the forum State over foreign States must respect the foreign State's immunity with regard to subject-matters resulting from *acta iure imperii* and to objects serving public purposes of the foreign State (→ State Immunity).

7. *Sovereignty and International Organizations and Régimes*

With international relations intensifying tremendously and world trade (over $2 trillion in 1986) and traffic in persons, goods and services reaching unprecedented records (→ Traffic and Transport, International Regulation), the 20th century has become the age of international organizations and multilateral instruments. The → General Agreement on Tariffs and Trade (GATT), for example, covers about 90 per cent of the international trade of the non-communist countries on the basis of → most-favoured-nation treatment and the principle of non-discrimination. While denying the United Nations and most other international organizations, with the important exception of the European Communities and certain technical organizations, a legislative power over member States, institutionalized cooperation and treaty relations have become the predominant form of international action (→ International Organizations, General Aspects). The manifold legal obligations of States cooperating within this network of international instruments, while restraining their freedom of action, neither deprive States of their sovereign status nor diminish such status, but are a form of exercising sovereignty and may politically and economically rather enhance the preservation of their legal status of sovereignty. At the same time, the idea of considering oceans, ocean floors and space and their resources as → common heritage of all mankind has gained ground, barring claims to titles of sovereignty and exclusive use in these areas by individual States (principle of non-occupation). It has promoted efforts to establish régimes of *res communes* for their use and administration (see United Nations → Conferences on the Law of the Sea, as well as the → Outer Space Treaty of January 27, 1967, and the treaty concerning the Moon of December 15, 1979, ILM, Vol. 18 (1979) p. 1434, although with regard to → Antarctica no such idea has been followed). The extension of territorial waters to 12 nautical miles and of the → exclusive economic zone to 200 miles backed at the Third UN Conference on the Law of the Sea, neverthe-

less, diminished by more than one third the territorial scope of the full freedom of the → high seas in favour of sovereign rights of individual coastal States. Establishment and administration of international régimes over such *res communes* meet serious problems in view of diverging socio-economic, political and strategic interests and ideologies (→ International Economic Order), for example with regard to deep sea mining, rights of passage (→ Innocent Passage, Transit Passage), or → satellite broadcasting.

8. *Conclusion*

The contemporary international society of States is characterized by a plurality of moral, political and ideological value systems and by most serious differences in socio-economic conditions. It is much less homogeneous than the society of European politial communities in the 17th to 19th centuries which produced the concept of State sovereignty. Yet, in spite of universal international organizations, regional economic integration in Western Europe, and two superpowers with hegemonic spheres of political and military influence, its basic unit is still the sovereign State, in most cases more or less of the nation-State kind, strictly maintaining sovereignty as a principle of international law.

The concept of sovereignty reflects the fact that contemporary international law is a legal order predominantly between coordinated, juxtaposed States as its typical subjects. The basic instruments of international organizations, innumerable multilateral and bilateral treaties, as well as many State constitutions again and again refer to the external sovereignty of States. The daily practice of States and of international institutions transacting international relations and involved in affairs reveals similar reliance on the concept.

If a legal theory is seen as the attempt to explain the structures and implications of a given legal order, the theory of international law must take into account this attitude of States. A theory's pretended detachment from any substantive contents of law, designating merely the hypothetical superiority of legal systems, as is postulated by "pure" theories of law (Krabbe, Nelson, Kelsen), fails to explain the historical as well as the normative meaning and practical importance of the concept of sovereignty in the modern international society of States (see Heller, loc.cit.).

There is hardly another principle of international law so generally recognized by States as sovereignty, although its meaning and scope in specific contexts is very often controversial. While they are often used interchangeably in political and judicial practice (see e.g. the arbitral award in the *Las Palmas* Case of 1928, RIAA, Vol. 2 (1949) p. 831, at p. 838), replacing the term sovereignty with independence, as has been frequently suggested, would not appear to promise a substantial gain in precision for explicating the basic legal status of States within the international legal order once it is acknowledged that this status is not *iure gentium solutus*. It is *communis opinio* of the contemporary international society of States that a State by virtue of its sovereignty is not *iure gentium solutum* but, in exercising its sovereignty, is bound by international law. As a juridical status protected by international law, it is embedded within the normative order of this law. The numerous provisions in international instruments to submit controversies to means of peaceful settlement *according* to international law confirm this. Even where they provide for binding decisions by third institutions, i.e. arbitrators and international tribunals or courts, neither this nor a request to submit to such procedures infringes the sovereignty of the parties concerned.

The problem of "absoluteness" of sovereignty is ultimately a problem of the source of validity of international law and, accordingly, a question of philosophy of law. As such it cannot be answered by mere normative theories nor can it be legislated upon or adjudicated. Absolute sovereignty would mean the very denial of the idea of an international legal order of mankind, be it a society of juxtaposed States of equal status or a global State.

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HELMUT STEINBERGER

SOVIET REPUBLICS IN INTERNATIONAL LAW

1. Historical Evolution

The first Soviet Socialist Republic was declared the successor to the Russian Empire on the night of November 7, 1917. Its very name, Russian Soviet Federated Socialist Republic (RSFSR), indicated that in contrast to the unitary State preceding it, the new State was to be a federation (→ Federal States). Many regions of what had been the Empire were occupied by foreign troops or in → civil war during the final months of World War I, preventing definition of sub-units. Nevertheless, the first constitution of the RSFSR, promulgated on July 10, 1918, incorporated the principle of → self-determination, which Lenin had preached to win adherents among minority groups of the Empire to his revolutionary cause.

The manifestation in constitutional law of the federal concept was not solely in the name but in Art. 11, declaring that regions with a "distinct mode of living and national composition may unite in autonomous regional unions" to be headed by regional congresses of soviets (councils) and their executive organs. No indication of a distinctive legal status for such regions was as yet established.

Shortly thereafter Lenin initiated a policy of recognition of independence of some non-Russian peoples living on the fringes of what had been the Empire. Independence was recognized for the following: Finland (December 18, 1917), the labour commune of Estland, later called Estonia (December 7, 1918), Lithuania (December 16, 1918), and Latvia (December 22, 1918). Expectations that these entities would eventually re-enter the RSFSR in a soviet socialist form were dashed when their non-communist majorities turned against the Russians. The government of the RSFSR, after failing to recover them, made agreements with each terminating hostilities.

The international community of States then recognized each of these governments as States in international law. Such → recognition continued

until 1940 when Estonia, Latvia and Lithuania were incorporated into the Soviet Union. Some Western governments, including those of the United States of America and the United Kingdom, refused, however, to accept → annexation and continued to recognize the three States as independent and to accept their diplomatic missions, as representing → governments-in-exile (→ Baltic States).

The Slavic peoples inhabiting the Ukraine and Byelo-Russia progressed along a different path. Although hampered by civil war after World War I, communist-oriented governments began functioning and eventually joined their territories with the RSFSR in treaty arrangements. Manifestos in January and February 1919 declared each State "independent". Constitutions were adopted (Byelo-Russia on February 3, 1919 and the Ukraine on March 10, 1919).

As the Red Armies of the RSFSR won victory over White Armies in regions to the south and east, the RSFSR's Central Executive Committee took note of the need for new structures by publishing a resolution on February 15, 1920, stating that in view of the victory of communist forces in regions of the Volga, the Urals, Siberia, Central Asia, Turkestan, the Crimea and the North Caucasus, a number of small non-Russian peoples with distinctive cultures, history, and class groupings had been brought within the RSFSR, making it necessary to reconsider the federal structure of the State.

The new approach led eventually on December 30, 1922 to formation of a broader federation entitled the Union of Soviet Socialist Republics. The Treaty of Union was signed by the original RSFSR, the Ukrainian and Byelo-Russian Soviet Socialist Republics and a fourth unit, the Transcaucasian Soviet Federated Socialist Republic (L. Shapiro (ed.), Soviet Treaty Series. A Collection of Bilateral Agreements and Conventions, etc., Concluded Between the Soviet Union and Foreign Powers, Vol. 1 (1950–1955) p. 199). This fourth unit had been formed on March 12, 1922 by treaty between the Governments of the three republics of Armenia, Azerbaijan and Georgia (V.J. Vasil'ev and P.P. Gureev (eds.), Formation and Development of the USSR as a Union (1972) p. 99). Even prior to formal union the Ukrainian and Byelo-Russian Governments took steps to merge their administrative institutions with those of the RSFSR.

2. *International Relations beyond Former Imperial Frontiers*

Although taking a position during the first months following the revolution that inter-State relations as known in international law would be replaced by those of a working class brotherhood organized on an ill-defined basis, the government of the RSFSR was forced to make peace with the Central Powers in the spring of 1918 (→ Peace Treaties after World War I). The Treaty of → Brest-Litovsk was concluded on March 3, 1918. Thereafter the RSFSR concluded numerous agreements with the Central Powers on exchanges of → prisoners of war and delimitation of → boundaries. The first agreements beyond those relating to termination of war were with Sweden on June 1, 1918 (Foreign Ministry of the USSR, Documents of Foreign Politics of the USSR, Vol. 1 (1957) p. 341) concerning trade and with Denmark on September 21, 1918 (ibid., p. 493) concerning trade and credit.

The Ukrainian Soviet Socialist Republic first appeared as a party to treaties when its government joined the RSFSR to conclude treaties with Austria on → repatriation of war prisoners and interned civilians on July 5, 1920 (Foreign Ministry, Collection of Treaties, Agreements and Conventions in Force, Concluded by the USSR with Foreign States (hereafter SDD following the Russian title), Vol. 1 (1924) p. 213; → Internment) and with Poland (October 12, 1920, LNTS, Vol. 4, p. 7) to establish preliminary peace following the post-World-War-I incursion of Polish troops into Ukrainian populated territory. A peace treaty was signed with Lithuania on February 14, 1921 (SDD, Vol. 1, p. 106). Each treaty was followed by agreements on repatriation of prisoners and demarcation of borders. A treaty with Germany on April 23, 1921 (SDD, Vol. 1, p. 236) concerned repatriation.

Not until June 1, 1921 did the Byelo-Russian Soviet Socialist Republic become a treaty partner, joining at that time with the RSFSR and the Ukrainian Soviet Socialist Republic to establish arbitration commissions with Poland to resolve border incidents (People's Commissariat of Foreign Affairs, Collection of Treaties, Agree-

ments and Conventions in Force, concluded by the RSFSR with Foreign States (hereafter SDD RSFSR following the Russian title), Vol. 2 (1921/23) p. 83). Subsequent Ukrainian treaties were with Latvia on August 3, 1921 (LNTS, Vol. 17, p. 317) concerning future relations, with Turkey on September 17, 1921 (SDD, Vol. 1, p. 281) concerning repatriation of prisoners, and during 1921 to 1922 with Austria, Poland, the Baltic States and Turkey on future relations and communications (for sources see Slusser and Triska (eds.) pp. 16–37). The Transcaucasian republics signed their first treaty in 1920 after the victory of their communist dominated governments with the help of Russian troops. The treaty established friendship with Turkey on October 13, 1921 (SDD RSFSR, Vol. 3, p. 49). The RSFSR joined them as signatory.

Temporary unification of foreign policies followed in 1922 when the Western powers invited the Soviet Socialist Republics to Genoa to re-establish friendly relations between East and West and to mark the end of the Western policy of confining Bolshevism within a *cordon sanitaire*. In preparation, the RSFSR signed a Protocol on February 22, 1922 (SDD RSFSR, Vol. 3, p. 1) with the Soviet Socialist Republics of Azerbaijan, Armenia, Byelo-Russia, Bukhara, Georgia, Far Eastern, Ukraine and Khorezm, in which it was stated that

> "the above named independent Republics . . . in order to provide the best real protection of the interests of these republics at the said Conference entrust the RSFSR with representation and protection at the Conference of the interests of the said eight Republics and to conclude and sign on their behalf any formal documents that may be worked out at the Conference".

Although no formal agreements were reached at Genoa (excepting the → Rapallo Treaty of April 16, 1922 with Germany, LNTS, Vol. 19, p. 247) or at a continuation Conference at The Hague (June 26 to July 20, 1922), committee reports were prepared on finances, economics and transportation. These were later included in the RSFSR Treaty Series.

The various Republics continued to conduct independent foreign relations after Genoa and The Hague, signing treaties, agreements and conventions through the remainder of 1922 until conclusion at the end of that year of the Treaty of Union in the USSR. In that Union the four constituent Republics retained their → sovereignty and the right to secede (→ Secession). By Art. 1(a) the jurisdiction of the federation was stated as "representation of the Union in international affairs, the conduct of all diplomatic relations and the conclusion of political and other treaties with foreign states".

The same formula in slightly different words was inserted in the second Soviet Constitution of 1936 as Art. 14(a). From that time until the amendment of February 1, 1944, which added an Art. 18a, the constituent Republics made no claim to be → subjects of international law.

3. The Amendments of 1944 and Their Aftermath

By Art. 18a, the Soviet Constitution added to the jurisdiction of the then existing Union Republics the following: "Every Union Republic shall have the right to enter into direct relations with foreign states, to conclude agreements with them, and to exchange diplomatic and consular representatives." The amendment was adopted shortly before the → Dumbarton Oaks Conference called to prepare a structure for an international organization to maintain peace and security (August 21 to October 7, 1944). With the amendment in hand the Soviet delegation requested seats for the 16 Union Republics in the proposed → United Nations. Western delegations interpreted the request as a Soviet effort to increase Soviet representation to avoid the isolation that had existed in the → League of Nations.

Western thinking focussed on the accompanying change in Art. 14(a) to include among the federal powers, "establishment of the general procedure for the mutual relations of Union Republics with foreign states". Coordination of federal and Republic policies seemed to be required, preventing a Republic from taking an independent position. For that reason the Soviet request was opposed.

Under continuing insistence of the Soviet delegation a compromise was reached, later to be confirmed by Churchill, Roosevelt and Stalin at the → Yalta Conference of 1945. It was to grant admission to two of the 16 Republics as the principal sufferers from World War II. The re-

maining 14 Republics, in spite of identical constitutional standing in the USSR, were excluded. Thereafter the Ukrainian and Byelo-Russian Soviet Socialist Republics requested and gained admission to the San Francisco Conference constituting the United Nations.

Both newly admitted Soviet Republics established permanent missions at the seat of the United Nations, and each with few exceptions joined the → United Nations Specialized Agencies. In subsequent decades each concluded over 100 treaties.

4. Opinio Juris *on the Status of the Republics*

Jurists debated the effect in international law of the 1944 amendments. Some Western jurists concluded that inactivity of the 14 excluded Republics proved that in spite of their constitutional status they could not be accepted as subjects of international law. None maintained embassies abroad or participated in international conventions (→ Diplomatic Agents and Missions; → Diplomatic Relations, Establishment and Severance). Even Byelo-Russia and the Ukrainian Republic sought no membership in the → Council for Mutual Economic Assistance, relying evidently on the Soviet Union to represent their interests. Both appeared to coordinate their public positions with the Soviet Union.

Soviet jurists consistently claimed international legal status for all Union Republics. A 1951 text linked the 1944 amendments historically to the pre–1922 status of the Republics to claim that they had not lost their status as subjects of international law upon entering the Union (Academy of Sciences of the USSR. Institute of State and Law. International Law (1951) at p. 167 [in Russian]). Note was taken of the legislative history of the amendments. The Soviet Foreign Minister had explained them to the Supreme Soviet deputies, saying,

> "there are not a few specific economic and cultural needs of Union Republics which cannot be fully embraced by the all-union representation abroad and also by the treaties and agreements concluded by the Union" (ibid.).

The authors claimed that all of the Union Republics had implemented the amendments by establishing Ministries of Foreign Affairs.

A 1961 text remarked that "[t]he Soviet Union as a single federal state acts in the international arena as a single subject of International Law. But this state of affairs does not reduce or qualitatively affect the sovereignty of each Union Republic" (Academy of Sciences of the USSR. Institute of State and Law. International Law. A Textbook for Use in Law Schools (1961) at pp. 91–92). The authors add, "[t]hus, both the Soviet Union as a whole and each Union Republic separately are full subjects of international law" (ibid.).

Western jurists were less positive. One (Akehurst) concluded that the amendments were designed to increase Soviet votes to three, and the admission of two Republics to the United Nations was only a political accommodation (M. Akehurst, A Modern Introduction to International Law (3rd ed., 1977) at p. 58). Another author (Bernier) declared that a majority of jurists agree that "constitutional provisions are not enough to grant international status to member states of federations" (Bernier, p. 81).

5. *The Debate at the Vienna Conference on the Law of Treaties*

Proponents of the declaratory and constitutive theories of recognition of States clashed at the Vienna Conference on the Law of Treaties. The issue was raised by presentation of a text reading in Art. 5(2): "State members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down" (United Nations Conference on the Law of Treaties, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Official Records, UN Doc. A/CONF. 39/11/Add.2, p. 11; → Vienna Convention on the Law of Treaties). The → International Law Commission in its commentary stated that, "there is no rule of international law which precludes the component States [of a federation] from being invested with power to conclude treaties with third States" (ibid., p. 12).

The declaratory school argued that recognition in international law should follow when a constitution creates capacity in federal units to act as subjects of international law. The constitutive school argued against automatic recognition based on constitutional grants of capacity. Opponents of the declaratory school argued that members of federations are by definition not subjects of

international law; municipal law as interpreted by municipal tribunals alone governs (→ International Law and Municipal Law), and international law has no part to play; acceptance of the text would impermissibly authorize third States or international tribunals to interpret federal constitutions; the text might encourage a federal unit to defy restraints established by a federal government and this would impair unity; certain States might be encouraged to attempt to revise the constitution of a third State through recognition in international law of a federal unit's capacity to act; the text would facilitate attempts by federations to increase their voting strength in international bodies; and it was questionable whether the provision should be adopted since both Byelo-Russia and the Ukraine as UN members were indubitably subjects of international law. Presumably it was thought that any other federal unit seeking recognition should apply to the United Nations for a determination of its status.

Opponents defeated the proposal to adopt the text for the various reasons indicated. Soviet jurists continued thereafter to adhere to their position that a constitution alone is determinative of status in international law. Other commentators think that defeat of the text throws doubt on the application of the declaratory theory of recognition to federal units.

6. The 1977 Constitution

On October 7, 1977 the present USSR Constitution was adopted. The above discussed Art. 14(a) and 18a of the 1944 Constitution were slightly modified and now appear as follows (in the English translation in W.E. Butler):

"Article 73. There shall be subject to the jurisdiction of the Union of Soviet Socialist Republics in the person of its highest agencies of state power and administration:

. . .

(10) representation of the USSR in international relations; links of the USSR with foreign states and international organizations; establishment of the general procedure for and coordination of relations of union republics with foreign states and international organizations; foreign trade and other types of foreign economic activity on the basis of the state monopoly;

. . .

Article 80. A union republic shall have the right to enter into relations with foreign states, conclude treaties with them, and exchange diplomatic and consular representatives, and to participate in the activity of international organizations."

Official Records of the United Nations Conference on the Law of Treaties, 1st session, Vienna, 26 March–24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, UN Doc. A/CONF.39/11 paras. 60–68.

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STATE

1. Need for a Definition

Various articles of this Encyclopedia discuss the rights and duties of States (cf. → States, Fundamental Rights and Duties) as well as important aspects relating to the existence and extinction of States (→ State Succession; → States, Extinction); this article is confined to the basic characteristics of the States as the main → subject of international law.

Looking at the historical development of the organization of human societies (→ History of the Law of Nations), one could suppose that there is no further need to define the notion of the State. It is true that because this notion is so obvious, it seems to be clear for everybody. Nevertheless, the need for a generally accepted definition cannot be ignored. The notion of the State plays a decisive rule in every country's constitutional law as well as in its participation in → international relations, i.e. within the community of States. One might think that in both these cases a uniform definition is required, i.e. that such an entity must be judged either to be a State from all relevant legal perspectives or not to be a State. This presupposition, however, would be wrong. Even under the view that the law as a whole forms an undivided and homogeneous body of norms, we still need a double definition, since a society may consider itself a State, although other States are not willing to recognize the existence of that State in → international law. On the other hand – and this seems surprising – a society may be qualified to be a State under international law, though the internal law of this entity does not correspond to this judgment. Thus, a State may continue to exist under international law even if it is occupied by foreign powers, lacks an autonomous constitution, and is represented during that phase only by a → government-in-exile. Such a situation cannot of course, be upheld indefinitely.

The consequence of these considerations is that the definition of the notion of the State, following from the constitutional law of an entity, may also influence the qualification as State under international law, but it is not decisive. A definition under constitutional law, valid for all members of the community of nations, cannot exist because the constitutions of States show profound differences emanating from the freedom of States to determine their legal systems autonomously. Political, sociological, philosophical and historical attempts to define the structure of a State are worthy of particular interest, but they are nevertheless unfruitful for the purposes of international law, which cannot respect all the differing legal concepts of various constitutions. International law needs a general and commonly accepted definition suited to the requirements of all inter-State relations. International law must govern all imaginable legal relations, in particular because it has to take into account that all States possess the same rights and are under the same duties. No State can escape from its international responsibility by invoking its particular constitutional requirements (→ Vienna Convention on the Law of Treaties, Art. 27; → Responsibility of States, General Principles).

2. Definition in International Law

The State in international law is an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals (→ Nationality). Particularly because of the principle of equality, the definition can only be of a

rudimentary and simplifying character, because it must embrace all kinds of States. Nevertheless, international law cannot dispense with a definition or rely only on certain evidence.

States are the original subjects of international law and the original bearers of international rights and duties. International organizations are also subjects of international law, but only in respect of rights and duties conferred on them by States to enable them to perform their special tasks (→ International Organizations, General Aspects). States, on the other hand, possess an all round competence concerning their internal affairs and external relations. Rights and duties under international law are primarily those of States. The general competence to conclude → treaties, i.e. the legal possibility of conferring rights and duties on other subjects of international law, does not infringe this principle of all round competence, if sovereign rights are not conclusively given up.

A definition of the notion of State is necessitated both by general principles of international law and by special provisions. Two examples of special provisions of international law which require such a definition may elucidate this fact: Only States can be members of the → United Nations, since the Charter presupposes this qualification (→ United Nations Charter, Chap. II); secondly, only States can be parties before the → International Court of Justice (ICJ) (Statute of the ICJ, Art. 34).

An agreed definition substantiated during the development of international law and founded in a certain sense by Georg Jellinek at the end of the 19th century is well known as the so-called doctrine of the three elements (see also Art. 1, Montevideo Convention on Rights and Duties of States, December 26, 1933, LNTS, Vol. 165, p. 19). Following this doctrine, a State only exists if it is established that a population lives on a territory under an organized → government. The rudimentary structure of this definition has often been criticized; however, an overly subtle definition would not be more appropriate as has already been demonstrated in relation to constitutional definitions. Above all, the doctrine of the three elements would no longer be regarded as a simplifying concept if one takes into account that these three elements themselves need a detailed and subtle interpretation.

(a) State population

The State population is the most important element of the notion of the State, because territory and government must serve the welfare of the population. The State itself is an organization whose primary task is to support human beings. Membership in the State population is determined by domestic laws on nationality, international law leaves it to the discretion of every State to define the nature of nationality, be it under the principles of *jus sanguinis* or *jus soli*, or a mixture of the two. It also lies in the discretion of every State to prescribe the mode of acquisition and loss of nationality. Only an abuse of discretion in conferring nationality is illegal (→ Abuse of Rights), for instance the imposition of nationality on a person who does not have any link to the State conferring its citizenship. The freedom of States in this area can produce double nationality as well as statelessness (→ Stateless Persons), a result which until now could not be prevented despite the modern tendency to seek to avoid such a result.

Nationals and their States find themselves in a mutual relationship of loyalty and protection; a government may impose duties on its citizens and can protect them against other States (→ Diplomatic Protection), whereas the national is under a duty of loyalty and can invoke the government's protection inside and outside the State territory. On the other hand, it is not required by international law that the State population recognize the legitimacy of the acting government; international law remains neutral regarding the question whether a State population identifies itself with the governmental system in a constitutional or personal respect. However, a State population in international law exists only if its overwhelming part at least is willing to form a particular State. A population whose majority refuses to be assembled as a State population does not correspond to the requirements for identifying a State in international law. This statement is not self-evident, but rather expresses a firm rule of international law only since the principle of → self-determination of nations and peoples has been recognized as positive international law.

The concept of State population is not identical with that of the nation. The nation is a legal notion

in international law exclusively in respect of the right of self-determination conferred on it. For the definition of State population, homogeneity regarding ethnic, cultural, religious, racial or other criteria is not decisive. A multinational State can be a State under international law, and the criteria mentioned above are only relevant when defining the nation as a bearer of the right of self-determination.

International law also leaves it to the rules of national constitutional law whether the bearer of the State's authority is the State population, a monarch, a dictator, or a political party, as is the case in communist States in a factual and even in a certain legal sense. On the basis of the internationally recognized principle of personality, the link of nationals to their own State has predominance over possible links with other States. Violations of this principle must be seen as illegal → interventions, at least if any enforcement is intended.

(b) State territory

International law as a legal system, as it is construed today, began its existence when societies, organized under governments, claimed exclusive jurisdiction over a delimited territory (→ Territorial Sovereignty). State territory is of essential importance for the application of international law, because inside this territory the competent government is exclusively entitled to take legal and factual measures. A government, therefore, which tries to exercise authority beyond its territory would commit a violation of international law, if its actions were extended to the territories of other States. Conversely, every State is entitled to prohibit and to hinder such actions by another State.

The State authority possesses sovereignty inside its territory. It is, however, permissible for a State to exercise jurisdiction over ownerless territory (→ Territory, Discovery), on the → high seas and in outer space (→ Space Law); only the exercise of power on a foreign territory is an → internationally wrongful act. Thus, unauthorized passage through foreign territory is prohibited as well as the crossing of air space over that territory (→ Innocent Passage, Transit Passage; → Air Law).

Every government is free to recognize → acts of State of other governments producing effects beyond the → boundaries of the acting State, but governments are also free to deny such effects by invoking their → *ordre public*. All foreigners including stateless persons are exposed to territorial sovereignty when entering foreign territory and thus must observe the laws of that territory's country. Only when a government gives consent in its capacity as territorial sovereign is another government allowed to exercise jurisdiction on the territory concerned.

It follows from these principles that a concrete delimitation of State territory is an unavoidable requirement in international law. Thus, a State is not only entitled but strictly obliged to mark clearly the boundaries of its territory, since only then do the rules mentioned above become applicable.

The delimitation of land boundaries offers no particular difficulties; it rests on historical development, on recognition by the adjacent States, on customary law, and on treaties. In particular, the permanent validity of treaties establishing boundaries is specially protected by the Vienna Convention on the Law of Treaties (Art. 62(2)(a)).

The delimitation of State territory with respect to the high seas is at present not fixed in a strictly binding sense, but the treaty provisions envisaged by the → conferences on the law of the sea may today, nevertheless, be partly qualified as → customary international law (→ Law of the Sea). Under these principles, every State can claim 12 miles as territorial waters, and in this area the same rules are applicable as on land (see also → Continental Shelf; → Contiguous Zone; → Exclusive Economic Zone).

A clear rule for delimitation of State territory, and following therefrom a rule for delimitation of exclusive jurisdiction above the land territory, i.e. in air and space, has also not yet been reached. Many efforts have been made and continue to be made in this respect. For example, an analogous application of the law of the sea has been taken into consideration, whereby the question has arisen whether a limit of about 100 kilometres could be bindingly fixed. However, on account of the still persisting unclearness and the lack of a commonly accepted rule, a definite answer about the permitted altitude for flying over foreign States cannot be given. This uncertainty, however, has

no influence on the right of a State to hinder illegal actions of other States when they use air and space over the former's territory.

(c) Government

A State under international law only exists if the population, living on a delimited territory, is subject to the authority of a → government which exercises jurisdiction corresponding to the requirements of international law. This notion of government also needs a subtle interpretation.

Under international law it makes no difference whether the establishment of the acting government reposes directly on the will of the State population, whether the legitimacy of the government derives from a previously existing government or, lastly, whether the acting government has come to power through the support of other States. The only essential factor is that the government in exercising its power, must be capable of acting independently of foreign governments. The old question in philosophy of law whether recognizable State power may be created autonomously or derivatively is of no importance in positive international law; only its independence during the time of its active jurisdiction is decisive.

A government may, of course, partially limit its jurisdiction by concluding treaties with other States. Nevertheless, a situation under which a government is completely bound by treaties, no longer permitting the exercise of essential portions of sovereignty, would be contrary to the notion of government. Thus, the member States of the → European Communities, it is true, partially waived their sovereignty, but they did not completely abolish their independence. The fundamental principle therefore says that a government exists only if the governed State remains a sovereign entity in so far as it is independent from direct orders from other State powers.

A further criterion of the notion of government is its → effectiveness. This means, firstly, that the government must be in a position to enact and enforce legal rules inside the State; secondly, it must possess sufficient power to accomplish its duties under international law. Only if both these features are present can it be guaranteed that a State represented by its government may be seen as a reliable partner in international relations.

Thus, a resolution of the → Institut de Droit International (Brussels 1936) indicates in Art. 1 that a State may only be recognized if the power of its government exists independently of other States, and if it is capable of observing the rules of international law. The same principle is laid down in para. 100 of the Restatement (Second) of the Foreign Relations Law of the United States. This fundamental principle of effectiveness also gains importance indirectly through the UN Charter, where it is expounded in Art. 4 that only such peace-loving States can be members as are willing and able to carry out their duties under the Charter; such behaviour can only be expected from an effective government.

If a government loses its effectiveness, one has to decide whether at the same time the State no longer exists. Such a result, however, should not be stated prematurely, since the required effectiveness of the government could be re-established. Therefore, further developments must be awaited; the State, for instance, may find itself in a → civil war or may temporarily be occupied by foreign powers.

The international qualification of a government does not depend on any evaluation of the government's legal system; i.e. the qualification as a State cannot be denied with the argument that the legal system in question is undesirable. The decision concerning the type of government belongs to the domestic affairs of every State (→ Domestic Jurisdiction), and any attempt to influence the legal nature of a foreign government must be seen as a violation of Art. 2(7) of the UN Charter (→ Non-Intervention, Principle of).

Recognition of a foreign State cannot be denied because of objections to its kind of government, in particular since the declaratory theory on → recognition corresponds to the overwhelmingly accepted doctrine, which rests essentially on the principle of self-determination guaranteeing independence in internal and external affairs. An exception to this principle may only be invoked if the system of government by itself and through its organization violates peremptory norms (→ Jus cogens) of international law or → human rights. Recognition solely with regard to a government may, of course, be refused on account of its legal system.

3. Establishment and Extinction of States

Firm and exhaustively enumerated rules on the establishment of a State under international law

are not available; factual and legal events may coincide in various respects. Thus, the establishment of a State may emanate from an international treaty concluded by members of the community of nations with or without the cooperation of the government being created. A → secession from a → federal State may also result in the foundation of an autonomous State. The foundation of a State may also be achieved through revolutionary movements (→ Liberation Movements), which may lead to the division of an existing State (→ Dismemberment). The union of several States, founding together a federal State, results in the extinction of the international personality of the formerly existing entities, and it creates a new subject of international law. In the course of history, States have also been created by factual occupation of territories.

Thus, the establishment of a State may be connected with the extinction of formerly existing States, with the amplification or the diminution of the territory of States and with the establishment or the abolition of sovereign rights. In those cases, the recognition of the existence of a new State is connected with a decision about the creation or the abolition of rights and duties referring to the territory concerned. Such changes also produce an effect on the nationality of the population involved and are governed by the legal principles on State succession.

It has long been discussed whether the establishment of a State requires the constitutive recognition of other States, or whether the factual existence of the three elements mentioned above suffices and the recognition by other States is only declaratory in character. The second theory seems to be overwhelmingly accepted, since the right of self-determination of nations and peoples has gained more and more the character of an autonomous right requiring legal observance. It has even been pointed out that the right of self-determination forms part of peremptory international law.

Rules similar to those indicated here in respect of the creation of States also govern State extinction. However, the statement that a State has ceased to exist needs particular caution, because the factual and legal development of such a situation only allows a definite answer when a certain consolidation has taken place. The legal principles on State succession are also applicable here. The complete and final abolition of one of the three elements of a State results in the extinction of the international personality of the State, so that it no longer exists. Of course, the abolition of the government will be the most frequent case. But here again caution is necessary, since the determination of a final situation produces particular difficulties. The continuing existence of a government-in-exile outside the territory of an occupied State is one example.

4. Special Categories of States

The relatively clear principles concerning the notion of the State, its elements, its creation and extinction as dealt with in the foregoing description admit of exceptions and restrictions, however, because special kinds of States and State jurisdiction are well known and recognized. Thus, for instance, a → protectorate is qualified as a State, though its foreign affairs may be directed and conducted by another State, so that doubts about the sovereignty of the protected State may arise. Often it seems to be somewhat unclear whether a certain entity should be qualified as a federal State or a union of States. The first of these is a single subject of international law; in the second case, the members of the union preserve their sovereignty even if they exercise it commonly (→ Confederations and Other Unions of States). International organizations also possess legal personality and therefore a special kind of sovereignty, but they differ from States as subjects of international law in so far as their sovereign rights can only be exercised legally in order to accomplish the duties and purposes conferred on them by sovereign States.

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STATE ACTS *see* Acts of State

STATE IMMUNITY

1. Definition; Legal Nature. – 2. Historical Developments. – 3. State Immunity as a Principle. – 4. Scope of Immunity: (a) State immunity and recognition. (b) Subdivisions of States. (c) State-owned and State-controlled enterprises. – 5. Exceptions from Immunity: (a) Waiver of immunity. (b) Proceedings relating to immovable or heritable property. – 6. Immunity from Adjudication: (a) Service of process. (b) Default proceedings. (c) Determining nature of foreign State's activity. (d) Claims based on tortious conduct. (e) Expropriation. – 7. Immunity from Execution: (a) Survey of State practice. (b) Conditions for enforcement. (c) Limits on the objects of enforcement. (d) Interest of third parties. (e) Interim measures to secure satisfaction of a judgment. – 8. Prospects.

1. Definition; Legal Nature

In the context of public international law the law of State immunity means the legal principles and rules under which a foreign State may claim exemption from, suspension of, or non-amenability to the → jurisdiction of another State (the territorial or forum State). Jurisdiction means the comprehensive governmental power of a State, including, in particular, its legislative, judicial and administrative powers; it is not derived from, but limited and protected by public international law. In relation to State immunity its main practical importance consists in the power of the territorial State to adjudicate, to determine questions of law and of fact, to administer justice, and in such other executive and administrative powers as are normally exercised by the judicial and administrative authorities of the territorial State (YILC (1980 II) p. 1). It is to these powers that jurisdictional immunities are related.

Although resulting partly in the same effects, the rules on State immunity have to be distinguished from the rules on inviolability of diplomatic or consular missions (→ Diplomatic Agents and Missions, Privileges and Immunities); these have largely been codified by the respective Vienna Conventions and are *leges speciales*, flowing from the principle *ne impediatur legatio* (→ Vienna Convention on Diplomatic Relations (1961); → Vienna Convention on Consular Relations (1963)). The same is true with regard to personal privileges and immunities of heads of State, diplomats, members of → special missions or of → military forces abroad (→ Representatives of States in International Relations), and privileges and immunities of intergovernmental organizations and their officers (→ International Organizations, Privileges and Immunities). It is generally recognized that the immunity of the foreign State must not be undermined or circumvented by subjecting the organ or person having acted on its behalf to the jurisdiction of the forum State. A different question is whether a person, even when acting as an organ of a foreign State, may be brought to court because of alleged → war crimes, → espionage, → crimes against peace, → crimes against humanity, → genocide, or gross violations of the territorial integrity of the forum State (→ Territorial Integrity and Political Independence).

Jurisdiction of the forum State and, accordingly, immunity from its jurisdiction can be distinguished from the forum State's international competence (*compétence d'attribution*; *internationale Zuständigkeit*). By its rules on international competence the territorial State defines what kinds of matters with extraterritorial links may be adjudicated by its courts (for various methods to do so, see C.N. Fragistas, La compétence internationale en droit privé, RdC, Vol. 104 (1961 III) pp. 159–271, at p. 205 et seq.). Public international law requires the territorial State to abstain from extending its international competence to matters which have no reasonable connection with it; in this sense the limits, under general public international law, of its international competence are one aspect of and coincide with part of the limits under general public international law of the territorial State's comprehensive governmental powers (jurisdiction in a wider sense). By its domestic law the territorial State may limit the international competence or the jurisdiction of its courts further than required under public international law. It may normatively connect them, e.g., by denying juris-

diction and granting immunity to the foreign State in matters for which, under domestic law, its courts are denied international competence. Lacking international competence, the courts of the forum may consider the question of immunity redundant.

Immunity *ratione personae* must be distinguished from the question whether the courts of the forum are allowed to review the conduct of a foreign State under international or foreign public law (→ Acts of State). The forum State may deny its courts such power of review (e.g. → Sabbatino Case), but, given its international competence, it is under no obligation under international law to do so (a different question is which extraterritorial effects, if any, will result from such review). If the foreign State, on the other hand, rightly enjoys immunity, the courts of the forum, once they have established the circumstances from which immunity results, must not exercise their jurisdiction, and thereby are precluded from reviewing the foreign State's conduct.

Immunity from jurisdiction does not amount to an exemption from the legal order of the territorial State. The question may arise as a prejudicial matter in proceedings in which the foreign State is not engaged, or before the courts of third States who by their rules regarding conflict of laws may have to apply the substantive law of the (first) territorial State, e.g. the *lex delicti commissi*.

Rules on State immunity form part of → customary international law and are sometimes incorporated into treaties. As they do not constitute → *jus cogens*, treaty provisions will prevail *inter partes* over customary rules. Many bilateral and multilateral treaties (see United Nations, Materials on Jurisdictional Immunities of States and their Property (hereafter "UN Materials"), p. 131 et seq.) deal with questions of State immunity, most comprehensively the European Convention on State Immunity with Additional Protocol of May 16, 1972 (ILM, Vol. 11 (1972) p. 470). Rules on the immunity of foreign States may also form part of domestic law either in the form of special acts or instruments (e.g. United States Foreign Sovereign Immunities Act of 1976, ILM, Vol. 15 (1976) p. 1388), of special provisions in general laws (e.g. Art. 61 of the 1961 Soviet Law on Fundamentals of Civil Procedure), or as customary or judge-made domestic law (UN Materials, p. 181 et seq.). International law on State immunity may be applicable before domestic authorities under the general provisions which determine the relation between → international law and municipal law (e.g. Art. 10 of the Italian Constitution; Arts. 25 and 59(2) of the Basic Law of the Federal Republic of Germany). While contemporaneous international law requires the territorial State to respect the immunity of the foreign State only with regard to *acta jure imperii* and to property serving the public purposes of the foreign State, domestic law may well go beyond and accord foreign States "absolute" immunity covering also *acta jure gestionis* and property in general.

2. *Historical Developments*

The concept of State immunity emerged with the concept of the territoriality of States and their related powers. It has been intrinsically connected with the very complicated development of the concepts of internal and external → sovereignty and, since the beginning of the 19th century, with the rapid growth of international economic relations and the direct participation of States, their subdivisions, agencies and instrumentalities in it. Due presumably to much older religious ideas on the origin of power and of rulers, in the period of absolutism the sovereign ruler was considered not to be subject to either domestic or foreign jurisdiction: *par in parem non habet imperium* (applied as early as 1354 by Bartolus on *civitates*), misconceiving the ancient Roman and canonical law doctrines which originally were related to the internal distribution of powers of an undivided jurisdiction (→ History of the Law of Nations). In spite of the slowly emerging distinction between the ruler and the State (Vattel), between his public powers (*majestas*) and his private conduct, the sovereign's immunity was likewise attributed to the State, sometimes by an argument *a fortiori* from the immunity of diplomatic representatives (*quasi extra territorium*) to the immunity of their sovereign (Grotius, De jure belli ac pacis (1625) Book II, Chap. 18, sec. IV; C. van Bynkershoek, De foro legatorum (1744)), a main argument in the trial of Mary Stuart. Preponderant legal doctrine supported sovereign immunity as a legal principle sometimes excepting the property, or criminal or hostile acts of a foreign sovereign,

while a minority disputed this reasoning (*rex extra territorium suum privatus*).

State practice was scarce and inconsistent, leading Bynkershoek (op. cit., Chap. 4) to the conclusion that no positive rules of international law existed and sovereign immunity had to be based on *ratio*, while others assumed an implied tacit consent. Substantive domestic legal principles, like *princeps legibus solutus*, or "the king can do no wrong", reflected the concept of absolute immunity of the State before its own courts but also tended to support a comprehensive immunity accorded to foreign States and sovereigns. This became questionable when in the 19th and 20th centuries the distinction between the ruler and the State and between his private and his public acts became prevalent and an increasing number of States were subjected to the jurisdiction of their domestic courts. The States, and no longer their rulers, were now considered as the → subjects of international law.

Hand in hand went a rapidly expanding intervention and participation by States in international trade and economic relations (State-owned vessels and railways, State commerce, State loans, expropriation), which resulted in manifold legal contacts, relations and conflicts. In view of this development it was increasingly felt that when doing business in the same manner as private persons, States should not be privileged by immunity when it came to legal controversies resulting from such conduct. During the 19th century only a very limited number of bilateral and multilateral treaties covering limited subjects (e.g. Art. 34 of the Revised Act on the Navigation on the Rhine River of October 17, 1868, CTS, Vol. 138, p. 167) brought some modest restrictions on the immunity of the foreign State. Scarce State practice as well as preponderant legal doctrines still tended to support comprehensive immunity of foreign States based on their dignity and sovereign equality (→ States, Sovereign Equality).

Most court decisions granting immunity relied on the public nature or purpose of the foreign State's conduct or property in question (e.g., The Schooner Exchange v. M'Faddon, 7 Cranch. 116 (1812); Gouvernement espagnol v. Cassaux, Recueil Sirey 1849 – I – 81; The Parlement Belge (1880), British International Law Cases, Vol. 3, p. 322; Sucharitkul, Chap. 3; Malina, p. 80 et seq.). It is thus rather questionable whether a customary rule of public international law providing for immunity for *acta jure gestionis* had come into existence at the time.

A turning point came when Belgian (e.g. Rau, Vanden Abeele v. Duruty, Pasicrisie, 1879 II 175; Chemin de Fer Liégeois-Luxembourg v. Etat néerlandais, Pasicrisie, 1903 I 294) and Italian courts (e.g. Typaldos v. Manicomio de Aversa, Foro Italiano, 1886 I 399; Guttieres v. Elmilik, Foro Italiano, 1886 I 913) no longer granted immunity from adjudication when the claim had been based on the foreign State's conduct *jure gestionis* (see Allen, p. 187). Similar decisions by German State courts (e.g. Heizer v. Austria (1885), Bayerisches Gesetz- und Verordnungsblatt, Beilage I, 1) and English lower courts (e.g., The Charkieh; The Parlement Belge, op. cit.) were not upheld by federal or superior courts. In the 20th century, the Austrian Supreme Court for two decades (Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen II, 3 (1920)), the Swiss Federal Court (Entscheidungen des Schweizerischen Bundesgerichts, 44 I 49), French (Clunet, Vol. 54 (1927) p. 406; Recueil Sirey 1930-I–49), Greek (Annual Digest, Vol. 4, p. 172) and Irish (Annual Digest, Vol. 12, p. 97) courts, Egyptian mixed tribunals (AJIL, Vol. 26, Supp. (1932) p. 594; Badr, p. 26 et seq.) as well as Latin American courts (Malina, p. 175) followed this new, restrictive trend, while the courts of other countries such as those of the United States (Berizzi v. Pesaro, 271 U.S. 562 (1926)), the United Kingdom (The Porto Alexandre (CA), British International Law Cases, Vol. 3 (1919) p. 350) and Commonwealth members, Germany (Reichsgericht in Zivilsachen 62, 165 (1905); 103, 174 (1921)), the Netherlands (e.g., De Booij-case, Allen p. 110 et seq.), Austria again after 1928 (Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen, X, 427), and Japan (Annual Digest, Vol. 4 (1927/28) p. 168) still granted comprehensive immunity, although frequently on the basis of the public nature or purpose of the foreign State's conduct or property. The Soviet Union, while claiming absolute immunity for herself in general, from 1921 conceded restrictions on immunity in trade agreements (Boguslavskij, Staatliche Immunität, p. 150). Since 1935 she has transacted her foreign

trade mainly via trade associations with distinct legal personalities; they regularly submit to contracted → arbitration or adjudication; thus, in practice, her attitude with regard to commercial transactions has effects comparable to those of a functionally restricted immunity.

Traditional exceptions to immunity have entailed a → waiver by the foreign State or have concerned claims related to immovable property (not in use for diplomatic purposes), to hereditary property or gifts, or to *bona vacantia*, situated in the forum State.

The starting point after World War I for a trend towards restricting immunity by way of treaties was the Paris Peace Treaties of 1919 and 1920 (→ Peace Treaties after World War I). They denied the defeated States any rights, privileges, or immunities of sovereignty when engaging in international trade (see e.g. → Versailles Peace Treaty (1919), Art. 281). Many bilateral treaties followed the trend of restricting immunity, in particular with regard to commercial transactions or commercial property of State trading missions, State-owned or State-controlled enterprises, agencies, or → State ships engaged in international trade (e.g. the Treaties between Germany and the Russian Socialist Federative Republic of May 6, 1921 (LNTS, Vol. 6, p. 267) and of October 12, 1925 (LNTS, Vol. 53, p. 7)).

The most important multilateral treaty restricting immunity was the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, of April 10, 1926 (LNTS, Vol. 176, p. 199), with its Additional Protocol of May 24, 1934 (LNTS, Vol. 176, p. 214). It was ratified successively by 19 States, although not by the United States and not until 1972 by the United Kingdom.

After World War II, in a period of rapid expansion of international economic relations and the extensive participation of States, their subdivisions, agencies and instrumentalities in them, the concept of functionally limited immunity became prevalent in State practice and legal doctrine. It recognizes an obligation under general international law to accord immunity only with regard to the foreign State's conduct *jure imperii* and to its property serving public purposes, leaving it to the forum State whether or not to grant immunity for conduct *jure gestionis* or with regard to non-public property. Supreme and superior courts of other countries also adopted this doctrine: e.g. France (Procureur-Général près la Cour de Cassation v. Vestwig, Annual Digest, Vol. 13, p. 78), Austria (Hoffmann v. Dralle, ILR, Vol. 17, p. 155), Federal Republic of Germany (Embassy of Iran, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 16, 27 (1963); Philippine Embassy Account, BVerfGE 46, 342 (1977); National Iranian Oil Company Case, BVerfGE 64, 1 (1983), ILM, Vol. 22 (1983) p. 1279), United States (Tate letter, DeptStateBull, Vol. 26 (1953) p. 984, Alfred Dunhill of London, Inc. v. Republic of Cuba, ILM, Vol. 15 (1976) p. 735), Great Britain (Philippine Admiral, (1976) 1 All E.R. 78 (PC); → Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria (1977) 2 W.L.R. 356, (CA)), Pakistan (Qureshi v. Union of Soviet Socialist Republics, ILM, Vol. 20 (1981) p. 1060); this doctrine was also enacted by special legislation in a number of States (United States Foreign Sovereign Immunities Act of 1976; State Immunity Act of the United Kingdom, 1978 (c. 36), ILM, Vol. 17 (1978) p. 1123; Singapore, 1979; Republic of South Africa, 1981; State Immunity Ordinance of Pakistan, 1981; Canada, 1982, ILM, Vol. 21 (1982) p. 798; Australia, 1985, ILM, Vol. 25 (1986) p. 715). Many bilateral treaties, with regard to State-owned or State-controlled enterprises, agencies or trade missions, provide only functionally restricted immunity (e.g., the → Treaties of Friendship, Commerce and Navigation of the United States with Italy, February 2, 1948, UNTS, Vol. 79, p. 171; Ireland, January 21, 1950, UNTS, Vol. 206, p. 269; Israel, August 23, 1951, UNTS, Vol. 219, p. 237; Japan, April 2, 1953, UNTS, Vol. 206, p. 143; Germany, October 29, 1954, UNTS, Vol. 273, p. 3; for Swiss treaties see Entscheidungen des schweizerischen Bundesgerichtes (BGE), 82 I 75, 86 et seq.; Soviet Union treaties with Germany, April 25, 1958, UNTS, Vol. 346, p. 71; France, September 3, 1951, UNTS, Vol. 221, p. 92; Austria, October 17, 1955, UNTS, Vol. 240, p. 289; Boguslavskij, p. 153; UN Materials, p. 131). A number of multilateral treaties keep within this trend (e.g. the UN Conventions on the High Seas (UNTS, Vol. 450, p. 82) and on the Territorial Sea and the Contiguous Zone (UNTS, Vol. 516, p. 205) both concluded April 29, 1958; Convention on the

Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965 (UNTS, Vol. 575, p. 159); Convention on Civil Liability for Oil Pollution Damage, November 29, 1969 (UNTS, Vol. 973, p. 3; see UN Materials, p. 150), most comprehensively the European Convention on State Immunity with its Additional Protocol of 1972).

Efforts to codify on a universal level the international law on State immunity undertaken by the → League of Nations (see LoN Doc. C.202.M.76.1927.V.) and the → United Nations (see ILC, Reports, op. cit.) up to 1984 had not brought about a universal convention (→ Codification of International law). The → Asian-African Legal Consultative Committee in 1960 as well as the Draft Convention on Jurisdictional Immunity of States approved in 1983 by the Inter-American Juridical Committee of the → Organization of American States (ILM, Vol. 22 (1983) p. 292) support a functionally restricted immunity. The same is true with efforts on a private level (see → Institut de Droit International, Resolution of September 11, 1891, Ann-IDI, Ed. Nouv., Vol. 2, p. 1215 and of April 30, 1954, AnnIDI, Vol. 45 II (1954) p. 293; Harvard Draft, AJIL, Vol. 26, Supp. (1932) p. 451; German Society for International Law, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 8 (1968); → International Law Association (ILA), Montreal Draft Convention on State Immunity, September 4, 1982); contemporaneous publicists largely support this doctrine.

A number of States still grant as well as assert comprehensive immunity, based, in their opinion, on general international law, e.g., the Soviet Union (see UN Doc. A/CN.4/371 (1983)), the Eastern European countries, Portugal, Brazil, Ecuador, the People's Republic of China (Russell Jackson v. The People's Republic of China, ILM, Vol. 22 (1983) p. 1082, at p. 1099), Sudan and Syria (see UN Materials, p. 557 et seq.).

From this development two general conclusions can be drawn: a) Contemporary general international law requires the forum State to grant immunity from jurisdiction (and execution) when and in so far as the claim of action against the foreign State is based on its conduct *jure imperii*, or execution is sought against its property serving public purposes of the foreign State; b) The forum State under public international law is at liberty but not obliged to grant immunity beyond this, i.e. with regard to a conduct or property *jure gestionis* of the foreign State.

3. State Immunity as a Principle

The customary and treaty rules on State immunity are expressions of a principle of immunity under public international law. The obligation to grant immunity to foreign States in respect of their conduct or property *jure imperii* today forms part of positive international law, not merely of → comity, regardless of whether under municipal law immunity is treated as a political question or as a question of law on which the courts may rule. Opinions to the contrary (e.g. see Lauterpacht, p. 220 et seq.) can no longer be upheld. For the development of public international law rules on immunity, the increasing trend to subject States to the jurisdiction of their domestic courts has played an important role. It did not, however, result in a mere *renvoi* by international law to the respective municipal law (see, e.g. the assimilative theories of Staehelin and Badr); State immunity under public international law, rather, has gained its own substantive legal content. With respect to conduct or property *jure imperii*, the forum State must not deviate from its obligation to accord immunity for a mere lack of → reciprocity on the part of the foreign State, but only under the conditions of a → reprisal, i.e. of an actual violation of its rights under international law by the foreign State.

The principle of State immunity has been considered as an expression of the dignity of sovereigns and of the sovereign equality of States (e.g., → Aramco Arbitration). This has been countered with the rather formalistic argument that equality was not violated if all States would mutually be subjected to the jurisdiction of other States. Jurisdiction of the territorial State as well as immunity of the foreign State are both principles of international law based on the independence of sovereign States, a fundamental principle. Under international law neither principle takes priority over the other, both their limits being governed by international law; the decision in the → Lotus Case does not support a general priority of national jurisdiction. Under international law, therefore, there does not exist a presumption in favour of immunity or of jurisdiction, nor an

obligation to provide for either presumption in domestic law. In case of conflict, the solution must be found by their adequate balancing in view of the fundamental principle of independence and other basic principles of international law.

The principle of independence protects essentially the substance and the exercise of the public, governmental functions of States, but not their conduct or property outside this public sphere. Restrictions of immunity outside this scope, therefore, do not conflict with the principle of independence; they may, moreover, serve to assure judicial protection for private persons, and thereby support the development of a → human rights → minimum standard of international procedural justice. The concept of absolute immunity, in order to do justice to private persons, only leaves the ways and means of → diplomatic protection. This is barred or inadequate in many cases, as when there has been no violation of international law by the foreign State, and, moreover, overburdens diplomatic and political relations with matters better handled by independent, impartial national or international courts. Absolute immunity granted by the forum State, on the other hand, does not amount to a → denial of justice.

4. *Scope of Immunity*

In principle, only foreign sovereign States are protected by the rules of public international law on State immunity, i.e. States subordinated to no foreign positive legal order other than international public law.

(a) State immunity and recognition

There is no consistent State practice to support a customary rule which would require a grant of immunity to States not recognized by the forum State. British and United States practice tend to accord immunity to recognized States only. As → recognition has retroactive effects, immunity eventually will have to be accorded retroactively during proceedings on the merits or on execution.

If the foreign State but not its → government has been recognized by the forum State, the latter must accord immunity to the State with regard to its conduct or property *jure imperii*. Should the foreign government under the procedural law of the forum State be barred from pleading immunity in such cases, the forum State, nevertheless, must still grant immunity. This may be accomplished, e.g. by the courts of the forum State taking *ex officio* note of the question of immunity. British court practice would appear to deviate from this view (The Annette, The Dora (1919) Law Reports, Probate, Divorce & Admiralty Division 105), while United States practice tends to support it (Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372 (1923); Alexy, p. 102 et seq.).

The lack or suspension of → diplomatic relations does not affect the obligation to grant immunity (Schaumann, p. 48).

(b) Subdivisions of States

Organs or organizational subdivisions of the foreign State's central government without separate legal personality as such, such as heads of States, prime ministers, ministers acting in their official capacity, ministries, departments, agencies, and offices – for purposes of international immunity – form part of the foreign State, even if they are capable of suing or being sued under their domestic law or under the law of the forum State.

There is no consistent State practice with regard to immunity (*ratione personae*) of constituent states of a federal State, or provinces, regions, districts, municipalities, or of other political subdivisions with separate legal personality distinct from the central government, or of agencies, instrumentalities, or other entities legally distinct from the foreign State. While French courts denied immunity to member States of → federal States (Céara Case, Clunet, Vol. 60 (1933) p. 644; Neger v. Etat de Hesse, Revue Critique de Droit International Privé, Vol. 59 (1970) p. 98, ILR, Vol. 52, p. 329), United States courts tended to accord it even before enactment of the Foreign Sovereign Immunity Act. The cities of Geneva, Rome and Polish districts have been denied immunity by French (Dalloz, 1894 II 513, 1895 I 344), United States (Sneider v. City of Rome, ILR, Vol. 15, p. 131) and German courts (Entscheidungen des Reichsgerichts in Zivilsachen 110, 315). Under general international law, therefore, no obligation of the forum State to grant immunity (*ratione personae*) to political subdivisions can now be ascertained.

Art. 28(1) of the → European Convention on State Immunity does not extend protection by

immunity to the constituent states of a federal State or to any legal entity of a contracting State which is distinct therefrom and is capable of suing or being sued, even if it has been entrusted with public functions. It provides, however, that a contracting federal State may declare that its constituent states may invoke the provisions applicable to contracting States and have the same obligations (Art. 28(2)). The British State Immunity Act follows a similar approach (sec. 14 (5)(6)). The American Act, on the other hand, takes a broad view of foreign States, including their political subdivisions, agencies or instrumentalities (sec. 1603 (a) and (b)).

The question of immunity of these subdivisions and entities *ratione personae* must be distinguished from whether and to what extent the forum State may entertain proceedings in respect of acts performed by them in the exercise of sovereign authority, i.e. *jure imperii*, or of their property serving public purposes (immunity *ratione materiae*). Art. 27(2) of the European Convention, for example, expressly precludes such proceedings.

(c) State-owned and State-controlled enterprises

State-owned enterprises without a distinct legal personality are covered by the immunity of the foreign State *ratione personae*. The situation is different, however, for enterprises with distinct legal personality where a substantial part of the shares or of other ownership interest is owned by the foreign State, or which are in any other way under the special control or prevailing influence of the foreign State.

Under general public international law, the forum State has no obligation to recognize the distinct legal personality of the foreign State's enterprises, within the limits of arbitrary denial. In many States recognition is assured via their conflict of law rules which respect, for example, incorporation under the foreign State's law. English courts tend to lift the corporate veil and consider as decisive the actual relation between the foreign State and its enterprise depending on the functions entrusted to it and the extent of State control actually exercised (Tass Case (1949) 2 All E.R. 274; Lord Denning in Trendtex, op. cit., p. 484; Kincaid, 115). State practice with regard to immunity (*ratione personae*) of such entities, again, is rather inconsistent; it does not result in an obligation, under general international law, to accord them immunity *ratione personae*. There appears to be a trend by States to seek a solution by resort to the concept of immunity *ratione materiae* of the conduct or property of such entities. This involves not bringing proceedings against them with regard to their conduct or property if and in so far as they were acting *jure imperii*, but denying them immunity if and in so far as, in corresponding circumstances, immunity would be denied to the foreign State itself (see European Convention, Art. 27(2) and (3); United Kingdom Act, sec. 14 (1) (2); United States Act, sec. 1603 (b), 1605; BVerfGE 64, 1 (1983)). This is practised in particular with regard to central banking institutions, where courts have frequently left undecided the legal status of the institution but have based their decisions upon the nature of the conduct underlying the claim (e.g. Epoux Martin v. Banque d'Espagne, Revue Critique de Droit International Privé, Vol. 42 (1953) p. 425; Blagojevic v. Banque du Japon, Clunet, Vol. 103 (1976) p. 687; S.A. Dhlellemes et Marusel v. Banque Centrale de la République de Turquie, Pasicrisie, 1965 II 42; Lord Denning in Trendtex, ILM, Vol. 16 (1977) p. 471, at p. 485; Nonresident Petitioner v. Central Bank of Nigeria, ILM, Vol. 16 (1977) p. 501; National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria, ILM, Vol. 16 (1977) p. 505, 448 F. Supp. 622 (1978); Gramlich, p. 545). The United States Foreign Sovereign Immunities Act (sec. 1611 (b) (1)) and the United Kingdom State Immunity Act (sec. 14(4)) contain special provisions regarding execution with respect to central banks and other monetary institutions.

Immunity *ratione personae* of a State-owned or State-controlled entity should be determined according to its principal functions, whether *jure imperii* or *jure gestionis*; and in case it exercises both, then according to the actual centre of its activities. If the entity qualifies in general as a "public" entity, it may claim, under general international law, immunity *ratione personae* with regard to its conduct or property *jure imperii*. This solution spares the courts of the forum from having to examine the thorny question of whether and to what extent the entity is owned or controlled by the foreign State.

5. *Exceptions from Immunity*

(a) Waiver of immunity

The forum State may exercise its jurisdiction if and to the extent that the foreign State has waived its immunity. This has been a traditionally recognized exception from the obligation to grant immunity. While under a system of absolute immunity the → waiver has a constitutive function for assuming jurisdiction by the forum State, its main practical importance under a system of functionally restricted immunity lies with its clarifying effect. As far as covered by the waiver, the courts of the forum need no longer qualify the foreign State's conduct as *jure imperii* or *jure gestionis* for the purpose of ascertaining their jurisdiction in regard to public international law; they may still deny their international competence or other requirements of admissibility of the respective proceedings, depending on the applicable law.

A waiver may be accomplished expressly or impliedly. An explicit waiver may be made by unilateral declaration, by international agreement, by a provision in a contract, either for a specific case or for categories of acts. A waiver may be implied from the foreign State's participation in proceedings before a court of the forum State (except for the purpose of claiming immunity, or of asserting an interest in the proceedings in circumstances such that it would have been entitled to immunity had the proceedings been instituted against it). A merely passive reaction by the foreign State (not answering a suit, not appearing at the proceedings), as a rule, cannot be deemed an implied waiver. Agreements to submit disputes to arbitration must be interpreted whether or not they constitute waivers. If they provide for international arbitration (e.g. by the Economic Commission for Europe, the → United Nations Commission on International Trade Law, → International Chamber of Commerce), they may document exclusion of any national jurisdiction. If they provide for the application of the rules of arbitration of another State, the foreign State must be deemed to have submitted to the arbitration as well as to the procedures related to this arbitration before the courts of that other State and admissible under the arbitration agreement, such as proceedings in respect of the validity or interpretation of the arbitration agreement, subsidiary nomination of arbitrators, auxiliary judicial acts, or nullification of the arbitral decision and so forth.

Under general international law, a provision in a contract between the foreign State and its private partner specifying that the contract is to be governed by the law of the forum State or another State (proper law of the contract), cannot as such be regarded as a waiver of immunity by the foreign State (cf. United Kingdom State Immunity Act, sec. 2 (2)). A *prorogatio fori*, relating to the forum State, may be considered by it as a waiver of immunity by the foreign State, at least for proceedings on the merits.

In order to be valid, a waiver must originate in a competent organ of the foreign State. Besides the organs generally competent under international law to represent the foreign State or expressly authorized for the specific case, other organs are deemed also to have such authority in matters which fall under the scope of their respective tasks or functions, such as ministers or heads of government departments for the scope of their respective ministries or departments. The same is true for the acting head of the foreign State's diplomatic mission in the forum State and for any person who has entered into a contract on behalf of and with the authority, still valid, of the foreign State in respect of proceedings arising out of the contract. Political subdivisions of the foreign State and its State-owned or State-controlled enterprises, acting through their competent organs, are likewise deemed capable of waiving immunity in respect of cases falling under the scope of their activities. The foreign State's agent for the specific proceedings is in particular deemed to have authority to waive immunity. With regard to an excess of authority or acts *ultra vires* by organs declaring a waiver, the provisions of the → Vienna Convention on the Law of Treaties (Art. 46) would appear to be applicable by analogy.

Unilateral declarations of waiver must be received by the competent organs of the forum State (→ Unilateral Acts in International Law). Besides its organs generally competent under public international law to represent the forum State, these include the courts of the forum State when dealing with the specific case. The situation is less

clear with respect to waivers made in a contract between the parties concluded prior to a dispute. With regard to the principle of → good faith, in public international law, the forum State may deem such provision to constitute a waiver as soon as it is actually introduced by either party in the proceedings before the court of the forum.

Under international law, the forum State may deem a waiver to be revocable only in accordance with the terms of the waiver, and it may consider it irrevocable as soon as the foreign State has taken any procedural step before the courts of the forum relating to the merits. If the foreign State has taken such steps without knowledge of facts entitling it to immunity, it is not deemed to have submitted to the proceedings if those facts could not reasonably have been ascertained and if immunity is claimed as soon as reasonably practicable.

The scope of a waiver must be ascertained by interpretation, according to the relevant rules of international law, of its explicit terms, or in case of an implied waiver, by evaluation of the circumstances from which it is implied.

If immunity has been waived in respect of a specific action brought against the foreign State, the scope of the waiver is limited to the subject-matter of the action, i.e. to the tenor of the eventual decision requested by the plaintiff as a legal consequence of the facts submitted, at the time the waiver was made; amendments or changes of the subject-matter by the plaintiff extending it are not covered by the (original) waiver. This may be different with waivers made prior to specific cases and related to categories of possible future disputes; change of the subject-matter of a specific action may then still come within the scope of the waiver.

Under a system of restricted immunity, the foreign State under international law is not entitled to immunity with respect to any counterclaim or set-off – irrespective of the amount thereof – for which it would not be entitled to immunity had such action or claim been brought in a separate action against it (domestic law of the forum State may provide more stringent rules on their admissibility). A problem of immunity remains, however, when the counterclaim or set-off against the foreign State is based on its conduct or property *jure imperii*. Absent any express waivers to the contrary, immunity may only be denied under general international law with respect to such counterclaims and set-offs which arise out of the same legal relationship, transaction, or occurrence that are the subject-matter of the claim of action by the foreign State, and to the extent that they do not seek relief exceeding in amount or differing in kind from that sought by the foreign State. To that extent a denial of immunity is justified on the ground that the foreign State, when bringing a suit, takes advantage of the judicial system of the forum State. It may then be confronted with all the possibilities of defence available to the respondent under the procedural and substantive law applicable before the courts of the forum to the extent that they are used as a shield against the claim, not as a sword beyond (Stooke v. Taylor (1880) 5 Q.B. 569, 575; Damian, op. cit.). Sec. 1607 (b) of the United States Act would appear to deviate from these limits in permitting the courts to adjudicate the counterclaim even where it exceeds the foreign State's claim (and arises from the same transaction or occurrence); the same appears to be true with Art. 1(2)(b) of the European Convention on State Immunity.

Having waived its immunity, the foreign State may be subjected to the procedural law of the forum State, including the rules on evidence, costs, and security for costs, except for any measures of coercion or penalty for its failure or refusal to disclose any documents or evidence (cf. Art. 18 of the European Convention). Absent a provision to the contrary the scope of a waiver extends to any appeal or other judicial remedies related to the proceedings.

(b) Proceedings relating to immovable or heritable property

Under general international law the forum State has no obligation to accord foreign States immunity from jurisdiction as regards any proceedings in which rights, obligations, or interests in immovable property situated in the forum State, or in property acquired by hereditary succession or gift, are at issue. This includes proceedings relating to possession, eviction, use, mortgages, nuisance, liabilities as owner or occupier, and actions in trespass, with the exception of (public) dues or taxes. While the terms "rights, obligations and

interests" may be understood broadly, there is required a certain link with the property. Whether proceedings relating to mere payments allegedly due from the rental or lease of such property come within their scope may be doubtful, as they do not necessarily presuppose ownership of the claimant; by their legal nature, however, they may fall under claims relating to the foreign State's conduct *jure gestionis*.

6. *Immunity from Adjudication*

(a) Service of process

When a proceeding is commenced against a foreign State, the forum State is not prohibited under international law from serving any writ, complaint, summons, or other document required to be served for instituting the proceedings, to appoint the date for entering an appearance or a plea, whether or not there exists any doubt with respect to the immunity or non-immunity of the foreign State. The courts of the forum have jurisdiction to establish whether they may exercise jurisdiction or not. Even where immunity appears to be established from the very beginning, service of process will not amount to a violation of international law, as the foreign State may waive its immunity.

Service of process must be effected on the competent organ of the foreign State and in forms permissible under international law. While the head of the Ministry of Foreign Affairs of the foreign State, under international law, is always deemed authorized to accept service, such is not the case, absent special authorization, with the head of the diplomatic mission of the foreign State in the forum State. With respect to its political subdivisions legally distinct from the foreign State it would appear appropriate, under international law, to effect service on the Foreign Minister of the central government of the foreign State (cf. para. 1608 (a) (3) and (4) of the United States Act). With regard to State-owned or State-controlled entities which are legally distinct from the foreign State, service must be effected on the organ authorized to represent the entity for such service.

Service may be effected, moreover, in accordance with any special agreement for service between the plaintiff and the foreign State or in any manner to which the foreign State has agreed; it is a question of the domestic law of the forum State whether such service is considered effective. Agents of foreign States in court proceedings are deemed authorized to receive service.

Service may be effected by transmittal of the relevant document by the Foreign Minister of the forum State to the Foreign Minister of the foreign State, through the diplomatic channels of the foreign State (→ Diplomacy; → Diplomatic Agents and Missions), in accordance with an applicable international convention on service of judicial documents (e.g. the Hague Convention of November 15, 1965), or under a special arrangement for service between the plaintiff and the foreign State or its entities. While effecting service via diplomatic ways and means does not constitute the rendering of a public act by the forum State on the foreign State's territory, service effected by non-diplomatic authorities of the forum State on the territory of the foreign State, if undertaken without the foreign State's consent, amounts to a violation of international law (→ Administrative, Judicial and Legislative Activities on Foreign Territory; → Internationally Wrongful Acts). Accordingly, service abroad, e.g. by bailiffs, sheriff's officers, or other authorized process servers or by post (whether registered or not), unless consented to by the foreign State, is in violation of international law. Service of process, even by post, within the premises of the diplomatic mission of the foreign State would infringe the inviolability of diplomatic missions. Under general international law there is no duty on the part of the foreign State to cooperate in receiving or accepting the service of process. If it declines to do so, the forum State may effect service by public note.

(b) Default proceedings

In default of appearance, a decision against the foreign State may be given in the following circumstances. Service of process upon the foreign State, its political subdivisions, or entities legally distinct from it must have been effected. A reasonable period of time must have elapsed between the effected service and the date of the hearing (cf. sec. 1608 (d) of the United States Act, sec. 12 (2) of the British Act; Art. 16(4) of the European Convention). Finally, the decision must

not be based on factual grounds which had not been communicated in time to the foreign State.

The forum State must provide for an examination of the question of immunity, if necessary *ex officio*; no fiction or presumption in favour of non-immunity is permissible. As soon as immunity has been established the proceedings must be terminated as to that defendant. In case of a *non liquet* with respect to the question of immunity, courts have always in practice terminated the proceedings. If a case were continued beyond the issue of immunity the forum State would run the risk of violating international law, should immunity turn out to have existed from the very beginning.

(c) Determining nature of foreign State's activity

Under contemporary public international law the forum State is obligated to accord a foreign State immunity from adjudication with respect to proceedings relating to claims of action based on conduct (acts or omissions, legal or illegal) of the foreign State performed in the exercise of its sovereign (public) power, i.e. *jure imperii*. It has no obligation to accord immunity with respect to proceedings relating to claims based on a conduct of the foreign State performed *jure gestionis*.

It has been argued that in order to qualify a foreign State's conduct as *jure imperii* or *jure gestionis* general international law referred to the law of the forum State, the *lex fori*, because in general it did not itself contain substantive rules to make such determinations, and it eventually merely limited such determinations (cf. IDI, AnnIDI, Vol. 45 II (1954) p. 294; BVerfGE 16, 27 (62)). This view appears to be correct in so far as general international law does not preclude the forum State from providing in its domestic law for criteria for such determination; international law is interested in the result conforming with the obligations it imposes upon States, not in the techniques by which the forum State may achieve such result. Whatever criteria the *lex fori* may provide, their results in given cases when judged according to international law must be in conformity with the obligation to grant immunity with respect to a conduct *jure imperii* of the foreign State.

This implies that the final limits for the qualification of a conduct as *jure imperii* of necessity are governed by autonomous substantive criteria of international law (IAMAW v. OPEC, 477 F. Supp. 553 (D.C. Cal. 1979)), not varying from one national *lex fori* to the next. In order to ascertain these limits, the *ratio* of the principle of immunity is decisive: it protects, *vis-à-vis* other subjects of international law, those functions of States which are constitutive for their independence and sovereignty and are essential to their exercise.

The courts of the forum may have to obey their domestic law for the qualification of the foreign State's conduct; under international law these functions and their protection by immunity is to be determined according to the autonomous legal notions of international law. To achieve this a comparative view of municipal law is indispensable, particularly regarding distinctions between private and public law or definitions of conduct which may be performed by public institutions exclusively or by private persons as well. But this can only be a heuristic view, not a normative *renvoi* to domestic law. Otherwise, central notions of international law of State sovereignty and independence, together with the normative function of international law, would be undermined.

The scope of the functions protected by immunity, on the other hand, may vary with different historical periods, not unlike the changes in the scope of "domestic affairs" under the principle of → non-intervention, as in the field of the protection of → human rights. At present, the legislative and judicial functions of States, in particular, their functions to establish and preserve law and order, to maintain a legal and administrative framework for international relations, the exercise of diplomatic and defence powers and similar functions fall under this scope. In order to be covered, however, it will not suffice that conduct merely purports to be for the common good of the foreign State, or is somehow related to it; it rather must be a direct exercise of the respective public function.

It is no surprise that in State practice many problems have emerged in delimiting the spheres of *acta jure imperii* from other State conduct.

In the development of functionally restricted immunity the decisive step was that the criterion central to designating conduct as *jure imperii* or *jure gestionis* has shifted from the purpose of the foreign State's conduct to its intrinsic legal nature.

While the decisions granting immunity, such as the cases of The Parlement Belge, Porto Alexandre, and Pesaro were based on the public purpose pursued by the foreign State, under the British, the Canadian and the United States Acts the legal form or nature of the conduct has as a rule become a decisive criterion for the qualification in question (see respectively sec. 3(1)(b); sec.2; sec. 1603(d)). The same is true with judicial case-law in other countries (e.g. Austria: Hoffmann v. Dralle; Federal Republic of Germany: Embassy of Iran Case). Nevertheless, it cannot be derived from the obligation under international law to grant immunity for conduct *jure imperii* that either criterion would have to be the decisive one under domestic law to the exclusion of the other. International law, again, is not interested in the domestic criteria of qualification but in the result of the forum State's handling a given case. For example, if the foreign State has acted in the forms of private law, this may be a strong indication that it did not act *jure imperii*, and may even place the burden on it in court proceedings to prove its claim to immunity (Primero Congreso del Partido (1981) 3 WLR 328, 341, per Lord Wilberforce). From the point of view of general international law the qualification as *acta jure imperii* requires a consideration of all relevant circumstances. Thus the purpose of an act may be decisive in spite of its legal form or nature, even more so when the foreign State, while acting under the law of some third State, may not be capable of availing itself of any forms of conduct other than private law forms (e.g. Philippine Embassy Account Case, BVerfGE 46, 342).

As a rule, however, the fact that the foreign State has acted in fields or in legal forms which under various domestic legal orders are also open to private persons for the sake of its substantive contents (discounting a possible public purpose of the foreign State's conduct) is a strong indication that such types of conduct are not considered under general international law to be functions essential to sovereignty and independence of foreign States.

Accordingly, the forum State may, without thereby violating general international law, qualify as conduct *jure gestionis*, such issues relating to, *inter alia*:

- commercial activity carried on by the foreign State; its commercial nature may readily be assumed if the kind of activity is customarily carried on for profit, even if the profits go to public budgets or funds;
- any contract for the supply of goods or services, even if those goods or services after their supply are to be used for public purposes, e.g. supplying armed forces, constructing fortifications, harbours, public communications, etc.;
- the borrowing of money, or any loan or other transaction for the provision of finance, or any guarantee or indemnity in respect of it;
- intellectual or industrial property rights (patents, industrial designs, trademarks, business names, or similar rights);
- contracts for employment not conferring upon the employee a status to exercise public functions of the foreign State (with employees of diplomatic missions the rule of *ne impediatur legatio* may command the grant of immunity);
- rights arising out of membership in a corporation, association, partnership, or other legal entity not authorized to exercise sovereign authority in respect of the subject-matter in question (cf. e.g. sec. 1605(a)(2) of the United States Act; secs. 3(1)(3), 4(1), 5, 7 and 8 of the British Act; Arts. 4 to 8 of the European Convention).

(d) Claims based on tortious conduct

The distinction between *acta jure imperii* and *acta jure gestionis* was also made by several courts with respect to claims of tortious conduct by the foreign State (e.g. In re Palestine Railways Administration, Annual Digest, Vol. 11, p. 146; Aboutebout v. Etat Hellénique, RevHellén, Vol. 1 (1948) 279; Landgericht Kiel, Juristenzeitung, 1954, 117; Austria: Juristische Blätter, 1961, 43). Recent developments appear to deviate from this: Art. 11 of the European Convention denies immunity in proceedings which relate to redress for injury to the person or damage to tangible property (provided that the fact which occasioned the injury or damage occurred in the territory of the forum State, and that the author of the injury or damage was present in that territory at the time when those facts occurred. In this way the European Convention has normatively connected the international competence of the forum State with its jurisdiction). Applied to that extent

between the contracting States also to tortious conduct *jure imperii* of the foreign State, this deviation from general international law meets no objection. Similar provisions, with some variations, in the United States, British and Canadian Acts (respectively, sec. 1605(a), sec. 5 and sec. 3) however, if applied to conduct *jure imperii* of the foreign State will meet objections under general international law. So far, despite lower court decisions under the United States Act in Letelier v. Republic of Chile, 448 F. Supp. 665, 668 (D.D.C. 1980) and De Sanchez v. Central Bank of Nicaragua, 515 F. Supp. 900, 914, such application does not have the support of State practice sufficiently universal to allow derogation from general international law. The main goal behind these provisions – to deny immunity with regard to claims relating to traffic accidents – can be met by qualifying participation in traffic as conduct *jure gestionis*, which incurs no objection under international law (see Austria: Juristische Blätter, 1961, 43). Whether such deviation may be accomplished via treaties (see Art. III, ILA Montreal Draft) is yet to be seen.

(e) Expropriation

Sec. 1605(a)(2) of the United States Act denies immunity in any case in which rights in property taken in violation of international law are at issue and that property or any property exchanged for it is present in the United States in connection with a commercial activity carried on in the United States by the foreign State, or such property is owned or operated by an agency or instrumentality of the foreign State which is engaged in a commercial activity in the United States. In so far as this provision covers conduct *jure imperii* of the foreign State, its application would appear to be justified under general international law only if it met the conditions of a → reprisal by the United States against the foreign State. Confiscatory acts remain acts *jure imperii* even if they violate international law. As between contracting parties a treaty provision to this effect would not meet similar objections.

7. Immunity from Execution

(a) Survey of State practice

Immunity from enforcement measures (arrest, attachment, execution, etc.) is to be distinguished from immunity from adjudication. Measures to secure or realize execution of decisions more directly affect the foreign State than do adjudicative acts. Respective immunity rules, accordingly, have to some extent undergone different development.

State practice since the 19th century has generally been uniform in granting foreign States absolute immunity from enforcement measures even where the forum State had denied immunity from adjudication. Exceptions to this were, in particular, Italy (e.g. Hamspohn v. Bey di Tunisi, Foro Italiano, 1887 I 474; Rumania v. Trutta, Giurisprudenza Italiana, 1926 I 774), the Bavarian Court of Conflicts (Heizer v. Austria (1885), op. cit.), and Switzerland (Dreyfus Case (1918), BGE Vol. 44 I 49), with French courts being inconsistent for some time. A small number of bilateral or multilateral treaties waived immunity from enforcement in very limited fields (e.g. Arts. 1 and 2 of the Brussels Convention of 1926 concerning immunity of State vessels with regard to procedures *in rem*; Art. 3(1)(a) of the Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft of May 29, 1933 (LNTS, Vol. 192, p. 289)). The most comprehensive bilateral treaty appears to have been the Austro-Hungarian treaty on mutual legal assistance of 1914/1924 which waived immunity from execution if a contracting State conducted a commercial enterprise in the forum State. Traditional exceptions to the rule of comprehensive immunity have been enforcement measures resulting from decisions concerning immovable and heritable property, gifts or *bona vacantia* situated in the forum State (see above), with execution limited to the object at issue.

Since the end of World War II an increasing and considerable number of courts have no longer granted absolute immunity from enforcement measures, but rather restrict immunity to property serving public purposes of the foreign State (e.g. Italy: Amministrazione del Governo Britannico e Comune di Venezia v. Guerrato, Raccolta ufficiale delle sentenze e ordinanze della corte costituzionale, Vol. 2 (1963) 572; Belgium: Soco belge v. Etat hellénique, Clunet, Vol. 79 (1952) p. 244, Szczesniak c. Baker, Pasicrisie, 1957 II 38; Netherlands: Cabolent v. National Iranian Oil Company, ILM, Vol. 9 (1970) p. 152; SEEE v.

Yugoslavia, ILM, Vol. 14 (1975) p. 571; Switzerland: République Arabe Unie v. Dame X (1960), BGE 86 I 23; (1977) BGE 103 III 1; BGE 104 Ia 367; France: Vestwig Case, Annual Digest, Vol. 13, p. 78; Cavnos Case, Revue Critique de Droit International Privé, Vol. 67 (1978) p. 532; Austria, ILR, Vol. 21, 101; Neustein v. Indonesia (1958), Netherlands Yearbook of International Law, Vol. 10 (1979) p. 107; Federal Republic of Germany: Philippine Embassy Case, BVerfGE 46, 342 (1977); National Iranian Oil Company Case, BVerfGE 64, 1 (1983), ILM, Vol. 22 (1983) p. 1279).

The immunity acts of the United States (sec. 1610(a)), the United Kingdom (sec. 13(4)), Canada (sec. 11(1)), Pakistan, Singapore and South Africa restrict immunity from enforcement measures along similar lines. A number of States still claim and grant absolute immunity from enforcement measures, e.g. the Soviet Union (Art. 61 of the Law of December 8, 1961), the People's Republic of China, Yugoslavia, Brazil, Chile, Syria. Multi- and bilateral treaty practice since 1945, although covering only limited fields of State activities, nevertheless equally reflects the trend towards restricting immunity (e.g. Art. 20(3) of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958; Art. 28(3) of the 1982 Law of the Sea Convention; for numerous bilateral treaties see UN Materials, p. 131 et seq.). Art. 23 of the European Convention excludes execution or preventive measures against the property of a contracting State in the forum State except where and to the extent that the foreign State has expressly consented thereto in writing in any particular case. This provision, however, must be seen in the context of Art. 20, secs. 1a, 1b, 2 and 5 and Arts. 21 and 26 of the European Convention and Art. 1, sec. 1(d) of the Additional Protocol which provide for a substantive and procedural régime in order to ensure that decisions rendered against a contracting State will be given effect – a régime more favourable to the private plaintiff than general international law. Learned private institutions and authors increasingly have supported a doctrine of restricted immunity from enforcement measures.

From this development it is justified to conclude that under present general international law the forum State is obligated to accord the foreign State immunity from enforcement measures only with regard to property serving public (sovereign) purposes of the foreign State.

(b) Conditions for enforcement

In order to be admissible under general international law enforcement measures will have to meet several conditions and fall within certain limits:

There must exist, as against the foreign State, a court decision capable of being enforced, or a document automatically enforceable without court decision, from which can be ascertained the substantive claim raised. Dealing with this claim must not have been precluded by the foreign State's immunity from adjudication. The decision of a court (of the forum or of a third State) which lacked jurisdiction over the respondent foreign State due to the latter's immunity from adjudication must not be enforced by the forum State against the foreign State. Thus *fiat* or writ of execution of a foreign judgment must not be rendered, unless the foreign State has waived its immunity from execution. The same is true when the foreign State has succeeded the debtor and execution is now sought against it.

Domestic or foreign arbitral awards against the foreign State may be enforced by the forum State if the claim awarded is based on conduct *jure gestionis* of the foreign State or if its waiver of immunity also covers enforcement measures in the forum State. The forum State under general international law may deny the exequatur to the foreign arbitral award if the award suffers from a lack of jurisdiction or of international competence of the arbitral body.

Depending on the special circumstances of a particular case, the forum State may be obliged out of good faith to stay enforcement measures for an appropriate period of time.

(c) Limits on the objects of enforcement

Committal orders (personal arrest) or fines for not fulfilling a debt against a person representing the foreign State as a judgment debtor are inadmissible (aside from possible personal immunities and inviolabilities) if the person is entrusted with public functions of the foreign State in the forum State. International law, on the other hand, does not require privileges to be accorded to persons not entrusted with such functions but

acting, for example, in a purely commercial capacity.

As a rule, the forum State must not levy any kind of enforcement measures (interim protective measures, garnishing of bank accounts, stop orders, vesting orders, seizures, attachments, distraints, sequestration, etc.) against the foreign State with regard to property serving the public purposes of the foreign State unless the foreign State has waived its immunity from execution covering the object in question.

Property in this context means any tangible object (movable or immovable), right (claims, liens, mortgages, intellectual, industrial property, etc.), or legal interest owned by, in the possession of (whether immediate or constructive), or under the actual control of the foreign State. International law does not prevent the burden of proof from being placed on the foreign State to educe facts conclusive of its property in this sense (see Lord Denning in Rahimtoola v. Nizam of Hyderabad (1958) A.C. 379, 415; Juan Ysmael v. Indonesia (1955) A.C. 72, 89 (PC)). There is no sufficient State practice from which to deduce a rule of general international law that immunity would have to be accorded in cases where the foreign State had not acquired the property until after the enforcement measure had been levied.

When it is established that the object of an intended measure of enforcement is the property of the foreign State, the forum State must accord immunity if the object is serving the public purposes of the foreign State. If such service is apparent from the particular circumstances of the case, the forum State is bound to abstain from measures in regard to the object in question. If that is not apparent, the forum State may request the foreign State to render credible by appropriate means the circumstances conclusive for such use (BVerfGE 46, 342 (400)); if rendered credible, the forum State has to take these circumstances as established.

Taking of evidence which results in or brings about the inherent danger of intruding into the internal affairs of the foreign State or of its authorities entrusted with public functions (inspecting its premises, files, bank account transactions, hearing testimony by its officers or employees, etc.) is inadmissible even where diplomatic or consular privileges do not apply.

Whether an established use qualifies as serving public purposes may be determined by the forum State according to its own legal order (*lex fori*) or according to the foreign or a third State's law, as the case may be. But any qualification which results in a denial of immunity must not violate the limits that general international law or treaty law draws for such qualification. This implies, again, that the final limits for the qualification of a use as serving public purposes are governed by autonomous criteria of international law, as determined along the lines indicated above.

Property protected by the foreign State's immunity comprises, in particular, objects serving its diplomatic or consular functions, objects of a military character or used or destined for use for military purposes (including food, clothing, fuel, office equipment); equipment for maintaining law, order and security; property held for central banking or monetary policy purposes; and property rights in intergovernmental organizations (see Eurofima Case, Swiss Bundesgericht, SchweizJIR, Vol. 31 (1975) p. 219).

State practice tends to accord immunity with regard to property serving postal communications of the foreign State (see Art. 3(1)(a) Convention relating to the Precautionary Arrest of Aircraft of May 29, 1933), while it is more restricted with regard to rolling material of railway communications (see Art. 12 of the Geneva Convention on Railways of December 9, 1923, LNTS, Vol. 47, p. 55; International Conventions concerning the Carriage of Goods by Rail (Art. 56) and Passengers and Luggage by Rail (Art. 52) of February 7, 1970, British Command Papers, Cmnd. 5897, 5898). Property serving the purposes of the foreign State's official news agencies, public radio and television systems need not, as a general rule, under general international law, be considered as serving public (sovereign) functions.

When, after enforcement measures have been taken against property not hitherto covered by immunity, it is turned into public use by the foreign State in order to avoid or escape such measures, its change of function may be disregarded by the forum State unless exceptional circumstances of urgent State necessity relied upon in good faith can be shown by the foreign State.

Property, such as funds in bank accounts, which

has not yet been assigned to serve either public or non-public purposes at the time enforcement procedures are commenced may be denied immunity by the forum State (Swiss Case of République Arabe Unie v. Dame X, (1960) BGE 86 I 23; National Iranian Oil Company Case, BVerfGE 64, 1 (1983)).

Objects serving both public and non-public purposes, if indivisible for enforcement purposes, are protected by the foreign State's immunity; if divisible, the part serving public purposes is covered by immunity. With respect to funds in "mixed" bank accounts, immunity must be accorded unless and to the extent they are earmarked as serving non-public purposes (Alcom Ltd. v. Republic of Colombia (1984) 2 All E.R. 6 (HL)). To establish this qualification the forum State must nevertheless not intervene in the internal affairs of or infringe the foreign State's diplomatic or consular inviolability, e.g. by requiring it to reveal the transactions handled through the current bank account of its diplomatic mission (Philippine Embassy Case, BVerfGE 46, 342 (1977)).

Unlike sec. 1610(a)(2) of the United States Act, under general international law enforcement measures by the forum State need not be limited to property that is or was used specifically for the commercial activity of the foreign State upon which the claim on the merits has been based.

The foreign State need not be granted immunity with regard to objects it has brought into the forum State in violation of the forum State's territorial sovereignty (e.g. → warships entering → territorial seas in violation of international law, or instruments of → espionage; Kämpfer v. Zürich, Swiss Bundesgericht (1939), BGE 65 I 39).

(d) Interest of third parties

The foreign State's immunity, to the extent indicated above, must also be respected when enforcement measures are intended for or levied on the property of third parties while the foreign State has a right in the property concerned, or while the object of the measure is under its actual control. The same is true if the foreign State is the garnishee of a claim to be attached (Court of Appeal of Vienna, July 7, 1978, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 30 (1979) p. 340; BYIL, Vol. 53 (1982) p. 421). Enforcement measures, on the other hand, which do not endanger, impede, or prejudice the object's service for public purposes of the foreign State (e.g. entry, rectification or deletion of entry in land registers, as the case may be) are not prevented.

(e) Interim measures to secure satisfaction of a judgment

Sec. 1610(d) of the United States Act and sec. 13(2)(a)(3) of the British Act permit attachment prior to the entry of judgment to secure satisfaction of assets of a foreign State only if the latter has made an appropriate waiver. The Immunity Acts of Pakistan, South Africa, Singapore and Canada do not indicate any such restriction, nor does general international law (Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria (1977) 2 W.L.R. 356; Hispano Americana Mercantil S.A. v. Central Bank of Nigeria, 2 Lloyd's Rep. 277 (CA), BYIL, Vol. 50 (1979) p. 221; National Iranian Oil Company Case, BVerfGE 64, 1 (1983)). Such measures, nevertheless, must observe the limits indicated above.

8. Prospects

The doctrine of functionally limited immunity increasingly adhered to in State practice today, has made international law on State immunity much more complicated than under the doctrine of absolute immunity. The borderline between sovereign and non-public functions, conduct and property of the foreign State must be determined in the final stage of judicial analysis by criteria of international law. As long as international treaties with sufficiently broad scope of application do not exist, the danger will continue that State practice will vary considerably, with all the negative aspects ensuing from such discrepancies.

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STATE JURISDICTION *see* Jurisdiction of States

STATE RESPONSIBILITY *see* Responsibility of States: Fault and Strict Liability; Responsibility of States: General Principles; Responsibility of States for Activities of Private Law Persons

STATE SUCCESSION

1. Notion

As a matter of historical development, the notion of State succession referred to the legal problems arising from cases where territory was transferred. In the broadest sense, the term means the succession of one State to the rights and obligations of another State as a result of the extension of its supreme power over territories which until then were under the sovereignty of the other State. Along these lines, the → Vienna Convention on Succession of States in Respect of Treaties of 1978 and the → Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983 define State succes-

sion as "the replacement of one State by another in the responsibility for the international relations of territory" (common Art. 2(1)(a)). With this orientation towards national territory the definition applies to a great number of practical cases of succession, except for those where there is no actual transfer of territory. An example of this latter form of State succession which Verdross called *unecht* (artificial) is an increase or loss of sovereignty without any outer change in the national territory (e.g. upon the creation or termination of a → protectorate or → mandate). The territorial element is likewise lacking in cases where national sovereignty is gradually placed under the competences of a → supranational organization.

The concept of State succession today merely represents a collective designation for very different instances of succession with more or less close connections to a given State territory. A basic albeit not comprehensive criterion of legal delimitation is the status as a → subject of international law; in this way, "State personality" provides a key to the whole problem of State succession. Relying – as Hall and the majority of international authors do – on State personality as an element of delimitation, it is at least possible to state when a case of succession has not occurred. A case of succession arises only when one subject of international law enters into the rights of another. Succession can only take place between at least two subjects of international law. In this respect the question of State → continuity may be called the indispensable preliminary question.

The great variety of cases of State succession have led to attempts to work out particular categories. However, efforts to develop a common theoretical basis have failed; only a differentiation between partial and universal succession is generally accepted, which provides at least a degree of clarity.

Partial succession takes place when only a part of a State's territory is detached and either becomes part of another State or makes up a new international subject. Universal succession takes place if one State dissolves completely and ceases to exist (→ Dismemberment) or is absorbed by another State. At present, traditional categories of this kind are invested with connotations which refer to the process of → decolonization and an attempt is made to develop special regulations in this field for "newly independent States" (→ New States and International Law).

In these matters, there are no generally fixed criteria in the identification of a given situation as a case of State succession. This is why the term largely lacks legal practicability. Both in State practice and in theory the tendency has been to use State succession as a convenient label and to work out rules of law for a few instances only. This is one of the reasons why the law of State succession – in spite of all the efforts of the → International Law Commission (ILC) – has remained one of the most complex and complicated areas of public international law.

2. Historical Background and State Practice

The practical significance of State succession grew as the modern territorial State emerged. The practical problems of State succession arose as the map of Europe was redrawn by way of cession, → annexation or regulation of the results of wars. The formation of new national States during the 19th century was of particular importance. The effects of the birth of the Italian State, for example, or of the divisions of Poland gave rise to serious legal difficulties characteristic of the scope of the problem; more specific problems arose within the → British Commonwealth or with the national development of the United States. The number of practical cases of State succession grew larger still with the end of World War I and the disintegration of the Austro-Hungarian and the Ottoman Empires (→ Peace Treaties after World War I). New problems were added in the wake of World War II, which increased the number both of territorial disputes and of → divided States in the world (i.e. Germany, → Korea, → Vietnam). The period of decolonization after 1945 introduced a new dimension when some 100 States either came into being or regained their sovereignty. The potential number of disputes was reduced considerably by State practice, which, in spite of some legal doubts, settled the essential problems using devolution agreements, unilateral declarations and other instruments of succession between the States concerned (especially in the case of the French colonial empire). Nevertheless, many problems of succession were left unresolved when agreement and consent proved impossible to

attain for political reasons, for instance as a result of the intensifying conflict between East and West.

Further uncertainties were provided by the "re-establishment" of States which occurred a number of times in the twentieth century: States which in legal terms appeared to have perished over a longer period of time were resurrected (e.g. Albania, Ethiopia, → Austria, Syria, Czechoslovakia). It was apparent that the distinct rules of → customary international law then current were incapable of dealing with "resurrected" States of this kind.

The gradual development of rules of customary law in the field of State succession is only partly due to the multiplicity of historic events that had to be taken account of. Close entanglement with municipal law served to greatly add to the prevailing conceptual ambiguity. The notion of → State, in particular, was formed during the period of classical international law by the respective constitutional law; the operation of the relevant national constitutional laws delayed the independent development of rules of international law governing State succession. An equivalent effect results from a national interpretation of succession, for example in cases of revolutionary → secession. Cases of succession affect the national existence of a State over a longer period and thus do not constitute a single legal act. The point of departure of the two Vienna Conventions, the consideration of State succession "occurring in conformity with international law" only (1978 Convention, Art. 6; 1983 Convention, Art. 3), does not govern the really difficult cases. It has to be added that the process of succession, especially in cases of extinction of States (→ States, Extinction), may extend over several decades, so that a precise "date of the succession of States" cannot be determined. The Vienna Conventions seek to overcome part of the problem by making distinct the constituent facts of succession and the legal consequences arising from succession. Both Vienna Conventions are expressed to apply only to the effects of the succession of States (Art. 6 of the 1978 Vienna Convention; Art. 3 of the 1983 Vienna Convention).

3. General Rules

For a long time the attempt to find a general solution for cases of succession rested on references to Roman law and civil law. However, the civil law rules governing devolution of rights and duties could not be transferred to international law since the rights and duties of individuals are not comparable with those of States. Therefore, the civilian concept had to be ruled out as a "universal touchstone" (O'Connell). Unfortunately, neither of the Vienna Conventions supplies a sufficient legal basis. The 1978 Vienna Convention on Succession of States in Respect of Treaties covers only a part of the law of treaties, in particular the treaties concluded between States only. The Convention in part relies on rules of customary law in force, but it also provides for new uncertainties in respect of newly independent States. The attempt to apply the clean slate principle to former colonies (Arts. 16 to 30) prevents the acknowledgement of the Convention as representing law already in force. Thus, in every single case it must be ascertained whether a rule of international law actually exists and is applicable. The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts also considers only some of the cases of succession and focuses to an even greater extent on the specific interests of the "new" States. As a source of law, the Convention can achieve only a supplementary function.

One of the customary rules of State succession generally accepted today is that a mere change of personnel does not constitute a case of State succession. Whether revolutionary constitutional alterations were capable of inducing a succession of States remained a highly controversial issue for a long time. Following the consensus reached during the *travaux préparatoires* of the Vienna Conventions, it can now be definitively stated that a revolution or any kind of overthrowing of government does not result in a succession. Likewise, a secession (separation) of a part of a State's territory does not necessarily lead to a total succession. No State succession occurs in cases of *occupatio bellica* (→ Occupation, Belligerent).

4. Succession in Respect of Treaties

The principle of discharging a new State from the obligations of its predecessor and the preference for a *tabula rasa* solution corresponds with the understanding of → sovereignty under classical international law. In conflict with this principle

are the interests of the community of States and those of third States in the continuation of treaties.

State practice has developed different and, on the whole, inconsistent solutions for the particular conditions of each type of treaty. In cases where the territory of a State that continues to exist is reduced or enlarged, the principle of "moving treaty frontiers" is applicable, "unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation" (Art. 15, 1978 Vienna Convention; → Treaties, Effect of Territorial Changes). The 1978 Vienna Convention provides for the continuation of treaties in principle – unless the States otherwise agree – also in cases of the uniting of States (Art. 31); the separation of part or parts of the territory and the forming of one or more new States (Art. 34); and the separation of only part of the territory where the predecessor State continues to exist (Art. 35). The tendency whereby "non-political" treaties (for example, humanitarian or economic treaties) are continued by the successor State can be traced to older State practice together with the refusal to accept the "political" or "strictly personal" treaties of the predecessor State.

The 1978 Convention exempts various kinds of treaties as far as cases of incompatibility, multilateral treaties and particular stages of a treaty are concerned.

Although these regulations for "normal" States more or less maintain continuity with the effective customary law, the Convention contains many special regulations for the "newly independent States" which came into being as a result of decolonization. With the applicability of the clean slate principle they obtain a general release from the obligations of the predecessor State (Art. 16); they have the right to choose whether to participate in a treaty by "notification of succession" (multilateral treaties) or by agreement (bilateral treaties). The divergence in the legal treatment of newly independent States and "normal" States conforms with the special interests of Third World States, but as yet fails to accord with prevailing international law. A certain lack of clarity exists especially as to the period of validity of the codification, since the process of decolonization has almost come to its end.

Special rules of customary law as well as the 1978 Convention apply in respect of "localized", "dispositive" or "real" treaties, i.e. special territorial régimes (→ boundaries and → servitudes; Arts. 11 and 12). In these cases the Convention provides for the automatic commitment of the successor State. The material provisions of the 1978 Convention in this respect are highly controversial even under the existing law in force. The successor State cannot be committed in so far as foreign military bases are concerned (Art. 12(3)), so that here the general law of treaties remains relevant.

In the interests of States which have become independent during the course of decolonization, the numerous "devolution agreements" are no longer to be regarded as sufficient to serve as a legal basis for the devolution of rights and duties upon the successor State (Art. 8). The same rules are to be applicable to unilateral declarations (Art. 9).

In the field of State succession international law proceeds from the assumption of the equality of States, as enshrined in the → United Nations Charter (→ States, Sovereign Equality). However, the Vienna Conventions grant special protection to the new States by establishing special treatment for "newly independent States". States in this sense are successor States whose territory immediately before the date of the succession was a dependent territory for the purposes of → international relations for which the predecessor State was responsible. The wording of the codification may indeed cover various forms of dependence, e.g. colonies, trusteeships, mandates or protectorates. Yet in terms of the perceptible aims of the ILC, the provisions concerned were devised to regulate only the specific case of decolonization.

The introduction of the clean slate principle for these cases can only in part be attributed to older theoretical approaches like those of Jellinek, Cavaglieri or Schönborn, and to older State practice. Thus, the United States, for example, never regarded itself in any way bound by, or entitled to, the benefits of the treaties of the United Kingdom (see Keith). The overriding factor was rather the recent expansion of the right

of → self-determination of people in various areas of the world. The general development by the → United Nations of the right of self-determination towards a status as a norm of → *jus cogens* (with respect to the process of decolonization), provided the legal basis for the dogmatic breach within the codification and for the characteristic special treatment of those cases of State succession where newly independent States are involved (Arts. 16 to 30 of the 1978 Convention). One example of this is the possibility of settling problems by agreement within the various constellations of State succession. In this context the principle of equity, which explicitly appears in both Conventions is of particular importance (→ Equity in International law). Reflecting the supposed significance of the right of self-determination and trends towards a new → international economic order closely related to the said right, the treaty law is qualified by the basic rule that nothing in the 1978 Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources (Art. 13; → Natural Resources, Sovereignty over). The 1978 Convention covers only some of the possible treaty relations. There is, for example, no provision dealing with agreements concluded between States and other subjects of international law which are not States. As a result, treaties with or between international organizations, including the so-called "hybrid unions", are left unregarded. Furthermore, only treaties in writing are considered (Art. 2 (1) (a)). The 1978 Convention is only applicable to cases of succession resulting from "normal situations", i.e. cases of succession that occur in conformity with international law and the principles of international law embodied in the UN Charter (Art. 6). This refers to the prohibition of the → use of force in international relations and to the right of self-determination. Explicit limitations exist – in conformity with Art. 73 of the → Vienna Convention on the Law of Treaties – with regard to cases of State responsibility and the outbreak of hostilities (Art. 39; → Responsibility of States: General Principles; → War). In conformity with existing standards of customary international law, cases emerging from a military occupation are also excluded (Art. 40). References to the principles of the Vienna Convention on the Law of Treaties provide for further indirect limitations of the scope of the 1978 Vienna Convention.

5. State Property, Archives and Debts

The 1983 Vienna Convention aimed to a limited extent at the regulation of other matters of State succession, concentrating on State property, State debts and State archives, and explicitly excluding other matters from its scope. When considering the State practice in this field, due allowance must be made for the many changes in State practice since World War II which largely superseded the previous partially developed rules with the result that older doctrine and legal decisions widely lost their significance. Moreover, the ILC's codification work was bound by the course which the → United Nations General Assembly had set in early demanding it to make "appropriate reference to the views of States which have achieved independence since the Second World War" (Res. 1765 (XVII) of November 20, 1962, GAOR 17th session, Suppl. 17, p. 65). The ILC accordingly placed emphasis upon the "progressive development of international law" and the codification was always to reflect the recent development of international law as it is presumed and shaped primarily by the United Nations (→ Codification of International Law). As a result, the right of self-determination of peoples with all its economic, financial and cultural implications played not only a political but also a major juridical role in the codification. This was the starting point for concepts such as a new economic world order, financial capacity, permanent sovereignty over natural resources and the development of a new international cultural order. The special difficulties of this subject are clearly demonstrated by the specific consideration given to the principle of equity (equitable proportion, equitable compensation). The explicit references in the Convention to the priority of agreements between the States concerned underlines the fact that general legal rules are of an only limited value in this subject.

(a) State property

The 1983 Convention abandons the older differentiation between property in the public domain and property in the private domain in favour

of a uniform concept of State property. State property now means property, rights and interests (in a legal sense) which, at the date of the succession of States and according to the internal law of the predecessor State, were owned by that State (Art. 8). The scope of application is thus not extended to the private property of third States situated in the territory of the predecessor State (Art. 12). As customary international law has not established any autonomous criterion for determining what constitutes State property, the ILC considered that the most appropriate method of definition was reference to the internal law of the predecessor State. A remarkable limitation results from the fact that the successor State is free, within the limits of general international law, to change the status of State property as a consequence of its sovereignty.

For all cases of State succession the distinction between movable and immovable property applies first of all. The crucial point then is whether or not a newly independent State is concerned. If no newly independent State is involved, an agreement between the States concerned generally takes precedence. If the parties cannot reach such an agreement, in principle the immovable property situated within the territory of the successor State passes to that State. Movable property passes to the successor State in so far as it is "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates" (Art. 17(1)(b)). Other movable property in cases where a part of the territory is separated is to be shared by "equitable proportion" (Art. 17(1)(c)). The same applies to the dissolution of a State (Art. 18(1)(d)). Correspondingly, in cases of dissolution immovable property situated outside the territory of a predecessor State shall pass in an "equitable proportion" (Art. 18(1)(b)).

If, on the other hand, the successor State is a newly independent State, an agreement between the States concerned is not necessarily impossible, but it is not designated as the first resort and it is applicable only within certain limitations. The Convention explicitly emphasizes that an agreement "shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources" (Art. 15(4)). The commentary of the ILC here referred to the practice of UN resolutions, especially to the → Charter of Economic Rights and Duties of States (UN GA Res. 3281(XXIX) of December 12, 1974, GAOR 29th Session, Suppl. 31, p. 50). Immovable State property, situated in the territory to which the succession of States relates, is to pass to the successor. Movable State property also passes, as far as it is connected with the activity of the predecessor State in respect of the territory concerned. Special regulations apply to movable and immovable property which belonged to the territory concerned before colonialization and became the property of the predecessor State and which is situated outside the territory now subject to State succession. This kind of property is to pass to the successor State as well as property "to the creation of which the dependent territory has contributed" (Art. 15(1)(c)). This was designed to cover the possibilities of participation by the dependent territory as such in various intergovernmental bodies, e.g. the → International Bank of Reconstruction and Development. Among other things the proportion of the contribution by the dependent territory is to be taken into account. Art. 15 as a whole clearly emphasizes the special treatment of the newly independent States and indicates the general footing upon which particular regulations in other parts of the codification are based. Thus, some regulations on State property (for example, Arts. 17(3) and 18(2)) provide for "equitable compensation" departing from the basic rule in Art. 11, yet no such provision can be found in Art. 15, which deals with the newly independent States.

(b) State debts

In the field of State debts, a number of rules had already been recognized which, however, were accepted by the Convention only to a limited extent. The codification remained a relatively distinct exercise in so far as a succession of States did not "as such affect the rights and obligations of creditors" (Art. 36). A number of difficulties did, however, arise in connection with the definition of State debt. The Convention supplies an answer in some fields only and not in a general way. Art. 33 defines State debt to mean any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of

international law. In other words, the predecessor State's debts towards private persons are excluded. Also excluded are debts owed by a third State to the predecessor State. Such debts under the scope of the Convention are State property and therefore covered by another part of the Convention. The definition of State debts in the text of the Convention provides no further differentiation of types of debts as developed in international law. Such differentiation must be sought in the commentary of the ILC and in the protocol of the discussions held during the United Nations Conference on Succession of States held in Vienna, between March 1 and April 8, 1983 (UN Doc. A/CONF. 117).

The Conference accepted the well known differentiation between national, local and localized debts, as generally recognized by customary international law and as formulated by the → International Law Association (ILA). Whereas national (general) State debts may pass to the successor State, local debts are not affected by the Convention. Local debts are not State debts: they remain the responsibility of the part of the territory which is detached in application of the adage *res transit cum suo onere*. Consequently the debts of local authorities, e.g. "a federal unit, a province, a Land, a department, a region, a country, a district, an arrondissement, a cercle, a canton, a city or municipality and so on" are excluded. The definition of local debts may follow certain criteria: the local authorities should be inferior to the (central) State (subordination), have limited territorial jurisdiction, have a certain degree of financial autonomy. It follows from this general point of view that the debts of public enterprises and public establishments are also excluded.

Another important distinction must be made between local debts and localized State debts. These debts are State debts which happen to be geographically situated, that is, in the terms used by the ILC, debts raised by a central government or by particular territories (ILA Reports, Vol. 54 (1970) p. 108). In these cases the debts are the responsibility of the State, for which the State itself is liable.

Apart from these definitions, there are a number of categories underlying the notion of State debts which had been developed by State practice and legal doctrine and which must be considered in each case as it arises now as before. The ILC confined itself to some general remarks (e.g. on financial and administrative debts, external or internal debts, secured or unsecured debts) and referred to former State practice without any pointed statement of its own. For cases of "delictual debts", for example, the ILC stated the solution "is governed primarily by the principles relating to international responsibility of states". The discussion within the ILA and at the final Conference in Vienna confirmed the older practice of the non-transferability of "odious" debts. This term describes debts which for instance have accrued in connection with warfare (e.g. war loans) or which are attached to the respective political régime in such a way that their devolution is unacceptable to the successor State (e.g. "subjugation" debts). However, it remains uncertain whether so-called "régime debts" may still be excluded under international law.

For particular constellations of State succession the Convention provides for the passing of State debts to the successor State in an "equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt" (transfer of part of the territory, Art. 37(2); separation, Art. 40(1); dissolution, Art. 41). These regulations only apply if a different agreement cannot be concluded and none of the special rules for newly independent States is relevant. Where the successor State is a newly independent State, the principle applies that no State debt shall pass to the successor State unless an agreement provides otherwise "in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State" (Art. 38(1)). Furthermore an agreement must not "infringe the principle of permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State" (Art. 38(2)). The preferential treatment of this category of States is discernible in other fields within the United Nations practice according to which the peculiar political relationship between former

colonial powers and newly independent territories must be taken into account. This → waiver of the devolution of State debts is to allow the new States to integrate into the community of States in order to preserve stability and orderly relations between States. These relations, which are, in the ILC's terms of reference, necessary for peaceful and friendly relations,

> "cannot be divorced from the principles of equal rights and self-determination of peoples or from the overall efforts of the present-day international community to promote conditions of economic and social progress and to provide solutions of international economic problems".

Within the context of this codification work the above reaffirms the characteristic political approach represented by Mohammed Bedjaoui, the special rapporteur over many years. The preferential treatment of the newly independent States corresponds with the interests of the majority of United Nations members and of the States participating at the Conference in Vienna. Nevertheless the occasionally vague wording of the Convention will probably impair its practical application. It should be mentioned that the financial capacity of the successor State also played a major role in older State practice (see Feilchenfeld, pp. 458 et seq., pp. 852 et seq.).

(c) State archives

The problems of State archives over the years have been no more than a fringe issue of State succession. It was again the progress of decolonization which lent special importance to this subject. Originally State archives constituted merely part of a State's property. However, archives also represent an important part of the national and cultural identity of States (→ Cultural Property). The special treatment given to State archives in the 1983 Convention is largely due to the influence of the concept of self-determination, which is also required to cover cultural aspects. In its work the ILC was able to refer to preliminary studies carried out by the → United Nations Educational, Scientific and Cultural Organization which provided the basis for a new understanding of the meaning of cultural heritage. However, the codification not only had to take account of demands from the newly independent States but also had to make provision for "normal" cases of State succession. The codification as a whole is characterized by a number of important guiding principles. In the first place, the Convention provides a remarkably wide definition of State archives, expressed to include all documents of whatever date and kind, produced or received by the predecessor State in the exercise of its functions which, at the date of the succession of States, belonged to the predecessor State according to its internal law and were preserved by it directly or under its control as archives for whatever purpose (Art. 20). Since this definition does not refer to the particular cultural value of any given archive, it also comprises objects which are of material value only. The Convention provides here again for a passing of property without compensation. Archives which are situated in the territory of the predecessor State and which are owned by a third State are excluded (Art. 24). It should be emphasized that the Convention tries to take into account the "integral character of groups of State archives" (Art. 25) and to oblige the predecessor State to preserve the archives concerned (Art. 26). One of the basic elements of the new regulation is the unlimited passing of administrative archives and of all other archives that relate exclusively or principally to the territory to which the succession of States relates. Different rules apply for supplementary claims to particular documents or copies of documents. In any case of succession it is possible to conclude a specific agreement. The unalterable limit to such arrangements is expressed by the right of the peoples of the predecessor and of the successor State "to development, to information about their history and to their cultural heritage" (Art. 30(3); Art. 31(4)). In cases of dissolution a passing of archives is to take place, with some minor exceptions, "in an equitable manner, taking into account all relevant circumstances". Specific regulations apply for newly independent States because archives "having belonged to the territory to which the succession of States relates and having become State archives during the period of dependence" are included. The predecessor State is to cooperate with the successor in efforts to recover any archives of those territories which were dispersed during the period of dependence. These and other regulations accentuate the difficulties that may

arise in a given case, especially with regard to the "territorial link". No regulations have been drafted to regulate access to and preservation of archives after their passing to the successor State. An obligation of preservation upon the successor State corresponding with the duties of the predecessor State, if the archives concerned are of cultural value to both States or peoples, is also lacking. The question as to which principles apply in the event of a conflict of interests between peoples and States in respect of the same archival objects is not answered by the Convention. Modern reproduction techniques can offer only limited compensation. A solution is to be arrived at by State practice which in the past already demonstrated that "diplomatic convenience rather than strict law is the governing consideration" (see O'Connell, 1970).

6. *Other Matters*

High among matters not covered by the Conventions are succession in respect of acquired rights, liabilities arising out of tort and the problems of → nationality. In these areas the law irregularly developed by State practice and already in force, remains applicable irrespective of whether or not the Conventions enter into force. Contrary to the ILC's initial intentions, the discussion of the problems of acquired rights was excluded from the codification project. This was due to the notorious difficulties inherent in the search for a "universal touchstone" governing all cases and the need to agree on general norms. It must also be appreciated that the current changes in the general understanding of international law must have retroactive effects on the theory of acquired rights. The differences between traditional views and the approach of the new States with regard to the expropriation of foreign private property clearly illustrates the problem (→ Expropriation and Nationalization). The controversial standing of UN resolutions does not contribute substantially to a uniform development of legal rules.

As to succession in matters of tort, now as before, the ground rule is that a devolution of claims and liabilities of the predecessor State does not take place because of the strictly personal character of such claims. It is a matter of controversy whether the exclusion of the passing also applies if the title is based on the infringement of rights of an individual who is a national of the successor State. A precise delimitation of acquired rights from the field of State responsibility also has not yet been found.

The assertion of an "automatic" passing of nationality of the citizens of the territory concerned has not prevailed. In any given State succession the question will be whether general international norms concerning nationality are involved. Thus, in the case of a dissolution of the predecessor State it will probably be legal to confer upon individuals the nationality of the successor State, provided a territorial link is present. Furthermore, it must be determined whether the succession itself was lawful (e.g. in violation of the prohibition on the use of force). How the new trends in international law will affect these questions of succession remains open. Whilst hitherto it has not been obligatory to take into account the will of the people concerned in any given case, recent developments in the right of self-determination, in international humanitarian law and in → human rights lead to greater consideration of the interests of the individual. This may as a consequence place an obligation upon the successor State to not only grant an → option of nationality to the people concerned, but also to observe such an obligation in the formation of its internal law.

7. *Conclusion*

Any general assessment of the effective law of State succession must also consider that the Conventions to different degrees change or at least indirectly influence this entire branch of law. The effects of the Conventions only depend in part on whether both Conventions formally enter into force. The codification of various rules of customary international law by the 1978 Convention will certainly facilitate its general acceptance. As to the 1983 Vienna Convention, acceptance is much less probable. This expectation is backed by the relatively small number of participant States at the Final Conference (76) and the high number of votes against, mostly by Western States (11). The Convention was adopted by 54 States only. But even a greater measure of support would not ensure the development of a uniform law of State succession. This is due to the very slow process of

codification which nowadays can only be used to deal with the few unresolved issues of decolonization remaining. An even greater obstacle to acceptance lies in the separation of the international community into different categories of States dealt with in different ways. The preferential treatment of newly independent States impedes the formation of consensus and the evolution of uniform State practice. However, the Conventions have at least had indirect results. In the first place the discussion of the extensive material on State succession has helped clarify several older points of controversy. Secondly, newer trends in international law have been introduced into this "classical" branch of law. In the field of State succession it remains to be seen whether current developments in international law, as for example expressed by the new concepts of self-determination, cultural heritage or new international economic order, can provide reasonable and acceptable results.

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WILFRIED FIEDLER

STATES, EQUAL TREATMENT AND NON-DISCRIMINATION

A. Terminology

The obligation to treat other States equally, and its corollary, the obligation not to discriminate between them, are both notions closely linked with the doctrine of equality of States and, in substance, emanate from this doctrine. In contemporary → international law, principles and rules of equal treatment and non-discrimination have increasingly gained in importance; this is evidenced by the growing number of rules and provisions of customary and treaty law which oblige States to treat other States and their nationals equally in many fields of → international relations. It must, however, be emphasized immediately that it does not follow from the widespread use of the principles of equal treatment and non-discrimination that this practice had evolved into a general rule that other States and their nationals should be treated equally in all respects. Obligations of equal treatment or non-discrimination arise only on the basis of specific rules and provisions and within the limited scope of their application.

The notions "equal treatment" and "non-discrimination" are frequently, though not always, employed interchangeably in contemporary treaty

language: A treaty clause which prohibits discriminatory treatment may thereby express the same obligation negatively as does a clause which prescribes equal treatment positively, and in international practice the term "discrimination" usually denotes nothing else than a violation of an obligation of equal treatment. On the other hand, there may be cases where the contracting parties have chosen the negative form of expression deliberately because they wanted to prohibit only certain forms of differential treatment in accordance with the limited purpose of the specific non-discrimination clause.

B. Scope of Application

1. The Doctrine of Equality of States

The doctrine of equality of States originated concurrently with the establishment of the system of independent sovereign States, and the equality of a State in relation to any other State has gradually evolved into an inherent attribute of the sovereignty of the modern State (→ States, Sovereign Equality). This doctrine has now been enshrined in the → United Nations Charter which declares that the Organization is based on the "sovereign equality" of its member States (Art. 2(1)). International practice has never gone so far as to interpret the doctrine of equality of States in the sense that it entitles each State to the same substantive rights as any other State may have; "sovereign equality" means rather that sovereign States, irrespective of their power, size, or wealth, are juridically equal in the sense that they all enjoy equally those legal capacities which appertain to a sovereign State, and those rights and obligations which general international law confers on a sovereign State as such (cf. the interpretation of Art. 2(1) by the committee which drafted this article at the 1945 United Nations Conference, United Nations Conference on International Organization Doc. 944, I/1/34(1), p. 12, and the definition of "sovereign equality" in the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 24 October 1970 (→ Friendly Relations Resolution)).

The doctrine of equality of States has, however, served as the ideological basis for claims to equal treatment in the international relations between States, foremost in the field of international trade and commerce. These claims which have drawn additional strength from the concepts of → natural law and equity (→ Equity in International Law), have resulted in the development of numerous provisions of equal treatment or non-discrimination in bilateral and multilateral treaties. Some of these provisions have gradually evolved into rules of customary international law, and have thereby supplemented the principle of "sovereign equality" by providing for more substantive equality among States.

2. International Trade and Commerce

The claim for equal treatment in international trade and commerce has a long history. The medieval Italian City States (Florence, Genoa, Venice) whose traders competed in foreign markets, sought and obtained assurance of equal treatment from their trade partners. In the 18th and 19th centuries, when the conclusion of → treaties of friendship, commerce and navigation became common practice between the trading nations of the world, such treaties usually contained clauses by which the contracting States accorded each other the same treatment as the most advantageous treatment accorded to any third State for the import and export of goods, for the use of their ports, and for the legal protection of persons and property of each other's nationals (→ Most-Favoured-Nation Clause). Such most-favoured-nation clauses have since become a standard element in modern → commercial treaties.

Under the mandate system (→ Mandates) of the → League of Nations, whereby the former German colonies and parts of the former Turkish Empire had been placed under the administration of a mandatory State, the latter had to assume the obligation to secure equal opportunities for the trade and commerce of all member States of the League of Nations within the mandated territory. This obligation was carried over into the → United Nations Trusteeship System. Art. 76(d) of the UN Charter declared one of the objectives of the system to be to assure "equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals" in the trust territories, and corresponding

obligations of the administering State were then laid down in the individual trusteeship agreements.

After World War II the multilateral trade régime of the → General Agreement on Tariffs and Trade (GATT) was created, under which 97 States parties (as of July 1, 1987) accord each other, in principle, equal (most-favoured-nation) treatment of their respective imports and exports.

3. Treatment of Aliens

With respect to the treatment of → aliens, bilateral treaty practice resulted in the granting to them of a wide measure of "national" treatment, i.e. the guarantee to them of the same enjoyment and protection of their rights and the same legal capacity to acquire, use and dispose of property and other rights as are guaranteed to the State's own nationals (→ Aliens, Admission; → Aliens, Property).

An effort to harmonize this treaty practice on the regional level has been undertaken by the European Convention on Establishment of December 13, 1955, which has so far been ratified by 11 European States (as of January 1, 1987), including the Federal Republic of Germany. All these treaties contain exceptions to the rule of national treatment to a varying degree, for example with respect to the acquisition of immovable property or access to certain professions or occupations; in those areas, however, the nationals of the contracting parties normally have the right to most-favoured-nation treatment or at least to non-discriminatory treatment. The rule that the State of residence is under an obligation to accord aliens the same measure of legal protection of his person and property as enjoyed by its own nationals, and the rule that aliens may not be discriminated against on the sole ground of their nationality, have already become part of general customary international law.

A most recent type of treaty dealing with the legal protection of foreign property is to be noted in the more than 200 investment protection treaties that have been concluded between the main capital-exporting States and numerous → developing States during the last few decades. These treaties provide partly for national and partly for most-favoured-nation treatment of the investments covered by their provisions; some of them also contain clauses against "arbitrary and discriminatory measures" against the operation and management of such investments (cf. Art. II, para. 2 of the Panama-United States Treaty of October 27, 1982; Art. II, para. 3 of the Turkey-United States Treaty of December 3, 1985).

4. Protection of Human Rights

The principles of national treatment of aliens and of non-discrimination between them have been considerably strengthened by the evolution of the protection of → human rights through universal and regional conventions during recent decades (→ Human Rights Covenants; → European Convention on Human Rights; → American Convention on Human Rights). All these conventions provide that the rights guaranteed therein will be enjoyed by the individual "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Art. 2(2) of the International Covenant on Economic, Social and Cultural Rights; repeated in somewhat different terms in Art. 2(1) of the International Covenant on Civil and Political Rights; → Racial and Religious Discrimination).

Thus within the range of the protected rights, any discrimination against an alien on the ground of his nationality is prohibited. This prohibition will become particularly relevant in those cases where the provisions of the human rights conventions allow a State to limit or restrict the exercise of certain human rights for reasons of public policy. The special conventions for the elimination of certain forms of discrimination, e.g. the Convention concerning Discrimination in Respect of Employment and Occupation of June 25, 1958, the Convention against Discrimination in Education of December 14, 1960, and the Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965, do not specifically address the problem of equal treatment between nationals and aliens; they do contain, however, some provisions which prohibit discrimination against a particular nationality (cf. Art. 1, para. 1(a) of the Employment Convention; Art. 1, para. 1 and Art. 3, paras. (c) and (e) of the Educational Convention; and Art. 1, para. 3 of the Racial Discrimination Convention).

5. *International Navigation*

(a) Ports

The early recognition of the importance of maritime transport for reaching foreign markets provides the reason for claiming equal access to foreign → ports. Therefore, the bilateral treaties of friendship, commerce and navigation contain provisions whereby the contracting parties accord each other national or at least most-favoured-nation treatment with respect to their ships and cargoes entering the waters and ports of the other party, in particular with respect to the right to carry all cargo to or from the territory of the other party and with respect to the use of the port facilities (see, for example, Art. 20 of the Treaty between the Federal Republic of Germany and the United States of October 29, 1954, UNTS, Vol. 273, p. 3).

Efforts to reach a multilateral agreement in this field have only been partly successful. The Convention on the International Régime of Maritime Ports of December 9, 1923 (LNTS, Vol. LVIII, p. 287), which provides for equality of treatment between the ships of all contracting parties, their cargoes and passengers, has been ratified or accepted by way of succession by about 40 States, among them a part of the main shipping States, including the Federal Republic of Germany. But among and *vis-à-vis* all other States, the reciprocal national or most-favoured-nation treatment of ships and cargoes in their respective ports still rests on the traditional bilateral basis. It remains doubtful whether this constant treaty practice of treating foreign ships and cargoes at least on a most-favoured-nation basis has already crystallized into a rule of → customary international law, because this treatment is still conditioned on reciprocal treatment by the other contracting party.

Complaints persist that the existing rules on the régime of maritime ports are still insufficient for creating or maintaining equal opportunities for all flags. Mention in this respect may be made to entrance requirements relating to the construction, manning, and equipment of ships, restrictive practices of shipping cartels (liner conferences), the impact of "cheap flags" and State trading and control over the distribution of the available cargo. An improvement is sought by the Convention on the Conduct of Liner Conferences of April 6, 1974 (ILM, Vol. 13 (1974) p. 217) which as of January 1, 1986 has been ratified by about 60 States, among them the Federal Republic of Germany, Norway, the Soviet Union and the United Kingdom, but not the United States. The Convention intends to assure that "conference practices should not involve any discrimination against the shipowners, shippers or the foreign trade of any country" (para. (d) of the Preamble), and contains elaborate directives to this effect. Its most controversial provision is the 40:40:20 trade sharing formula under which the trade, in terms of freight and volume, between two countries should be divided up between the fleets serving that trade by allocating, if possible, at least 40 per cent to each of the fleets of these two countries, and by leaving the remaining 20 per cent to third-country shipping lines.

(b) Passage through territorial waters and straits

The 1982 UN Convention on the Law of the Sea recognizes that the coastal State has certain well-defined powers for the purpose of regulating the passage of foreign ships through its → territorial sea. The Convention provides that laws and regulations, enacted by the coastal State within these limits, shall not "discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, or from, or on behalf of any State" (Art. 24, para. 1(b)). The same prohibition of discriminatory treatment applies in case of a temporary suspension of the passage of foreign ships in specified areas of the territorial waters (Art. 25, para. 3), and in case of the imposition of charges for piloting or other special services rendered to foreign ships (Art. 26, para. 2).

Likewise, in → straits used for international navigation which form part of the territorial waters of one or more States, the laws and regulations of the riparian States relating to the passage through such straits "shall not discriminate in form or in fact among foreign ships" (Art. 42, para. 2).

The Convention authorizes the coastal State to take special measures for preventing pollution from ships (Arts. 210 and 211, 216 to 221); Art. 227 of the Convention provides that in exercising such rights a State "shall not discriminate in form or in fact against vessels of any other State".

Although the Convention is not yet in force, its provisions relating to the régime of territorial waters are generally considered as reflecting an international consensus on that régime. In particular, it may be maintained that the prohibition of discrimination among foreign ships forms part of customary international law because the same prohibition in case of a suspension of innocent passage had already been included in the 1958 Territorial Sea Convention (Art. 16, para. 3). It may be inferred therefrom that the prohibition of discrimination among foreign ships is an obligation which has always been regarded as concomitant with the exercise of regulatory powers *vis-à-vis* foreign ships passing through territorial waters.

(c) Canals and waterways used for international navigation

Where artificial canals or other suitable waterways have been made available to international navigation, whether by treaty (→ Suez Canal; → Panama Canal), or *de facto* (Corinth Canal; → Kiel Canal; → St. Lawrence Seaway), the principle of equal treatment of all flags has been practiced by the respective riparian States. The Suez and Panama Canal treaties contain express stipulations to this effect, for example Art. II of the Treaty between Panama and the United States on the Operation of the Canal of September 7, 1977:

> "The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning conditions or charges of transit, or for any other reason . . . ."

Whether third States which benefit from such stipulations, but are not parties to these treaties, have thereby acquired an enforceable right to equal treatment, remains doubtful unless it could be assumed that it had been intended by the contracting parties to accord third States such a right (→ Treaties, Effect on Third States). In those other cases where a canal has been opened *de facto* to ships of all States, it would be even more difficult to construe an intention to create rights for other States. It may, however, be arguable that once a State has dedicated an artificial waterway under its jurisdiction to international navigation, this implies a duty not to discriminate among foreign ships in accordance with the rule of non-discrimination which applies in other areas of international navigation.

(d) International rivers

The legal régime of rivers which separate or traverse the territories of two or more States (→ International Rivers) rests primarily on agreement and practice between the riparian States, and varies according to the uses and interests involved. Where the riparian States enjoy free navigation on the navigable course of the river by treaty (→ Rhine River; → Danube River; → Moselle River), by custom or *de facto*, they treat each other equally in all matters incidental to the transboundary transport of goods and passengers. Whether → cabotage (transport between ports of the same State) remains reserved to the individual riparian State, as for example by Art. 25 of the Danube Convention, depends on the régime in question. Non-riparian States have normally no right to participate in the navigation of an international river; where they have been admitted (Art. 1 of the Rhine Navigation Act; Art. 1 of the Danube Convention), they do not necessarily have a right to equal treatment in all other respects (cf. Art. 4 of the Rhine Navigation Act).

With respect to the non-navigational uses of an international river, it is now generally recognized that each riparian State may claim a "reasonable and equitable share" (Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the → International Law Association on August 20, 1966, Report of the 55th Conference, pp. xi, 484–531), but the practical implementation of this principle needs an agreement between the States concerned.

6. Diplomatic Intercourse

Respect for the personality of the other State and the treatment of the other State as an equal member of the international community are scrupulously observed on the plane of formal diplomatic intercourse between sovereign States, as evidenced by the procedure in international conferences (→ Conferences and Congresses, In-

ternational), the formalities in concluding → treaties, the reciprocal recognition of the other State's juridical immunity, and the inviolability and immunities of diplomatic and consular premises and personnel (→ Diplomatic Agents and Missions, Privileges and Immunities). The → Vienna Convention on Diplomatic Relations of April 18, 1961 and the → Vienna Convention on Consular Relations of April 24, 1963, both contain the provision that in the application of these conventions the receiving State "shall not discriminate as between States", but that it is not regarded as discriminatory "where by custom or agreement States extend to each other more favourable treatment than is required" by the Conventions (Arts. 47 and 72 respectively). The → International Law Commission, which had drafted this provision, noted in its commentary that this rule of non-discriminations is "a general rule which follows from the equality of States" (YILC (1958 II) p. 105).

7. International Organizations

In many constitutions of international organizations the doctrine of equality of States has found expression in the composition of the organs of the organization and in the principle of "one State, one vote" and equal weight of each vote in the decision-making process of the organization (→ Voting Rules in International Conferences and Organizations). This is, however, not the general rule, and in quite a number of international organizations, in particular those whose decisions might seriously affect the political or financial interests of member States, the greater political power or economic weight of some States has been recognized by granting them permanent seats and special voting rights, for example by → weighted voting or → veto rights, in the principal decision-making organs of the organization. This differential treatment has been defended by the privileged States on the ground of their broader responsibility for and greater contribution to the attainment of the objects of the organization. While, in principle, such a differentiation has been accepted in international practice, the policy of the smaller States, in particular of the → developing States, is directed to more "participatory equality" in the distribution of power in international organizations.

8. European Communities

In the → European Communities the realization of an integrated common market requires in the final result the equal treatment of the nationals of the member States throughout the whole common market in respect of their commercial activities. For this purpose, the treaties which established the Communities contain numerous provisions of equal treatment or non-discrimination in the different fields of application of the respective treaties.

The treaty establishing the → European Economic Community contains an all-embracing provision whereby within the field of application of the treaty and without prejudice to any special provisions contained therein, " . . . any discrimination on the grounds of nationality shall be prohibited" (Art. 7). This prohibition applies, subsidiarily to any special non-discrimination clause, to all laws, regulations and measures that may be taken by the institutions of the Community as well as by member States in matters relating to the common market.

C. Interpretation of Obligations of Equal Treatment and Non-Discrimination

International practice has not produced generally applicable rules for the determination of the material content and scope of obligations of equal treatment. It can neither be assumed that a rule of equal treatment has necessarily to be interpreted in the absolute sense as to prohibit any reasonable differentiation, nor can it be assumed that a rule of non-discrimination has to be interpreted so narrowly as to prohibit only arbitrary differentiations. Each obligation of equal treatment or non-discrimination has to be interpreted in its special context, in the light of its object and purpose, and, if established by treaty, in accordance with the intentions of the contracting parties.

1. Standard Clauses Used in Treaty Practice

An essential prerequisite for determination of the material content of a rule of equal treatment is to ascertain the standard of comparison: What is to be considered equal in the specific context of the rule and should, therefore, be treated equally. In treaty practice the following standard clauses have come into common use and have acquired an

established meaning in the field of their application although they may still give rise to conflicting interpretations.

(a) Most-favoured-nation clause

This clause, by which a State accords to another State or its nationals treatment no less favourable than to any other State, has the effect, within the scope of its application, of automatically producing equal treatment among all States which can rely on such a clause, at an optimal level. The problem, however, with the clause is to determine in what respects the most-favoured treatment shall apply, and where differences are relevant to exclude the operation of the clause. For example, a clause which provides for most-favoured-nation treatment in respect of the import of "like" products may give rise to the controversy whether products, although different in kind, but competitive or substitutable in the market of the import State, will have to be treated equally.

While it is now generally recognized that, in the absence of a provision to the contrary, most-favoured-nation treatment is no longer "conditional" in the sense that it would require → reciprocity or an equivalent compensation in each case before equal treatment may be claimed, it still remains problematic to what extent "conditions" attached to a specific concession which had been granted to a third State can equally be imposed on the State which claims the same concession under the clause. For example, it may become controversial whether certain certificates of origin, product reliability or security clearance which are required for the import of certain products from the most-favoured State may likewise be required from the State which claims equal treatment for the import of such products, or whether this amounts to a "hidden" discrimination. The answer to these questions will depend on whether the specific most-favoured-nation treatment has the object of providing for formal legal equality or equal commercial opportunity, and whether the "condition" is an intrinsic part of the concession.

(b) National treatment clause

This clause, by which a State accords the nationals of another State the same treatment as it accords its own nationals, does not primarily have the object of promoting equality among States, but rather reflects the human right to equal treatment. However, the constant practice of States to embody national treatment clauses in their bilateral treaties of friendship, commerce and establishment, and the evolution of certain aspects of this treatment into customary law, as for instance the national treatment relating to the legal protection of persons and property of foreign nationals and to the exercise of those occupations and commercial activities which are open to foreigners, have had the result of contributing to more equality among States and their nationals.

National treatment clauses have to be carefully scrutinized as to the extent of their application, what differentiations they still allow, and which activities may be excluded from their application. In some areas where foreign States cannot claim national treatment for their nationals, most-favoured-nation clauses provide at least equal treatment among the foreign nationals.

(c) The combination of national and most-favoured-nation clauses

In modern treaty practice it has become quite common to combine both clauses by providing national treatment as well as most-favoured-nation treatment simultaneously for certain matters. Under this formula most-favoured-nation treatment applies where there is no comparable national treatment or where the most-favoured-nation treatment is more favourable to the foreign national. As the beneficiaries of most-favoured-nation clauses may claim any special privilege or concession granted to foreign nationals which surpasses the domestic standard, the simultaneous application of national and most-favoured-nation treatment contributes to more equality among foreign States and their nationals.

2. The Standard of Equality to be Achieved

The abstract character of legal rules of equal treatment or non-discrimination leaves room for different interpretations as to the kind of equality that should be achieved by such rules. It has to be ascertained whether the object and purpose of the specific rules is to attain merely formal or rather material or substantive equality. Although any attempt to categorize the various rules of equal treatment or non-discrimination would be futile

and each specific rule has to be interpreted on its own merits, it is nevertheless possible to observe a certain trend in the interpretation of these rules.

(a) The attainment of material or substantive equality

A legal obligation of equal treatment or non-discrimination requires that the laws, regulations and administrative measures of a State do not on their face discriminate against a foreign State or its nationals and are applied without discrimination in their area of application. However, this formal equality may still leave a foreign State or its nationals in an inferior position in those cases where the laws or regulations are framed in such a way or contain such conditions and requirements that the foreign State or its nationals are unable to avail themselves of the rights or advantages under the terms of the respective laws and regulations.

A well-known practice which has given rise to complaints in this respect has been the specialization of customs tariffs in order to favour goods originating from certain countries or regions. Whether a legal obligation of equal treatment may be interpreted to cover such cases depends on whether its object and purpose is not confined to maintaining formal equality before the law, but rather to providing materially equal opportunities. International practice has been inclined to interpret most-favoured-nation or national treatment clauses in the latter sense, and where in treaty practice a formula which prohibits "any discrimination in form or in fact" has been used, an interpretation to that effect is certainly called for.

(b) Proportionate treatment

The application of import quotas for balance of payments reasons or of tariff quotas agreed in trade negotiations has raised the problem how such a quota system could be administered in harmony with the obligation of equal treatment of imports under the most-favoured-nation clause. As long as it is feasible to administer this system by opening global quotas, equality of opportunity may probably be preserved among the supplying countries. However, where quotas are divided up among the supplying countries, it would not be in harmony with the principle of equal treatment to allocate each of the supplying countries a quota of the same amount without regard to the quantity that had been imported from each country previously, because such an allocation would affect them differently.

In such a situation a more equitable way of distributing the decrease of import opportunities evenly among the supplying countries is an allocation based upon the proportion of the total quantity or value that had been imported from each country previously. Although it may be difficult to find appropriate criteria and periods of reference for calculating each individual quota and to provide for their adjustment in accordance with the changing trade patterns, the method of proportionate allocation has been generally recognized in the General Agreement on Tariffs and Trade as an acceptable method of preserving the object and purpose of the GATT principle of equal treatment (Art. XIII(2)(d) of GATT).

3. Non-Discrimination Clauses

Treaty clauses prohibiting discrimination among or against foreign States and their nationals came into use after World War I under the influence of American juridical terminology. The term "discrimination" was employed to denote an unlawful distinction in violation of an obligation of equal treatment, and clauses prohibiting discrimination have since been used in numerous treaties instead of or in conjunction with clauses providing for equal treatment.

Here again, each clause must be interpreted in the light of its object and purpose and in accordance with the intentions of the contracting parties as to what kind of equality shall be attained thereby. In many cases, the wording of the clause points already to a certain interpretation, and it may be ascertained thereby whether the prohibition of discrimination is meant to prohibit differential treatment pure and simple, or differential treatment based on certain grounds which are specifically mentioned as unjustified, or differential treatment which has to be considered "arbitrary" in the sense that it lacks any reasonable ground. But this is not necessarily so, and it will always be necessary to rely on the object and purpose of the specific clause of non-discrimination. This is particularly necessary in the case where the clause prohibits just "discrimination" among States and their nationals because this leaves undefined what kind of equality among

States and their nationals is intended to be achieved.

As the term "discrimination" is usually used in the pejorative sense of denoting an inferior treatment as compared with the desired standard of equality, non-discrimination clauses are frequently interpreted in the sense that they do not prohibit a preferential or privileged treatment of one or more States compared with the standard of treatment accorded to the other States in general. Where there is a clear indication that this had been the intention of the contracting parties, or where there is an express provision excluding preferential treatment of one or more States from the operation of the clause, as for example Art. 47, para. 2(b) of the Convention on Diplomatic Relations, this interpretation is certainly correct, but otherwise the terminological argument is not necessarily conclusive because a privileged treatment of some States will simultaneously amount to an inferior and thereby possibly discriminatory treatment of the other States. Only where it could be shown that it was the object and purpose of the specific non-discrimination clause to guarantee nothing more than a treatment at the general level enjoyed by foreign States may such a narrow interpretation of the clause be admissible.

Non-discrimination clauses which forbid only "arbitrary" discrimination are found in those cases where most-favoured-nation or national treatment clauses cannot properly be applied, but where some measure of equality or equal opportunity is nevertheless intended to be guaranteed as far as possible. Notable examples of this kind are provisions whereby States are free to impose and enforce prohibitions, restrictions or other controls on the export or import of goods which they consider necessary on grounds of national security, protection of natural resources, balance of payments difficulties, public health, or other considerations of public policy; some of these provisions retain at least the obligation that, in the application of such measures, they may not be used as a means of an arbitrary discrimination between States (e.g. Art. XX, GATT; Art. 12, Germany/USA Treaty of October 29, 1954; Art. 36, EEC Treaty).

Where a non-discrimination clause prohibits "arbitrary" discrimination only, measures resulting in a differential treatment, but based on relevant and reasonable considerations of public policy, are not prohibited. Measures, however, which intentionally or without any reasonable ground place a foreign State or its nationals at a disadvantage on the ground of nationality, will certainly be unlawful under such a clause.

D. The Prohibition of Arbitrary Discrimination among States under General International Law

The question whether and under what conditions general international law prohibits any arbitrary discrimination among foreign States or their nationals has not yet been satisfactorily answered. While publicists are on the whole favourable to the recognition of such a rule as part of general international law, international practice remains rather reluctant to admit the existence of a legal obligation of this kind, although the argument of arbitrary discrimination has frequently been used in international political debate.

International theory has attempted to deduce the prohibition of arbitrary discrimination among foreign States or their nationals from different sources: from the doctrine of equality of States, from the general law concept of the → abuse of rights, and from the various treaty clauses which have prohibited arbitrary discriminations against a foreign State in the taking of certain governmental measures where the rule of equal treatment cannot be applied properly. It seems that the doctrine of equality of States is the most convincing legal basis from which the prohibition of arbitrary discrimination may be inferred, provided the prohibited discrimination is to be understood in the narrow sense of a discriminatory treatment which intentionally or without any reasonable ground singles out a particular State for inferior treatment as compared to all other foreign States on the sole account of its nationality. Such a discriminatory treatment, if not justified as a lawful countermeasure or → reprisal, disregards the recognized right of each sovereign State, inherent in its sovereign equality, to have its international personality and dignity respected and to be treated as an equal member of the international community of States.

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GÜNTHER JAENICKE

STATES, EXTINCTION

1. *Concept*

Sovereign States are → subjects of international law and as such legal entities possessing a distinct identity. According to international law a State becomes extinct with the disappearance of one of the criteria of Statehood (territory, people, and government), either because it has physically ceased to exist or has merged into larger, or split up into smaller units, thereby removing the social foundation of the former → State.

The legal personality of a State, on the other hand, is not affected by a change in its name (The Sapphir v. Napoleon III, 78 U.S. 164 (1871)), a change of government, social and political transformations including revolutions (Protocol of London of February 19, 1831, Martens NR, Vol. 10, p. 197, at pp. 197–199) (→ Continuity), or the interim rule of a non-recognized → *de facto* government (→ Tinoco Concessions Arbitration; → Recognition).

A formerly sovereign State may continue its existence as partially sovereign when it comes under the suzerainty or under the protection of another State (→ Mandates; → Protectorates), or becomes a member of a federation (→ Federal States). The member States of confederations, however, remain fully sovereign and separate international persons (→ Confederations and Other Unions of States).

A once-extinct State may be resurrected as the same legal person, and thus regain its previous position with regard to its former rights and obligations, if the actual extinction was caused by an unlawful act and is, therefore, legally negated, or – according to a contemporary point of view – if a legal union of States does not function in practice and ends in the separation into the previous parts (e.g. the United Arab Republic). The same ought to apply to a temporary dismemberment of a State which does not destroy the actual unity of the nation. In a similar vein it is argued that States, which lost their sovereignty by becoming colonies but subsequently regained their independence (e.g. Algeria, India, Sri Lanka) did not lose their identity (Dissenting opinion of Judge Moreno Quintana in the → Right of Passage over Indian Territory Case, ICJ Reports 1960, p. 6, at p. 95). It is not clear, however, what legal consequences can be derived from the regaining of identity, considering the fundamental intervening change in circumstances.

2. *Modes of Extinction*

State extinction due to a loss of the criteria of Statehood may take place as follows:

(a) By the extinction or the → emigration of the entire population, or its decimation below the level needed for the organization of a State (→ Micro-States).

(b) By the fusion of two or more separate peoples into one people, as for example during the unification of Germany and Italy in the 19th century.

(c) By division of one people into two or more peoples. This case should be distinguished from that of the mere splitting off of a section of a people, whereby the people as such is considered to be unaffected (→ Secession). However, sometimes it is not easy to distinguish these cases in practice. It is all a matter of proportion and how the actual circumstances are to be evaluated. Only for so-called imperial States is there no doubt that the people of the mother country continue to exist in spite of the break-up of the empire as such. The collapse of the British and Ottoman Empires affected the identity of neither the English nor the Turkish nation (→ Ottoman Debt Arbitration). The cases of → Austria and Hungary are less clear (→ Saint-Germain Peace Treaty (1919); → Trianon Peace Treaty (1920)).

(d) By the complete disappearance of State territory (e.g. an → island State), or its complete incorporation into another State (→ Territory, Acquisition). Even significant territorial displacements, however, as were experienced by Poland after World War II, do not affect Statehood. The continued existence of a State after the emergence of one or more new States on its territory depends on whether or not its distinctive, though diminished, people continue to exist in one of the smaller States.

(e) By the lasting removal of government. Its temporary absence (which may last for years), as may result from military occupation (→ Occupation, Belligerent; → Occupation after Armistice), does not affect the identity of the State concerned (cf. → Germany, Legal Status after World War II). Only when all hope of ever re-establishing a central government is lost, does a State break up into several parts ruled by regional authorities.

(f) By loss of independence due to the merger of the government of one State with the political system of another State.

3. Types of Extinction

So far no State has ceased to exist owing to the physical loss of its social foundations. Rather, States have become extinct on the ground of alterations in the attribution of the social foundations to a State. This occurs in the following types of situations:

(a) By incorporation of one State into another one on a voluntary basis.

(b) By → annexation. Illegal annexations, however, are considered to be without effect in accordance with the principle *ex injuria jus non oritur* (→ Stimson Doctrine; → Austrian State Treaty (1955)). Albania, Austria, Czechoslovakia and Ethiopia, for example, were resurrected as the "same" States that had existed prior to their annexation by Germany or Italy. Yet State practice is not uniform (→ Baltic States).

(c) By the fusion of two or more States into a new State, as for example Tanganyika and Zanzibar into the United Republic of Tanzania in 1964.

(d) By → dismemberment of a State into several parts.

(e) According to one opinion in international legal doctrine, by → *debellatio*.

(f) According to socialist doctrine, by a successful social revolution, in line with the Marxist-Leninist theory which views the State as an instrument of oppression in the hands of the ruling class; when this class changes, a new State necessarily arises (→ Socialist Conceptions of International Law).

4. Legal Consequences

With its extinction as a subject of international law, the State simultaneously disappears as the bearer of all rights and obligations pertaining to it. Views concerning the fate of these rights and obligations once ranged from that of their complete inheritance by the successor State to their complete extinction (clean-slate rule) apart from → servitudes. In the absence of adequate and uniform State practice, unambiguous rules have not so far emerged (→ State Succession).

Some of the questions arising from State succession in connection with the extinction of States have now been regulated by the → Vienna Convention on Succession of States in Respect of Treaties (Arts. 31 to 33 concerning the uniting of States and Arts. 34, 36 and 37 concerning dismemberment), and the → Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Arts. 16, 29 and 39 concerning the uniting of States and Arts. 18, 31 and 41 concerning dismemberment).

Nationality is lost with the extinction of a State (→ Nationality) and the same applies to public rights, including the civil service status, in so far as these have not been assumed by the successor. Acquired private rights, on the other hand, must to some extent be respected upon State extinction (→ German Settlers in Poland (Advisory Opinion)).

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ULRICH FASTENRATH

STATES, FUNDAMENTAL RIGHTS AND DUTIES

1. Concept

The concept of rights and duties of States, taken in a broad perspective, embodies the greater part of international law, which deals with norms regulating, through rights and duties, the conduct of States. But the addition of the adjective "fundamental" introduces some degree of qualification, since the concept is thereby reduced to those rights and duties of States which are not merely more important than the others, but so essential that the whole system of international law cannot work without compliance with them. Schwarzenberger ranks rights or duties as fundamental if they fulfil three conditions:

"1) that they must be exceptionally significant in international law; 2) that they must stand out from others by covering a relatively wide range of issues and fall without artificiality under one and the same heading; and 3) they must either form an essential part of any known system of international law or be so characteristic of existing international law that if they were ignored there would be a danger of losing sight of a characteristic feature of international law."

Since, in any society, including an international community of States, values change in the course of time, what could be considered to be fundamental rights and duties at a given time would not necessarily be the same at another. Therefore, the enumeration of these fundamental rights and duties of States has been different from one author to another, from one epoch to another. What is considered fundamental depends on the ideology of the jurist or the State seeking to categorize an international right or duty. An example of these considerations is the duty of non-intervention in the affairs of another State, which has only recently been recognized as one of the juridical bases of contemporary international life, after having been denied that status by jurists and States for several decades (→ Non-Intervention, Principle of).

The theory of fundamental rights and duties of States has employed varying terminology (e.g. "basic", "inherent", even "natural" or "inalienable"). Although it has declined in popularity as a subject of study in recent times, this subject was almost always included as an important theme in works of the 19th and early 20th centuries.

2. Historical Evolution

The theory of fundamental rights and duties of States was elaborated by jurists in the 16th and 17th centuries, who based international law on a rationalist conception of → natural law (→ History of the Law of Nations). H. Grotius saw the universe as dominated by a rational law of nature, which was for man a collection of those rules that followed inevitably from his essential nature. Natural law was intelligible and immutable. Man, unlike the animals, wanted to live in association and to act on general principles. If men were to live in peace certain rules would have to be observed; the same applied to nations, for the relations between which Grotius was inclined to emphasize only one rule, that promises should be kept. C. Wolff, who approached the law of nations from a purely philosophical perspective, elaborated a scheme of rights and duties, based on the idea that under the law of nature nations, like individuals, have first obligations towards themselves aimed at → self-preservation and self-perfection, and secondly obligations towards others aimed at assistance toward the preservation and

perfection; as a consequence, a right corresponds to each obligation.

But the real founder of the doctrine of fundamental rights was E. de Vattel, who accepted the theory of the state of nature, whereby complete liberty was supposed to have existed among men before the establishment of civil societies. The same reasoning is applied to States which, because they are sovereign and not subject to any superior power, are still supposed to be living in the state of nature. The law of nature is, therefore, in its origin applicable to States; this law establishes the freedom and independence of each State, which is itself the sole judge of its actions; this is a very individualistic theory. There are, then, some rights, such as these rights to freedom and independence, which are not subject to change, and treaties or customs contrary to them are invalid. Vattel distinguishes between voluntary law and necessary law; the first is created by agreement between States, the other being the element of natural law. What he called necessary law of nations (*droit des gens*) was the application of natural law to nations; it is necessary because nations are obliged to observe it. For Vattel, this law contained all the rules that natural law established for nations.

This doctrine of rights and duties has undergone many variations since Vattel, depending on the philosophy of the author. Sometimes the content of natural law is deduced from the social or rational nature of man; they are inherent rights, in contradistinction to rights conferred by a positive legal order (→ Positivism). This concept is transferred to the relations between States, which are assimilated to individuals, and some fundamental rights are attached to the individual personality of the State, as they are attached to the human person.

Other writers derive the fundamental rights of States from the nature of the State itself or of the international community. The State has to enjoy certain essential rights for the realization of its ends; they could also be indispensable for the safeguarding of the common good of the international community. As the foundation of the theory varies from one author to another, the number of rights and duties considered fundamental also varies; but most writers include the rights to independence, equality, respect and self-preservation (→ States, Sovereign Equality). There is also no agreement as to the content of these rights and duties.

This doctrine has been subjected to criticism since the beginning of this century, and the notion of fundamental rights has almost disappeared from contemporary juridical literature, under the classical heading. The Italian positivists, Anzilotti and Cavaglieri, opposed the doctrine from 1906 onwards, on the grounds that it lumps together subjective rights and positive norms and that it treats individually selected criteria and subjective ideas of the author as rules in force. The more articulate criticism has come, however, from the followers of the pure theory of law. Kelsen has shown that it is impossible to deduce any rights from nature, because nature is ruled by the laws of causality, which does not impose duties and does not confer rights, whether upon men or upon any other beings. Duties and rights presuppose the existence of a normative order, permitting or prescribing certain behaviour, and this normative order could only be established by acts of human beings.

3. Current Situation

(a) Doctrinal antecedents

Since the end of the 18th century numerous legal writers, politicians, scientific associations and even States have tried to define in brief formulas what they considered to be the fundamental rights and duties of States.

One of the first systematic presentations of these rights and duties was the Déclaration du droit des gens, submitted in 1793 and 1795 to the French Convention by its constitutional bishop, the Abbé Grégoire. This Declaration was intended to parallel the famous Déclaration des droits de l'homme et du citoyen approved in 1789 (→ Human Rights); both were inspired by the doctrine of natural law, as interpreted in the 18th century. The first article of Abbé Grégoire's Declaration affirmed the "state of nature" existing among nations and the bonds of universal morality prevailing among them. The text, drafted in rather vague terms, comprised twenty articles, referring, *inter alia*, to the inalienability of the → sovereignty of each nation; the right of each nation to organize and change its government;

recognition that an attack upon one nation is an offence against all other nations; and the subordination of the interest of the individual nation to the general interest of the human race. The Convention gave very brief consideration to the document and never approved it.

More detailed codes were prepared by jurists. They contained an enumeration of rights and duties of States, but they were not drafted in the form of declarations. They are lengthy, exhaustive and comprehensive documents, more in the nature of general treatises than the systematization of a code. Examples are the works of J. Bentham (1827), de Ferrater (1846), Paroldo (1851), A. de Domin-Petrushevecz (1861), J.K. Bluntschli (1863), D.D. Field (1873), P. Fiore (1890), E. Duplessix (1906), J. Internoscia (1910), E. Pessoa (1911) and R. Kleen (1911).

Other authors have, however, prepared succinct statements of international law in the form of draft declarations of the rights and duties of States. Some of these works were prepared as a basis for discussion by → non-governmental organizations or scientific institutions. In 1919 A. de Lapradelle was invited by the → Institut de Droit International to prepare a draft Declaration of Rights and Duties of Nations. The text was discussed in 1921 in Rome and in 1925 at The Hague, but no decision was taken on the subject.

V. Maurtua formulated another project in 1931, which was presented to the American Institute of International Law, which communicated it to the Seventh International Conference of American States held in Montevideo in 1933; the draft contained 15 articles, on self-preservation, independence, equality and jurisdiction as well as on several duties of the State. In 1931 Alejandro Alvarez prepared, following a suggestion he had made at The Hague Conference on Codification, a work entitled Exposé de motifs et projet de déclaration sur les données fondamentales et les grands principes du droit international de l'avenir, which was submitted to European and American scholarly associations. It contained 60 articles, divided into eight chapters, two of which were devoted to "Rights of States – their Limitations" and to "Duties of States, Groups of States and Continents". The draft was revised in 1938 and reduced to 40 articles. On the basis of the earlier Alvarez project, new declarations were approved by the Académie diplomatique internationale and the Union juridique internationale in 1935, and by the → International Law Association (ILA) in 1936 (ILA Reports, Vol. 39 (1936) p. 248). In 1944, the American Bar Association published a volume entitled the International Law of the Future – Postulates, Principles and Proposals, which had been prepared by a group of some two hundred American and Canadian jurists, under the direction of M.O. Hudson. The document contained no statement of rights, but only of duties, the former having to be inferred from the latter. Ten "legal duties" were mentioned: fulfilment of international obligations, territorial public order, non-intervention, prohibition of activities calculated to foment civil strife in other States, cooperation with the community of States, → peaceful settlement of disputes, abstention from threats to use force, cooperation in preventing or suppressing → aggression, conformity with armaments limitations imposed by the community of States, and abstention from entering into agreements inconsistent with the discharge of international duties.

Other private organizations also dealt with the subject of rights and duties of States. In 1891, at its third session held in Rome, the Universal Peace Congress adopted a declaration which was revised at the seventh session in Budapest in 1896. This succinct project contains 19 articles divided into an introduction and two chapters; the introduction, entitled Principles of International Law, contains a declaration of rights and duties in nine articles. The → Inter-Parliamentary Union, an unofficial organization composed of members of national parliaments, at meetings in 1899, 1925 and 1928, discussed the approval of a Declaration of the Rights and Duties of States, containing 14 articles, which was finally adopted in Berlin.

Special mention should be made of the Declaration of Rights and Duties of Nations adopted in 1916 by the American Institute of International Law, on the initiative of J. B. Scott, because it received much attention and comment. This Institute was an unofficial organization composed of the national societies of international law established in the Americas. The draft, containing only six articles, referred to self-preservation, independence, equality and jurisdiction, pointing out that rights and duties were correlative to each

other. This draft was described by United States Secretary of State Hughes in 1923 as embodying "fundamental principles of policy of the United States in relation to the republics of Latin America". Moreover, it was the basis of a study made by the International Commission of American Jurists, and was one of the precedents for the Convention on Rights and Duties of States, signed in Montevideo, December 26,1933 (LNTS, Vol. 165, p. 19). It was considered by de Lapradelle in the discussions on the subject at the Institut de Droit International, in 1919, 1921 and 1925, and also by the International Juridical Union, which adopted its own draft in 1919.

(b) Latin American declarations

In Latin America, the subject of fundamental rights and duties of States has not only been studied by eminent jurists, but has also attracted the attention of governments. It is well known that there was an intensive movement in the precarious inter-American system at the beginning of the century for → codification of rules of international law. In 1910, as already mentioned, the Third Inter-American Conference had before it the draft drawn up by E. Pessoa. Much work was done on a number of drafts on specific subjects by the International Commission of American Jurists, and several conventions were approved at successive conferences. But it was not until 1933 at the Montevideo Conference that an instrument on rights and duties of States was approved. This Convention was very well received among Latin-American countries because it was the first time that the United States recognized non-intervention as a duty between American States (contrast → Monroe Doctrine). The rights included in the Convention were: political existence (independently of recognition), territorial integrity, independence, self-preservation, jurisdiction and equality. The duties there declared were: non-intervention, respect for others' rights, non-recognition of territorial acquisitions or special advantages obtained by force (→ Territory, Acquisition; → Annexation), and finally, the obligation to resort to means for the pacific settlement of disputes.

The principles incorporated in the Montevideo Convention were reaffirmed in several succeeding inter-American conferences, among them the Declaration of Mexico (1945). At the Mexico Conference, it was resolved that the Governing Body of the Pan-American Union should prepare a draft Declaration of the Rights and Duties of States, taking into account previous declarations and a draft Declaration prepared in 1942 by the Inter-American Juridical Committee on the Reaffirmation of the Fundamental Principles of International Law. In 1946 the Governing Body approved its draft, which was later the basis for the discussion of this subject at the Ninth Inter-American Conference held at Bogotá in 1948.

At this Conference approval was given to the Charter of the → Organization of American States (OAS; April 30, 1948, UNTS, Vol. 119, p. 3), which devotes all of Chapter III to Fundamental Rights and Duties of States; Art. 5 also refers to several rights and duties. Chapter III is a restatement of previous Inter-American declarations, taking into account the need to adjust the Inter-American system to that of the → United Nations. The Charter was amended by the Protocol of Buenos Aires on February 27, 1967 (UNTS, Vol. 721, p. 266).

Chapter III contains 14 articles. On the subject of rights, the Chapter recognizes the rights to equality (Art. 9); to independence and defence, and to organize itself as it thinks best (Art. 12); to develop its cultural, political and economic life freely (Art. 16); and to territorial integrity (Art. 20). On duties, the Chapter refers to the respect for rights enjoyed by other States (Art. 10); and to the following duties: to abstain from unjust acts against another State (Art. 14); to observe treaties (Art. 17); to abstain from intervening in the internal and external affairs of another State (Art. 18); to refrain from encouraging the use of enforcement measures of an economic and political character to force the sovereign will of another State (Art. 19; → Economic Coercion), and to refrain from the → use of force in international relations, except in case of legitimate defence (Art. 21). On → recognition of States, the Chapter declares that such recognition implies acceptance of the personality of the new State, with all rights and duties provided under international law (Art. 13). A limitation is placed on the duty of non-intervention and the right to territorial integrity, inasmuch as it is provided that measures taken, in accordance with existing treaties, for the

maintenance of international peace and security, do not constitute a violation of these two norms (Art. 22). The Chapter also recognizes that the jurisdiction of the State is exercised over all inhabitants, whether nationals or → aliens (Art. 14).

The only two treaties which contain an enumeration of rights and duties of States are the Montevideo Convention and the OAS Charter. The latter instrument describes the rights mentioned in Chapter III as "fundamental", following the classical terminology.

(c) ILC Declaration

At the San Francisco Conference in 1945, several States submitted amendments to the Dumbarton Oaks proposals with a view to including a declaration on the rights and duties of States (notably Mexico, the Netherlands, Panama and Ecuador). The Conference decided not to include any declaration of this type, because of the lack of time to consider it, but that once established, the organization "could better proceed to consider the suggestion for such a bill of rights of nations".

At the first part of the first session of the → United Nations General Assembly in January 1946, Cuba proposed the inclusion in the agenda of the question of the adoption of a declaration on rights and duties of States. The General Committee decided that the item should not be included in the supplementary list of the General Assembly; moreover, it stated that the → United Nations Charter itself constituted such a declaration and represented the furthest extent to which duties and rights could be formulated. When the report of the General Committee came before the Plenary Session, the President of the Assembly endorsed the point of view of the General Committee and the question was not included in the agenda.

At the second part of the first session of the General Assembly in the autumn of 1946, a proposal by Panama to consider a draft Declaration on the Rights and Duties of States and a draft Declaration on Fundamental Human Rights was placed on the agenda. After a discussion, the Assembly adopted Resolution 38(I) on December 11, 1946, which requested the → United Nations Secretary-General to transmit the Panamanian draft on Rights and Duties of States to members of the United Nations and organizations concerned with international law, and to refer it to the Committee established to study the methods of codification of international law. This Committee recommended to the General Assembly that it entrust further studies to the → International Law Commission (ILC), taking the Panamanian draft as one of the bases for study.

The second session of the General Assembly, after a long procedural discussion, adopted on this subject Resolutions 175(II) and 178(II), both on November 21, 1947. The first instructed the Secretary-General to prepare the necessary work for the beginning of the activities of the ILC, particularly on the questions referred to it, such as the draft Declaration on Rights and Duties of States; the second referred specifically to the draft Declaration and entrusted its preparation to the ILC, taking as a basis for discussion the Panamanian draft.

The ILC met for the first time at Lake Success, New York in April 1949, and discussed the 24 articles of the draft one by one; they were defended by R. Alfaro of Panama, who had been the author of the initiative since San Francisco. After a thorough debate, the draft was approved by eleven votes to two. V. Koretsky (Soviet Union) and M.O. Hudson (United States) were the two dissenters, acting of course in their personal capacity and not as representatives of their States. Koretsky based his negative attitude on the many shortcomings of the document, and Hudson on his disagreement with the article on the duty of every State to respect human rights without discrimination, which in his opinion went beyond the provisions of the Charter.

The ILC submitted to the General Assembly the following comment on the draft as a whole:

> "the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic rights and duties. The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves

as a key to other provisions of the draft Declaration in proclaiming 'the supremacy of international law'" (YILC (1949) p. 290).

Art. 14 referred to the duty of States to conduct their relations with others in accordance with international law and having in mind the principle that sovereignty is subject to the supremacy of international law.

The draft Declaration consisted of 14 articles in all, ten less than the original proposal. It enunciated four rights (independence, jurisdiction, equality and self-defence) and ten duties. The right to independence of every State (Art. 1) included the right to choose its own form of government. The right to jurisdiction (Art. 2) over all persons and things in the territory was subjected to the immunities recognized by international law. The right of equality (Art. 4) is stated by reference to "equality in law", in simple and clear terms. The right of self-defence (Art. 12) includes individual and → collective self-defence against armed attack. Alfaro interpreted these four "inherent attributes" as "fundamental rights of the State".

The duties enumerated in the draft Declaration included: observance of the principles of non-intervention (Art. 3), → *pacta sunt servanda* (Art. 13) and the peaceful settlement of controversies (Art. 8), non-use of force or of the threat of force (Art. 9), non-recognition of territorial acquisitions effected by force (Art. 11), abstention from fomenting civil strife in other States (Art. 4), ensuring that conditions prevailing in the territory of the State do not threaten international peace and order (Art. 7), treatment of all persons within the territory with respect for human rights and fundamental freedoms (Art. 6), non-assistance to an aggressor (Art. 10), and finally, the duty to conduct relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law (Art. 14). According to the → preamble, these are "certain basic rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations".

After a discussion in the Sixth Committee, the General Assembly adopted, on December 6, 1949, Resolution 375(IV), in which the draft Declaration was deemed "a notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and of jurists of all nations". It also invited suggestions of member States on whether any action should be taken by the General Assembly and also on the exact nature of the document to be aimed at, and the future procedure to be followed. As only a small number of States submitted their comments, the General Assembly decided in Resolution 596(VI) of December 7, 1951 to postpone consideration of the matter until a sufficient number of States had responded. No further action has since been taken on this draft Declaration; it has therefore never been approved by the General Assembly.

The status of the draft seems clear. It was adopted by a body of experts, but not by States. Moreover, although not rejecting *de plano* the idea of having a Declaration on Rights and Duties of States of a classic type, States were no doubt reluctant to accept the idea. The time which has elapsed since 1951 reveals a situation in which an idea has been shelved, and become moribund.

In short, the ILC draft is one more doctrinal draft, the last of a series that have been elaborated since the end of the 19th century, none of them receiving any massive and widespread approval of States, with the exception of the declarations adopted within the inter-American system. No attempt has been made in the last 30 years to adopt a resolution of the classic type, but other important documents, though, with a different methodological approach, have been discussed and adopted.

(d) OAU Charter

The Charter of the → Organization of African Unity (OAU), adopted in 1963, includes a part entitled Rights and Duties of Member States, comprising two articles: Art. V recognizes that members shall enjoy equal rights and equal duties, and Art. VI enshrines observance of the principles established in Art. III, which are: sovereign equality; non-interference; respect for sovereign and territorial integrity; peaceful settlement of disputes; condemnation of political assassination and subversive activities in another country; dedi-

cation to the total emancipation of Africa; and affirmation of the policy of non-alignment.

(e) Declaration on Friendly Relations

In 1960, during the debate in the Legal Committee of the General Assembly on the future work on the codification and progressive development of international law, representatives of socialist countries proposed to codify the principles of peaceful → coexistence. This idea derives directly from Lenin's thought, and is based on two theses, that the final victory of communism over capitalism is inevitable, and that there will be a long period when both systems are to coexist. Lenin added that such coexistence is necessary and desirable.

After Stalin's death, the 20th Congress of the Communist Party of the Soviet Union declared that the general line of that country's foreign policy had always been peaceful coexistence among countries of different social systems. In 1958, Tunkin gave a course at The Hague Academy on this subject (Co-existence and International Law, RdC, Vol. 95 (1958 III) pp. 1–81). E.A. Korovin wrote during these years that the new international law was the law of peaceful coexistence, which presupposes the possibility of and need for economic, political and cultural cooperation among countries. He added that such peaceful coexistence and cooperation was possible only if "the general principles recognized by international law are permanently observed"; Korovin considered that in addition to the principle of peaceful coexistence, such general principles included reciprocal respect for sovereignty and territorial integrity, non-aggression, non-intervention, equality and mutual help (→ Socialist Conceptions of International Law).

Some years before, the term "peaceful coexistence" had appeared in certain international documents, such as the treaty between China and India, in April 1954, which recognized the five principles of peaceful coexistence, known also as the principles of Panch Shila, i.e., mutual respect for territorial integrity and sovereignty, non-aggression, non-intervention, equality and reciprocal benefits and peaceful coexistence. Several Asian countries and Yugoslavia adhere to these principles, and they were also adopted by the → Bandung Conference, in 1955.

In 1960, when the socialist countries presented their initiative for the codification of the principles of peaceful coexistence, they were joined by the representatives of several non-aligned countries. The General Assembly decided to include the question on the agenda of the next session. The delegates of many Western countries feared that this initiative would give the Eastern Europeans an important forum for propaganda for Marxist-Leninist ideology.

In 1961, the socialist countries and many Afro-Asian delegations insisted on the codification of the principles of international law relating to peaceful coexistence among States. Finally, on a Western initiative, it was decided to refer to "principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations" (UN GA Res. 1686 (XVI) of December 18, 1961), with a view to having a fruitful dialogue on the content of certain basic principles of international law central to the maintenance of international peace and security.

During the next Assembly, in 1962, Czechoslovakia presented a draft declaration containing 19 principles. Several Afro-Asian and Eastern European delegations insisted that the principle of peaceful coexistence was the basis of contemporary international law, a position which was challenged by the Western countries. Finally, after a long and interesting debate, Resolution 1815 (XVII) was adopted on December 18, 1962, which identified seven principles as being "principles of international law concerning friendly relations and co-operation among States in accordance with the Charter" and by which the Assembly decided to undertake a study of them. The list of principles, which is not regarded as exhaustive, because the resolution used the adverb "notably" before the enunciation, is as follows:

"(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (c) The duty not to intervene in

matters within the domestic jurisdiction of any State, in accordance with the Charter; (d) The duty of States to co-operate with one another in accordance with the Charter; (e) The principle of equal rights and self-determination of peoples; (f) The principle of sovereign equality of States; (g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter."

As may be seen, the seven chosen principles were derived to a very large extent from the language of Art. 2 of the Charter, which established the principles according to which the Organization and its members should proceed. The purpose of the resolution was not to make a study based on the practice of States, the United Nations and other international organizations, but to extract the legal content of the seven principles mentioned which are enshrined in the system of the Charter.

In 1963, the General Assembly decided to establish a Special Committee to draw up a report on the subject. Two years later, in 1965, the scope of the study was changed by the General Assembly with a view to the adoption of a declaration "which would constitute a landmark in the progressive development and codification of these principles". The Committee took its decisions by the way of → consensus.

At the 25th anniversary of the United Nations, on October 24, 1970, after several long and difficult sessions of the Special Committee, the General Assembly adopted, in Resolution 2625(XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (→ Friendly Relations Resolution). Since a separate article addresses this Resolution, only the most important issues in respect of each principle in the Declaration are explored here.

The preamble stresses the importance of the observance of the principles, stating in detail the reasons for each one.

Principle (a) on the prohibition of the threat or use of force in international relations is the most fully developed in the Declaration. Despite much debate on whether the term "force" meant armed force or other forms of pressure, no definition is contained in the Declaration. This principle entails, *inter alia*, the following duties of States: to refrain from → propaganda for wars of aggression; to refrain from acts of → reprisals involving the use of force; to comply in → good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and to endeavour to make the UN system more effective; to pursue in good faith → negotiations for the early conclusion of a universal treaty on general and complete → disarmament under effective international control; to refrain from the threat or use of force to violate existing international → boundaries and international lines of → demarcation, such as → armistice lines, established by or pursuant to an international agreement to which the State is a party or is otherwise bound to respect; to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and → self-determination of peoples of their rights to self-determination and freedom and independence; to refrain from organizing or encouraging irregular forces (→ Mercenaries) from incursion into other States; to refrain from organizing or participating in acts of civil strife in another State or → acquiescence in activities directed to that end (→ Civil War). Moreover, the Declaration states that a war of aggression is a → crime against peace, involving responsibility, and that the territory of a State should not be the object of military occupation or the object of acquisition resulting from the threat or use of force; no territorial acquisition by force should be recognized as legal.

Principle (b) on pacific settlement of disputes gave rise to an interesting debate on whether special emphasis should be laid on negotiations as a first procedural step, or whether attention should be focused on impartial third party procedures, including the → International Court of Justice for legal disputes. The consensus reached was very meagre. Most of the statements included in this important principle are mere repetitions of concepts included in the Charter. Mention should be made of the following duties of the parties: to agree on such means as may be appropriate to the nature of the dispute; if the chosen procedure fails, to continue to seek settlement by other means; to refrain from taking any action which could aggravate the dispute. The Declaration

recognizes the free choice of means, and that recourse to a procedure freely agreed to with regard to existing or future disputes is not to be regarded as incompatible with sovereign equality.

Principle (c) on non-intervention was the most fully discussed in the Special Committee, because of differences of opinion between Latin American and Western delegations. Consideration of the subject was rendered even more complicated by the adoption by the General Assembly, on December 21, 1965, in Resolution 2131(XX), of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty; many delegations were of the opinion that the Committee need do no more than incorporate the 1965 resolutions into the draft Declaration, but others thought that the Committee was free to draft new and more legalistic wording for this principle. The text adopted reflects the 1965 Declaration, of which paras. 1, 2, 3, 5 and 8 were included with minor drafting modifications, but other provisions were omitted because they were covered elsewhere in the draft. The principle agreed upon includes the following duties: not to intervene, directly or indirectly, in the internal affairs of any State (reproducing Art. 18 of the OAS Charter); not to encourage the use of political, economic or other types of pressure to coerce another State, not to organize subversive or terrorist activities towards the overthrow of the régime of another State (→ Terrorism); not to use force to deprive people of their national identity. These duties are complemented by the right of every State to choose its political, economic and social system without interference.

Agreement on the text of principle (d) on the duty to cooperate was reached at an early stage of the debate without much difficulty. The declaration mentions the following aspects of this duty: to cooperate in the maintenance of international peace and security, in the promotion of human rights, cultural and educational progress and economic growth; to conduct the → international relations of States in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention; to take joint or separate action in cooperation with the United Nations.

The drafting of principle (e) on equal rights and self-determination of peoples was a difficult task for the Committee. The main problems were the differences between those who accepted the right of self-determination of peoples and the duties of States to grant it, and those who maintained that in international law only States could have rights; and between the delegations which argued that the principle was of universal application, and those which contended that the application of the principle was limited to colonial situations (→ Colonies and Colonial Régime; → Decolonization). Another difficulty was the controversy over the right of a people to use force against colonialism, and the duties of other States to provide all possible assistance. The Declaration begins with the recognition that the right of self-determination applies to all peoples, and that every State has the duty to respect it and moreover to promote its realization, in order to bring a speedy end to colonialism. Among other points, it is recognized that there are other modes of implementing self-determination than full independence, such as free association or integration with an independent State.

The formulation of principle (f) on sovereign equality of States was simple: it is a repetition of the list of elements included in this concept which was accepted during the San Francisco Conference. The only addition is the right of each State to choose and develop its political, social, economic and cultural systems.

Principle (g) on good faith was also drafted in the form of a rather short and uncomplicated statement. It refers to the duties to fulfil in good faith the obligations assumed in accordance with the Charter, under recognized principles and rules of international law, and under international agreements.

The general part of the Declaration stresses the interrelationship of the principles and preserves the provisions of the Charter and the rights and duties of members and peoples under it. The final paragraph declares that the principles of the Charter embodied in the Declaration "constitute basic principles of international law" and appeals to all States to be guided by them and to develop their mutual relations on the basis of their strict observance.

The Declaration was presented to the General Assembly by 64 States, including the United

States, the Soviet Union, France and the United Kingdom, and was unanimously adopted. It is a compromise text, with lacunae and imperfections, repetitions and contradictions. Many of its provisions lack precision. However, at the time it was adopted it was regarded as an important success.

4. Evaluation

From the doctrinal point of view, the consideration of the subject "fundamental rights and duties of States" in its traditional sense has almost disappeared from contemporary juridical literature, under the influence of criticism from the positivist school at the beginning of the 20th century, and the diminishing influence of the natural law theories, especially those inspired by 18th century thinking.

However, on its original ideological basis it has survived in instruments establishing regional international organizations such as the OAS and OAU. The inclusion in the OAS Charter of a chapter on rights and duties of States follows a very powerful tradition among Latin American countries and jurists, which has to be understood within the framework of the long and difficult struggle for the acceptance of the principle of non-intervention by all States of the American continent. This is why the Montevideo Convention on Rights and Duties of States, the first treaty to be adopted on the subject, assumed a fundamental importance in the inter-American system, since it was in that Convention that the United States accepted the principle of non-intervention.

Circumstances have been different at the worldwide level. The efforts made by several Latin American countries for a Declaration on Rights and Duties of States to be included or annexed to the UN Charter were frustrated at San Francisco. A similar fate befell the Declaration prepared in the traditional fashion by the ILC in 1949, which has disappeared into oblivion. No new initiatives on this basis have been promoted since 1950, and therefore there is no Declaration of Rights and Duties of States at a universal level.

However, the Charter of the United Nations contains in Art. 2 the principles according to which the Organization and its Members should proceed. Art. 2 which, according to its para. 6, establishes rules of conduct for members and non-members, includes what the contemporary international community has considered to be the most important international rights and obligations for the fulfilment of the most important values which that community wishes to preserve. These are spelled out in Art. 1, beginning with the maintenance of international peace and security. Art. 2 of the UN Charter is today a compressed code of international law governing the vital aspects of international relationships. Furthermore, the last part of the General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations declares that "the principles of the Charter which are embodied in this Declaration constitute basic principles of international law". By principles should be understood basic and essential rights.

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J.M. RUDA

STATES, SOVEREIGN EQUALITY

1. Notion and Context

The doctrine of the equality of States is based on the democratic idea of the equality of individuals and citizens before the law. In Europe, the idea of the juridical equality of States was conceived as an absolute, natural or fundamental right of → States and has constituted a continuing aspiration characterizing the ideals of the system of pluralistic, independent States which has developed since the Renaissance (→ States, Fundamental Rights and Duties; → Territorial Integrity and Political Independence; → History of the Law of Nations).

The emphasis of the theoretical construct of the fundamental rights of States shifted after the two World Wars, reflecting the view that equality is inherent in the right of a State to independence, in its juridical personality and in its → recognition as an international person.

Whether State equality is considered a corollary of → sovereignty or is equated with independence, it has been the characteristic of the sovereign entity since the last century, which stands formally on an equal footing with the other members of the pluralist society of the international order. It is a question of equality before the law, regardless of the different degrees of power or influence of individual States.

International experience shows that States, great and small, arrange their multiple external relations as equals. In principle they have equal capacity to create law. No State, great or small, considers itself to be bound by an agreement or covenant that it has not recognized explicitly or implicitly.

The same principle applies with regard to the recognition of the jurisdiction of → international courts and tribunals, which always depends on the acceptance by the States concerned. It is an example of the classic maxim *par in parem non habet imperium*. However, the principle of absolute → State immunity is more and more becoming adapted to the modern European distinction between activities *jure imperii* and *jure gestionis*.

The general validity of the principle does not rule out the possibility of the existence of real legal inequalities by reason of the will of States. Limitations of sovereignty are not presumed, but may be agreed to.

The notion of equality is conditioned in turn by its essentially legal-formal character. It is not equivalent to material or substantial identity of rights and duties but rather entails the legal capacity to act on an equal footing and with equal freedom of decision, similar protection under the international legal order, and the equal respect due to States integrated in the system of → coexistence. It is in essence a juridical value with the rank of a fundamental principle of the law of nations. It is not a political reality, nor a physical-material fact of international life.

A different question altogether is the political influence that the biggest and most powerful State may exert over the smallest and weakest of States, or the political interference of the superpowers in certain regions or their direct or indirect pressure in certain associations or → alliances of States (→ Great Powers; → Power Politics; → Spheres of Influence).

Juridical equality then does not equal political equality. Politically it is obvious that States are by no means equal. Differences in the power of States generate the natural *de facto* inequality which is reflected in the political sphere and in the classification of a country as a great power, a concept which has been relative throughout history.

Of great juridical importance is the practice, unknown until the present century, of attributing a special, privileged status with universal validity to the great powers in international texts such as the Covenant of the → League of Nations or, with even wider scope, in the → United Nations Charter. This represents the realistic attribution to the great powers of broader responsibilities for the maintenance of the peace which concerns all equally. In the area of international organizations, but not in general international law, equality before the law has thus been modified and subordinated to the idea of → collective security.

2. *Historical Evolution*

The idea of the equality of States could not have developed in the ambit of the Roman Empire nor in the bosom of the *res publica cristiana* of the Middle Ages which postulated a unitary, hierarchic organization. The rise of the nation States – influenced by the Renaissance, the Reformation and the discovery of America – made possible the creation of a new type of society among equal and independent political communities on European soil. The States considered themselves as *superiorem non recognoscentes*.

The Peace of Westphalia (1648) is generally regarded as the beginning of a new era in → international relations in which the principles of sovereign independence and equality predominate (→ Westphalia, Peace of (1648)). Despite this, the historical consolidation in Europe of independent States had begun and developed centuries before the Peace of Westphalia. One century earlier the Peace of Augsburg (1555) had been based on the principle of equal respect for principalities and kingdoms of different religious confessions – *cujus regio, ejus religio*. The Treaties of Münster and of Osnabrück recognized the juridical parity of the States, regardless of the respective régimes and religious beliefs, and constituted the great, solemn legal declaration, in the European arena, of the sovereign equality of the modern States.

And it was precisely as a result of the Renaissance that on the occasion of the discovery of America, Francisco de Vitoria transferred, at a doctrinal level, the idea of the natural equality of man to the international plane of kingdoms and States in the juridical solutions characterized by the equality of treatment of independent political communities, whether American or European.

Vitoria's idea of the universal community of independent States was shared later by Suàrez, Gentili and Grotius. But it was Pufendorf who, in a more systematic way and by reason of absolute sovereignty, considered States as fundamentally equal by nature, as occurs with men by virtue of → natural law and despite *de facto* inequalities.

On the other hand, in the 19th century the so-called European Concert of Great Powers promoted frequent meetings of congresses and conferences with the participation of States, great and small. But in practice the European Great Powers maintained (from 1815 to 1885) their collective → hegemony.

The → Vienna Congress (1815) is considered, with undue emphasis, as an example of an international conference in which the doctrine of equality acquired a certain relevance. But the decision-taking at the Congress was subject to a hierarchical system. Although the small States participated to a certain extent in the creation of international rules of a general character, the superior role assumed by the great powers and the consequent privileged exercise of intervention (Protocol of Aix-la-Chapelle, 1818) was not compatible with the principle of equality. On more than one occasion, the small States saw themselves bound by decisions in which they had not participated and which they had not accepted.

Again at the → Berlin Congress (1878) the great powers did not formally recognize the equality of the minor States in the matter of the right to be represented or in the method of adopting decisions which even implied obligations for certain non-participating countries.

On the other hand, the → Berlin West Africa Conference (1884/1885) represented an important change in the democratization of international meetings. All votes had the same weight. The General Act of the Conference decidedly established the idea of jurisdictional equality.

The principle was observed more meticulously in the First Hague Peace Conference in 1899 (→ Hague Peace Conferences of 1899 and 1907). For the first time in a conference of this type, delegates from two American and four Asian countries participated, and the principle of equality prevailed both in the committees and in the plenary sessions. In the Second Hague Peace Conference of 1907, in which 44 countries took part, again no discrimination was made.

The rules of procedure responded to the doctrine of equality; one State–one vote and the rule of unanimity for substantive questions and the rule of the majority for matters of procedure (→ Voting Rules in International Conferences and Organizations). The rigorous practice of the principle of unanimity led to a stalemate at the → London Naval Conference of 1908/1909 with regard to the proposed → International Prize Court (cf. Hague Convention XII of 1907). The

States were only able to achieve improvement of the → Permanent Court of Arbitration.

3. *The Current Situation*

The UN Charter proclaims that "[t]he Organization is based on the principle of the sovereign equality of all its Members" (Art. 2(1)), both "large and small" (→ Preamble).

The principle suffers exceptions. The idea of equality is transformed into juridical inequality as far as the maintenance of peace and international security is concerned, since effectively and legally only the five permanent members conserve full sovereign equality.

Equality of representation is upheld fully at the → United Nations General Assembly and relatively, by an elective system, at the → United Nations Economic and Social Council. The composition of the → United Nations Security Council deviates from the principle of equality by virtue of the permanent presence of the great powers (Art. 23(1)). The situation exists in effect in the Trusteeship Council (→ United Nations Trusteeship System) and in the → International Court of Justice (ICJ).

The requisite of unanimity is not applied in taking decisions in the organs of the → United Nations. It is true that only one of the six principal organs of the Organization has the faculty to adopt decisions binding on all its members (the Security Council). All other organs, with the exception of the ICJ, only have competence to make recommendations.

The General Assembly adopts its decisions by simple majority (Art. 18(3)) *inter alia* in questions of procedure or by a two-thirds majority of all its members (Arts. 18(2) and 108). However, it is bereft of legislative powers.

The Economic and Social Council and the Trusteeship Council are under the authority of the Assembly and consequently lack independent powers. They are even further from the principle of unanimity; simple majority is the rule.

The Security Council has effective powers of decision in relation to its primordial responsibility of maintaining international peace and security. It decides by majority vote, but by a system of qualified majority. An affirmative vote of any nine (formerly seven) members is required, for questions of procedure (Art. 27(2)), but in substantive or important matters the nine affirmative votes must include the concurring votes of all the permanent members (Art. 27(3)). This is the famous → veto power. Therefore, in the Council, both equality of representation and the power to vote are lacking. The five permanent members enjoy full equality among themselves. All the other members are likewise equal among each other. But there is no equality between these five and the other members of the Organization.

In the field of international legislation, on the other hand, the traditional doctrine prevails: The State cannot be bound by any treaty to which it is not a party or to which it has not given its free consent. In this sense, and in the interest of juridical-formal equality, a modern practice has emerged whereby decisions in conferences under UN auspices are reached by → consensus, consisting in the general acceptance by all participating States without the need to manifest the individual vote.

4. *Special Legal Problems*

The expression of the principle of equality, through the rule of unanimity, continues to create special legal problems because of the difficulty of applying it in international conferences. This difficulty had already appeared in the 19th century when there were fewer and more homogeneous States. The same formal principle is acquiring a different content in the sphere of international technical and economic cooperation.

Intergovernmental organizations avail themselves of systems of interpreting equality which are more complex and go beyond the simple choice between unanimity or majority. Most of them bring a double State representation: in the assemblies, consisting of all the States, and in the more limited executive organs, the councils, consisting of only a certain number of States.

The adaptation of the representative system in the council operates on the criteria of rotation and objectives which respect the abstract principle of equality: equitable geographical distribution, specific importance or interest, etc. The notion of specific importance proves simple to apply in the organisms of a financial character and corresponds to the subscription of social capital: the → International Monetary Fund, the

→ International Bank for Reconstruction and Development.

The application of the same notion breeds, on the other hand, endless disagreements with regard to the other specialized organisms: the degree of countries' "industrial importance" (→ International Labour Organisation), or the criterion of "mastery of atomic energy technology" (→ International Atomic Energy Agency) or the classification of countries as "more or less important" in questions of air transport (→ International Civil Aviation Organization) or maritime navigation (→ International Maritime Organization).

The classic formula of one State–one vote is partly substituted by the formula of → weighted voting. States enjoy a different number of votes according to systems that have been freely agreed to: objective qualitative criteria, as in the case of the financial organisms, or according to an agreed coefficient as had been practised in the 19th century in the Federal Diet of the Germanic Confederation. The evolution of the concept has introduced a certain differentiation of the rights and duties of States, with different legal statutes, generated by diverse economic, geographical and technical determinants.

In certain international organizations of an economic type, States are grouped together with distinct rights and duties according to the category they belong to: developed countries or → developing States, socialist or market economies, importers or exporters, etc. Material differentiations are also registered in the regulation of raw materials and commodities: such as sugar, wheat, olive oil, coffee and tin (→ Commodities, International Regulation of Production and Trade).

The importance of the economic problems has at the same time stimulated modern international economic law which tries, without abandoning the postulate of equality, to establish rules, not only formal but substantive, adapted to the necessities of each State according to its economic category (→ Economic Law, International). This foreshadows a different interpretation of equality with the adoption of different ground rules aimed at attenuating the material inequalities of development thanks to the new → international economic order (UN GA Res. 3201 (S-VI) and Res. 3201 (S-VI) of May 1, 1974).

5. Evaluation

The modern adaptations of the principle of sovereign equality have continued into the present the older doctrinal tendency to deny the principle in practice. Thus, for example, the proclamation of the Peace of Westphalia was accompanied in practice by the preferential right of the great powers charged with supervising its application and the structure of the United Nations Organization implies a flagrant inequality with the right of veto of the great powers.

It is true that the political inequality of States is reflected not only in international practice but also in law. But it would be excessive to assert that the principle is absent from the positive rules enshrined in public international law.

History and law witness the usual recognition by States of the principle of equality in their mutual relations. Its application in the drawing up of treaties is well-known. The → Vienna Convention on the Law of Treaties of 1969 reiterates the sovereign equality and equal capacity of States to enter into agreements. The principles of freedom and equal value of mutual consent govern diplomatic and consular relations (→ Vienna Convention on Diplomatic Relations (1961); → Vienna Convention on Consular Relations (1963)). Positive equality manifests itself too in litigation, whether judicial or arbitral in nature. The consensual basis of the jurisdiction of the ICJ presupposes the subordination of equal States to the primacy of the international order.

The juridical-formal principle is not an absolute value; nor, today, is the *suprema potestas* of the State. The principle is susceptible of limitations which the States may esteem just when required by the preponderant interests, values and reasons of the general order.

As the Charter of the → Organization of American States declares, the equal capacity of States in the acquisition and exercise of their rights, and in the fulfilment of their obligations, does not depend on their power, but on their existence as international legal persons.

The positive admission of the principle is reiterated in innumerable fundamental → declarations of States in the United Nations: the → Uniting for Peace Resolution, the → Charter of Economic Rights and Duties of States, the Declaration and Program of Action on

the New International Economic Order, and others. The Declaration of the United Nations of 1970 on Friendship and Co-operation between States indicates the elements that constitute the principle of sovereign equality despite the differences of an economic, social, political or other nature (→ Friendly Relations Resolution).

In international juridical reality, equality is perfected by the application of the general legal norm of the equality of treatment that should characterize the reciprocal relations between States. In the absence of any binding international ruling that guarantees equality of treatment, formally and materially, primordial value is acquired by two fundamental duties proclaimed by the 1970 Declaration which tend to avoid the arbitrary use of discretion by the State: the "duty to fulfil international obligations fully and in good faith" and the "duty to respect the personality of other States". Failure to observe the norm may imply international responsibility (→ Responsibility of States: General Principles).

At a regional level, the Final Act of the → Helsinki Conference of 1975 on Security and Cooperation in Europe prescribes to the States "the mutual respect of their sovereign equality" which implies "equal rights and duties" in conformity with international law.

Consequently, the principle of sovereign equality of States is not a mere ideal, nor an absolute dogma, but a fundamental principle and a constantly progressing legal reality in the relations governed by the law of nations.

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TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE

1. Notion

The notions of territorial integrity and political independence constitute two basic facets of State → sovereignty which are traditionally interwoven with the fundamental principle of the prohibition of the threat or → use of force and are largely recognized as independent principles of international law. The notion of territorial integrity refers to the material elements of the → State, namely the physical and demographic resources that lie within its territory (land, sea and airspace) and are delimited by the State's frontiers and → boundaries. The notion of political independence covers the non-material elements of State sovereignty and power, namely the freedom of political decision-making and the direction of State organs in respect of the internal and international affairs of a State.

2. Historical Evolution

(a) The inter-war period

The concepts of territorial integrity and political independence emerged during the years immediately following the end of World War I. Art. 10 of the Covenant of the → League of Nations stipulated that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League". For the first time the combination of the two concepts appeared within the domain of international law closely intertwined with the question of the use of force. Another instance of similar phrasing arose some years later in a related context: in the Stimson Note of January 7, 1932, which was followed by a series of almost identical

pronouncements by organs of the League of Nations, the Government of the United States announced to the Governments of Japan and China that it was in no position to admit the legality of any *de facto* situation or to recognize any treaty or agreement entered into between these Governments "which may impair the treaty rights of the United States . . . including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China". Furthermore, the United States did not intend "to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928" (→ Stimson Doctrine). The → non-recognition principle embodied in the wording of the United States → note constituted one of the earliest legal manifestations of the 1928 → Kellogg-Briand Pact and the rule of prohibiting the use of force.

Another well-known use of the expressions integrity and independence as complementary notions is in Art. 3 of the Convention on Rights and Duties of States (done at Montevideo, December 26, 1933, LNTS, Vol. 165 (1933) p. 19), which dealt with the right of a State to defend its integrity and independence "and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts", regardless of whether its political existence was recognized by the other States. Here, again, the concepts were related to the notion of the use of force, but this time in an affirmative manner, connected with the right of a State to defend itself (→ States, Fundamental Rights and Duties).

(b) The concepts within the United Nations system

The concepts of territorial integrity and political independence were introduced in the post-war world through the → United Nations Charter, Art. 2(4) of which provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

The concepts were inserted in the Dumbarton Oaks draft at San Francisco upon the insistence of the smaller States with the belief that the composite wording covered a wide range of possible coercive actions or even preparatory acts against their territory and sovereignty. More particularly, the combination of the word "threat", contained in Art. 2(4) of the Charter, as an equally impermissible activity as the use of force, with the expression "political independence" meant that a State was protected not only from physical acts of violence against its territorial integrity and political independence, but also from threats which could be autonomously directed against and eventually influence the freedom of its decision-making and the normal operation of its organs.

The theory of international law, and mainly the early practice of the → United Nations since the coming into force of the Charter, have answered questions of interpretation of the latter instrument with regard to the exact interrelation existing between the two expressions and the threat or use of force. More specifically it is generally agreed that the notion of territorial integrity must be taken to refer to effective control and possession and not, necessarily, to a *de jure* recognized title. Consequently, loss of territorial integrity of a State implies loss of control and possession of the land, airspace or sea, totally or partially, regardless of whether the former were based upon a legal title or a *de facto* situation. The United Nations practice has shown that it is not only the direct occupation of a State's territory which constitutes a violation of its territorial integrity, but also the indirect involvement in its internal affairs such as the aid of rebels by a third State to gain control of a part of its territory (a classical example is to be found in the Resolutions on Threats to the Political Independence and Territorial Integrity of Greece, UN GA Res. of November 27, 1948; → Arms, Traffic in; → Neutrality, Concept and General Rules).

The notion of "political independence" lends itself to easier interpretation since it is obvious that the political independence of a State is infringed in all cases in which foreign acts tend to control the organs of a State and influence their capacity to decide through the threat or use of force or through subversive measures or pressures exerted upon them. It is interesting to note that in the cases which have been examined by the United Nations and which have been based upon a claim

of violation of political independence, frequent references have been made to the maintenance of foreign troops on the territory of a State contrary to the will of the local government (→ Military Forces Abroad; → Occupation, Belligerent). Early complaints against such a phenomenon may be detected in the Soviet → protest against the continuing presence of British troops in Greece (1946), demands of the Lebanese and Syrian governments for the withdrawal of foreign (French and British) troops from the ex-colonies (1949) and so forth (→ Colonies and Colonial Régime).

The concepts of territorial integrity and political independence have followed the course of the evolution of → international relations which have been revolutionized since the late 1950s. The grand event of → decolonization and the consequent emergence of a great number of new States, together with the East-West fissure, have heavily influenced the traditional concepts of international law, and among them the concepts of territorial integrity and political independence (→ New States in International Law). In 1960, through the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the → United Nations General Assembly enriched the surrounding environment of the two concepts by admitting two new elements into it: that all peoples – and not only States – have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory; and that by virtue of that right they freely determine their political status and they freely pursue their economic, social and cultural development. This latter element (namely the inclusion of economic, social and cultural considerations in the notions of independence and integrity) seems to enlarge the two concepts in new, hitherto unconsidered directions. It must also be noted that the element of the "peoples" as recipients of the privilege of integrity and independence is further substantiated by the same Declaration when it is stated that "[all] armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected". In fact, the wording of this Declaration extends the application of the precepts of Art. 2(4) of the UN Charter to cases of revolutionary agitations in colonial areas and equalizes the notion of State with the notion of peoples striving for their autonomous presence in international affairs (→ Liberation Movements).

The next reaffirmation of the continuing significance of territorial integrity and political independence in the new complex conditions of international relations in an enlarged world is to be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which was adopted by the General Assembly on October 24, 1970 (→ Friendly Relations Resolution). In this major document of the post-war international community, the expressions "territorial integrity" and "political independence" occupy an important position, intertwined, this time not only with the principle of the prohibition of the threat or use of force but also with the principle of sovereign equality of States (→ States, Sovereign Equality).

The notions of territorial integrity and political independence appear recurrently in the → preamble of the Friendly Relations Resolution. First, the UN General Assembly recalls the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State; in addition, it considers it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. Second, the General Assembly expresses its conviction that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter. Finally, the General Assembly considers that the → codification and the progressive development of a number of principles, including the prohibition of the threat or use of force against the territorial integrity or political independence would promote the realization of the purposes of the United Nations.

In the elaboration of the principle that States shall refrain in their international relations from the threat or use of force against the territorial

integrity or political independence of any State, the General Assembly proceeds to a number of specifications which seem to give substance to the object which is protected by the prohibition contained in the principle. Thus, under the Friendly Relations Resolution,

> "[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States .... Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is partly or which it is otherwise bound to respect."

Moreover, this Resolution specifies that "[e]very State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State" (→ Mercenaries). Likewise it proclaims that

> "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

Finally the Resolution proclaimes that

> "[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal" (→ Territory, Acquisition).

The inclusion of the two concepts in the Friendly Relations Resolution within the purview of the principle of the sovereign equality of States has emancipated them from their monolithic coexistence with the principle of the prohibition of the threat or use of force and their consequent "negative" definition in the context of international law. Acceptance by the Friendly Relations Resolution of these concepts as parts of the sovereign equality of States has put them in their right perspective, giving them an affirmative status in international law.

Two other documents emerging from the activity of the UN General Assembly complete the image of territorial integrity and political independence. The first is the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty of December 21, 1965, where the UN General Assembly, concerned at the increasing threat to universal peace due to armed → intervention (→ Peace, Threat to) and other direct or indirect forms of interference threatening the sovereign personality and the political independence of States, stated that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural developments. As in the case of the Declaration on the Granting of Independence to Colonial Countries and Peoples, this Declaration also encompasses the freedom of economic, social and cultural development of a people.

The second document is the Resolution on the Definition of Aggression (December 14, 1974, UN GA Res. 3314 (XXIX)) whereby the General Assembly, reaffirming the duty of States not to use armed force to deprive peoples of their right to → self-determination, freedom and independence or to disrupt territorial integrity, defines → aggression as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. Art. 3 enumerates the cases which are considered as acts of aggression: invasion or attack of territory, → bombardment, → blockade of → ports or coasts of a State, the attack on the land, sea or air forces, or marine and air fleets of another State (which presumably may take place outside the territory of the latter), the use of armed forces of one State which are within the territory of another State in violation of the conditions of an agreement allowing the presence of these armed forces in the territory of the latter State, the use of the territory of one State as a springboard by another State to perpetrate an act of aggression against a

third State or, finally, the dispatch of armed bands, groups, irregular or mercenaries by or on behalf of a State which carry out serious acts of armed force against another State.

The Declaration on Intervention and the Resolution on Aggression reflect in their texts the development of the notions of territorial integrity and political independence in the circumstances of an enlarged United Nations Organization, heavily influenced by new, small, mainly ex-colonial States with particular problems of integration within the international system, mindful of the past and prospective role of the Northern Hemisphere with respect to their sovereignty and integrity.

(c) The concepts outside the United Nations system

The notions of territorial integrity and political independence may also be found in international documents outside the UN system: in the Preamble of the Pact of the League of Arab States (signed in Cairo, March 22, 1945, UNTS, Vol. 70, p. 237; → Arab States, League of) the notion of independence is mentioned but not the notion of territorial integrity; in Art. 1 of the Charter of the → Organization of American States (signed at Bogotá, April 30, 1948, UNTS, Vol. 119, p. 3) the participating States agreed to defend their territorial integrity and independence; in the Preamble of the Charter of the → Organization of African Unity (OAU) (done at Addis Ababa, May 25, 1963, UNTS, Vol. 479, p. 39) the African States express their determination to safeguard and consolidate "the hard-won independence" as well as the sovereignty and territorial integrity of their States, while Art. 11 of the same instrument states that the defence of sovereignty, territorial integrity and independence constitutes a purpose of the OAU. Obviously, the above international instruments, which instituted the basic political regional organizations of the post-war era, followed, in many respects, the patterns of the UN Charter.

The most comprehensive approach to date to the notion of territorial integrity and political independence outside the United Nations system is to be found in the Final Act of the Conference on Security and Co-operation in Europe (signed at Helsinki on August 1, 1975, ILM, Vol. 14 (1975) p. 1292; → Helsinki Conference and Final Act on Security and Cooperation in Europe). In this important document on East-West relations, the notions of territorial integrity and political independence enjoy the status of rights under international law, while the notion of territorial integrity unequivocally acquires the status of a principle guiding the relations of the participating States.

In section I, the Final Act provides that "[t]the participating States will respect each other's sovereign equality and individuality as well as the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence". The section goes on to refer to the rights of States to freely choose and develop their political, social, economic and cultural systems, to define and conduct as they wish their relations with other States, to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral → treaties including the right to be or not to be a party to treaties of → alliance.

Section II binds the notions of territorial integrity and political independence together with the notion of the prohibition of the threat or use of force in the traditional manner.

Section IV is dedicated to a circumscription of the principle of territorial integrity. The text is rather innocuous in that it follows a wording which, instead of defining the notion and delimiting its scope, generally refers to the Charter of the United Nations and to the practice established therein. The wording of this section was a compromise between the views, on the one hand, of a number of Eastern European countries which had intended to broaden the scope of the concept (→ transfrontier pollution and unintentional violations of airspace were among the cases of non-forceful violations cited by certain countries) and the views, on the other hand, of the Western countries which had intended to keep the notion within the orthodox limits set down by the UN system.

3. Current Legal Status

The concepts of territorial integrity and political independence, together with the related notions of

→ domestic jurisdiction, → territorial sovereignty, sovereign equality, → non-intervention, prohibition of the threat or use of force and non-recognition of acts or situations resulting therefrom, form the legal panoply for the protection of a State from external threats and interferences. It is only natural that the weight and significance of all these concepts have increased since the end of World War II as a result of the emergence in the international community of a large number of small or weak States which are, more or less, the offspring of the process of decolonization. Their political and military weakness, their typically multi-ethnic and multi-national origin are elements which make the majority of these States eager to legally protect themselves from any reappearance of political or military interferences of third States in their internal and international affairs. Consequently, the new States are the most fervent proponents of the legal protection of their identity and, thus, of the legal concepts which substantiate their legitimate claims. The antagonistic trends in the relations of the two super powers has also increased the importance of these concepts. The protection of sovereignty, territorial integrity and political independence mean, in the last instance, recognition of the political → *status quo* within the powers' → spheres of influence and unhindered control of the operation of the respective ideologies and political dogmas. The threats to the elements of sovereignty in today's world have increased owing to the development of sophisticated means of interference in the affairs of a State, the economic → interdependence of States and the emergence of supra-national forces in international relations.

It would only be natural, under the above conditions, if the concepts of territorial integrity and political independence were vested with an autonomous legal import and a wide scope of application. Yet, both their legal status and their scope of application seem to be rather indeterminate: the exact legal nature of the concepts is vague since they either appear as subordinate elements of other principles of international law (prohibition of threats or use of force, sovereign equality of States) or as authentic rights under international law. In any event, the way they are introduced in the various international documents and in the UN practice, the degree of autonomy that they have begun to enjoy and the particular weight that they seem to have acquired in current international relations may justify their being considered as independent principles of international law.

The scope of application of the two concepts and their exact content may again be inferred from the international documents and the practice which directly or indirectly refer to them. In the absence of a clarifying codification, the assumption which can be made is that the scope of the concepts has been broadened so as to cover not only the traditional facets of territory and political power, but also elements of economic, social and cultural developments of the peoples living within the borders of a State. In other words, the principles of territorial integrity and political independence not only protect a State from direct or indirect forceful acts of a third State or forceful acts instigated by a third State against it: they also protect a State from non-forceful acts which, by means of non-military intervention, may infringe the economic, social and cultural developments of the population living in it.

A final point must be raised with respect to the hierarchy of these two concepts in the field of the principles of international law regarding the State and its sovereignty. A potential clash might arise where the right of self-determination of peoples was exercised against the territorial integrity and the political independence of an already existing State. Would international law regulate the relationship of these antagonistic concepts by establishing the priority of the latter against the former? The Friendly Relations Resolution which gives a prominent position to the principle of equal rights and self-determination of peoples, provides that nothing in the paragraphs which delimit the principle of equal rights and self-determination of peoples can be construed

> "as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

The wording of this reservation to the right of

self-determination – which may similarly be found in some other UN instances – seems to give a certain priority to the territorial integrity of existing States: as long as the presumption of the compliance of a State with the principle of equal rights and self-determination of peoples is satisfied by the existence of a government representing the whole people belonging to the territory and by the fact that the government does not apply a policy of distinctions, no claim of self-determination can be legitimately made. Thus the right of self-determination is limited, under the circumstances of the above presumption, to rather extreme instances of colonialism policies, racism and so forth. It is worth noting that the very Declaration on the Granting of Independence to Colonial Countries and Peoples, which is one of the key texts on self-determination, provides in para. 6 that "[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

Declaration on the Granting of Independence to Colonial Countries and Peoples, December 14, 1960, UN GA Res. 1514(XV).

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TERRITORIAL SOVEREIGNTY

1. Territory as the Substratum of Statehood: (a) Territory as physical underlay. (b) Territory as a legal element. – 2. Legal Function of Territory: (a) The theory of territory as object. (b) The theory of territory as subject. (c) The jurisdictional theory. (d) Critical assessment. (e) Conclusion. – 3. General Characteristics of Territorial Sovereignty. – 4. Restrictions on the Exercise of the Attributes of Territorial Sovereignty: (a) The general régime of immunities. (b) The grant of territorial rights. (c) Jurisdiction of State extended outside national territory based on other factors of appurtenance.

1. Territory as the Substratum of Statehood

The elaboration of a general theory of territory is, as some writers point out, an intrinsically difficult undertaking, since, while it has been clear from early times that territory, owing to its material function, is a physical precondition for the very existence of a → State, the modern age has witnessed a steady increase in both the prominence and the intricacy of its legal dimension, which – though still controversial in scope – confirms territory as a primordial factor while lending it a more abstract connotation. Both writers and international practice treat territory as a traditional constituent of statehood (see e.g. Art. 1 of the 1933 Convention on Rights and Duties of States adopted by the seventh international conference of American States, LNTS, Vol. 165, p. 19). This is not surprising, as it is the necessary premise of the aggregation of a State's population and of the exercise by the State of the power of government.

(a) Territory as physical underlay

From the physical viewpoint, territory traditionally springs to mind as a basic factor of stability without which the State entity could neither come into being nor survive. Internally, it enables integration of the State's human constituent to take place through its attachment to the soil (there are no nomad States in international law) and provides a solid basis for the powers of control and coercion. Externally, it helps guarantee the State's independence and security. Historians and sociologists generally agree in linking the appearance of the first State-like societies to the development of agriculture and the sedentar-

ism consequent upon it. Though not entirely overlooked in antiquity, the importance of the territorial element in the physical sense of the term was not the object of any concentrated attention until the Middle Ages, when it was considered in the framework of the patrimonial theory whereby the Prince's power to command rested on his eminent domain (→ History of the Law of Nations).

Even so, a few authors here and there have challenged the relevance of the State's territorial dimension. One of these was Grotius, who accepted that a State could move from place to place together with its population, while a more recent example is to be found in Scelle, who went so far as to describe the territorial element as an "adventitious circumstance characterizing a certain stage of political evolution". While such views are scarcely consistent with the requirements indicated above, it must be admitted that in recent decades the material function of territory has in particular instances, and especially as seen from outside, been affected by the impact of such new phenomena as fast communications, sophisticated weaponry and integrated economic regions. More generally, the above-mentioned stability is still compatible with territorial changes that leave the essence of the State collectivity intact and even, according to one recent writer (Ancel), with the uncertainty of → boundaries.

The physical components of a State's territory have in the course of time expanded and undergone a successive division of legal régime. To the primary corpus of land territory (including → islands and → enclaves), plus the → internal waters assimilated thereto, there have come to be added certain accessory spaces permanently situated in their horizontal or vertical prolongation: namely the territorial sea, the subsoil of both land and sea, and the airspace above them all (→ Territorial Sea; → Sea-Bed and Subsoil; → Continental Shelf; → Air, Sovereignty over the). One theory, no longer generally current, mistakenly sought to attach to the real territory above described a number of objects moving outside its limits but regarded fictitiously as extensions of it because they came under the jurisdiction of the State in question (i.e., ships flying the national flag; → State Ships; → Flags of Vessels; → Jurisdiction of States).

(b) Territory as a legal element

The idea of territory is not reducible to a purely physical reality, i.e. an area of the globe, with a sociological or political function. It is undeniably also a fundamental legal concept. As such, territory is central to the concerns of international law, in accordance with whose requirements it is attributed so as to render possible the coexistence of its necessary subjects: States. For it appears to be not only the full exercise of the rights vested in States as such which is closely dependent on territory, but at the same time the assumption of their correlative obligations (→ States, Fundamental Rights and Duties). What territory essentially means in terms of rights and duties must be clarified before one can accurately define the real nature of territorial sovereignty qua legal relationship between the State exercising certain powers and its territory.

2. Legal Function of Territory

(a) The theory of territory as object

This theory forms the extension and logical conclusion of a very ancient patrimonial concept. Thus the ancients saw territory as the property of the gods, whereas the Middle Ages gave birth to the idea of an eminent domain benefitting the prince, for whom the French Revolution substituted the people. To the proponents of this theory (Laband, Cavaglieri, Donati, Fauchille) territory was thus primarily an object over which a subject – the State – exercised *dominium*, i.e. a right in public law, similar to ownership in private law, expressed for example in the entitlement to expropriate or lay waste for military purposes. This theory is the source of the doctrine of absolute → sovereignty, now discredited, but whose influence still permeates the terminology of international law (e.g. cession (→ Territory, Acquisition), lease (→ Territory, Lease) or pledge (→ Pledge of State Territory and Property).

(b) The theory of territory as subject

This theory arose in consequence of the many criticisms levelled against the object theory, in particular to the effect that it represented territory as something ultimately extraneous to the State itself. Accordingly, the proponents of the subject

theory (Gerber, Fricker, Kaufmann, von Liszt, Jellinek, Westlake, Carré de Malberg, Hauriou) upheld the idea of the territory as the body of the State, a constituent element or facet of the State person over which the State does not enjoy direct power *in rem* but which consists, rather, of a space wherein the State enjoys *imperium* solely over the persons located there. As the territory thus appears as a spatial component of the State's very being, any violation of it is, by this theory, to be construed as an attack on the personality of the State.

(c) The jurisdictional theory

Advocates of this theory (Radnitzky, Henrich, Kelsen, Schoenborn, Verdross, Basdevant, Bourquin, Scelle, Rousseau) have endeavoured to avoid the obstacles which, according to them, the two preceding theories fail to overcome, and more particularly the inability of the subject theory to provide any self-consistent explanation of territorial changes. This they do by proposing a functional concept of territory as nothing more than the sphere of delimitation of State jurisdictional powers or, in other words, a special property of the legal order of the State, namely its area of validity (Kelsen). Thus territory is also to be viewed as constituting title to jurisdiction.

Verdross has introduced some important adjustments of this theory, presenting territory as the underlay of the territorial sovereignty ascribed to a given State by international law: thus there is more to the concept than a mere spatial limit to the exercise of the State's powers. The sovereign, that is the State enjoying the widest territorial right (or absolute right, one valid *erga omnes*), i.e. that of entire disposal, also simultaneously enjoys in most cases territorial supremacy (*Gebietshoheit*), a limited territorial right, closer to private-law possession, which has its basis in the domestic legal order (acts of legislation, administration and jurisdiction) and historically precedes the former. However, it may happen in practice that State A enjoys territorial sovereignty over what, in the view of Verdross, remains a piece of its territory while State B exercises territorial supremacy thereover (see e.g. Lighthouses in Crete and Samos, 1937, PCIJ, Series A/B No. 71 (1937) at pp. 101–103; → Lighthouses Cases) on its own behalf and with the consent of State A (→ Administrative, Judicial and Legislative Activities on Foreign Territory). In such cases, bare or residual sovereignty still comprises, in addition to a power of disposal, a potential territorial supremacy or "fallback right" (*Rückfallrecht* – Wengler). Hence the idea of sovereignty thus described extends well beyond that of territorial jurisdiction, and the territory thus conceived may be assigned relatively fixed frontiers such as could not be attributed to the mere seat of a competence which is of its very nature variable.

(d) Critical assessment

The proponents of the territory as object theory – or at least some of them – are chiefly criticized for over-insistence on the alleged similarity between the State's *dominium* over its territory and a right of ownership. Cavaglieri himself has stressed that the former, unlike the latter, extends over the whole territory. But that is not the only reason for rejecting the comparison. In principle ownership involves only the satisfaction of the beneficiary's personal interests, whereas the exercise of rights derived from sovereignty concerns the entire society by definition (Rousseau): inherently, therefore, there are far narrower limits to the practical implementation of *dominium* (Dabin); the State may itself be or become an owner, of course, but its conduct in that capacity will be quite another matter. Then again, international law can ill digest a concept which is borrowed from the private law peculiar to certain legal systems and is thus precluded from uniform acceptance at the inter-State level (Schoenborn). A further objection has already been mentioned, namely the distance impliedly placed by the theory between the State and one of its essential constituents. Cavaglieri has tried to counter such criticism by affirming that the State, once constituted, possesses an independent legal personality that enables juridical links of that kind to be formed. Finally it has been suggested that, as territory is not reducible to a mere physical reality, the State's relation to it cannot be limited to mere *dominium* (Suy). On the other hand, it can be said for the object theory that it does provide a satisfactory explanation for the occurrence of certain phenomena: territorial changes (Reuter) and the sovereign's granting of particular rights over its territory to a third party (Delbez).

As already indicated, it is precisely such phenomena that expose the basic weakness of the territory as subject theory, for it leads logically to the conclusion that territory is in principle both non-transferable and indivisible. Realizing the untenability of such inferences, some advocates of this theory have even gone so far as to claim that the transferring State disappears at the moment of cession only to be born again with a reduced territory (Fricker); but then it could only be a new State, one distinct from the first (→ States, Extinction). Others, no more successfully, have preferred to defend the idea of a transfer of *imperium* over the inhabitants of a given territory rather than an actual cession of territory (Jellinek). This theory nonetheless has the merit of highlighting the political dimension of territory and calling for a distinction to be made between the original territory and subsequent territorial acquisitions; it also serves to explain the disappearance of the State following the loss of all its territory (Reuter).

The jurisdictional theory, on the other hand, is, as we have already indicated, not upset by the problem of territorial changes, which its advocates analyze as mere shifts in the spatial limits of the State's powers (Schoenborn) or view as the accomplishment of "transfer of jurisdiction as between States" (Rousseau). It also restores to territory an essential legal function whereby it defines it and, without having the effect of confusing the two, nevertheless helps to integrate the territory with the State (Delbez). But there are also serious gaps in this Viennese theory. First, it is wrong to maintain that territory constitutes the limit of absolute validity of the State's legal order: each State, as we shall see, enjoys territorial powers with extra-territorial effects (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts) or even extraterritorial powers, some in foreign territory and some in spaces not subject to the jurisdiction of any State. Unless logic is to be taken to extremes and – as some authors believe – territory held to follow competence, which can lead to the absurd conclusion that even the → high seas may be included in a State's territory (for this reason Suy and others consider it a necessary condition for the recognition of the territorial character of a given space that "total competence" should be exercised within it, which does not prevent them from, for example, attributing a leased territory to the lessor or a territory under → protectorate to the protecting power), the theory in question is incapable of explaining such extensions of competence, unless corrected on the lines proposed by Verdross (who distinguishes between the *Staatsgebiet* in which territorial sovereignty is enjoyed and the *Herrschaftsgebiet* which is the area of territorial supremacy). Furthermore, while this theory represents territory as a title of jurisdiction, it does not adequately explain whether territory owes this property to the internal legal order concerned (as, for example, in the → *Lotus*, PCIJ, Series A, No. 10 (1927), at p. 19, and C. De Visscher), or, on the contrary directly to international law which alone is competent to establish a division of jurisdictions between States (Bourquin; see in that respect Basdevant's distinction between *répartition* and *réglementation* of jurisdictional powers). Finally it should be mentioned that Verdross' theses have themselves not remained unscathed. He has sometimes been criticized for overlooking the principles of → effectiveness and identity of the State and of the law, especially in the event of the sovereign's cession of territorial rights to another State for a fixed term or, *a fortiori*, in perpetuity. However, practice belies the problematic character of sovereignty in such cases. Thus Austria, to whom the administration of Bosnia-Herzegovina had already been transferred in 1878, had in 1908 to pay Turkey in order to acquire full sovereignty over this province, which up until then had remained Ottoman.

(e) Conclusion

Each of the theories reviewed above embodies part of the truth, and their weakness resides precisely in their possessing a merely partial grasp of the territorial phenomenon. Territory, as we have seen, is both a physical and a legal reality. That being so, the territorial sovereign is at one and the same time vested with a *dominium* or authority over the territory, which culminates in a right to dispose of it, and with an *imperium*, or an authority via the territory over the persons or things within it and the situations that develop there; however, in the latter instance, territory appears only as a sufficient, but not a necessary condition for the exercise of such powers (Manin),

though of course it is the most effective of supports for that exercise (Combacau).

3. *General Characteristics of Territorial Sovereignty*

Sovereignty is traditionally understood to represent the *summa potestas* or supreme power of command inherent in the concept of the State. The justification and limits of this power lie in the duty incumbent upon any State to discharge its proper functions. It concerns in the first place the internal legal order of each State (→ Domestic Jurisdiction). But, over and above this, as States are not isolated entities, the peaceful exercise of such power is in practice only possible to the extent that the members of the international community respect the imperatives of statehood, i.e., the rules which are aimed at ensuring its viability in a context both of "juxtaposition" (Reuter) and of → interdependence. At this level, sovereignty may be analyzed in terms of equality (Art. 2(1) of the → United Nations Charter; → States, Sovereign Equality), of independence (→ Territorial Integrity and Political Independence) and of submission to international law (see → Customs Régime between Germany and Austria (Advisory Opinion), PCIJ, Series A/B, No. 41 (1931), at p. 57, opinion of Judge Anzilotti). It follows that within the limits imposed by the international legal order, as to which there is no presumption (see The *Lotus*, PCIJ, Series A, No. 10 (1927), at p. 18), a State must be able to exercise full and exclusive authority over its territory as its indispensable physical basis and the main factor of appurtenance to itself (certainly mainly Italian writers, e.g. Giuliano, have refused to regard this as an intrinsic right). This general principle was affirmed as long ago as 1812 by Chief Justice Marshall in The Schooner Exchange v. McFaddon (7 Cranch 116) before the Supreme Court of the United States and has been frequently reaffirmed in cases decided on the international plane. One passage from Max Huber's → Palmas Island Arbitration award is customarily cited by way of example: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusivity of any other States, the functions of a State" (RIIA, Vol. 2 (1949) p. 829, at p. 838; cf. The *Lotus*, PCIJ, Series A, No. 10 (1927), at pp. 18–19; → Free Zones of Upper Savoy and Gex Case, PCIJ, Series A/B, No. 46 (1932), at pp. 166–167; → Interpretation of Memel Territory Statute Case, PCIJ, Series A/B, No. 49 (1932), at pp. 313–314; → Corfu Channel Case, ICJ Reports 1949, p. 4, at p. 35: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations"; → Right of Passage over Indian Territory Case, Merits, ICJ Reports 1960, p. 6, at p. 39; → Lac Lanoux Arbitration of 1957, RIAA, Vol. 12 (1963) p. 281, at p. 301 and p. 306. See also Arts. 1 to 5 of the Draft Declaration on Rights and Duties of States adopted by the → International Law Commission in 1949, YILC (1949) p. 287).

Elsewhere the international case-law alludes to each State's monopoly of the exercise of its main functions in its territory, envisaged separately. This concerns above all the power of constraint (→ Savarkar Case of 1911, RIAA, Vol. 11 (1961) p. 243, at p. 254; Corfu Channel Case, ICJ Reports 1949, p. 4, at p. 35), for it is with respect to this power that States are most jealously aware of the exclusivity of their jurisdiction (thus in relation to territorial → asylum, → extradiction, etc.; this results in a general prohibition of all encroachments on the territorial integrity and political independence of States, the forbidding of abductions by foreign agents on the national territory and so forth). It likewise concerns the power of the judiciary (Asylum Case, ICJ Reports 1950, p. 266, at pp. 274–275; → Haya de la Torre Case, ICJ Reports 1951, p. 71, at p. 81), and the power of statutory regulations (see → North Atlantic Coast Fisheries Arbitration of 1910, RIAA, Vol. 11 (1961) p. 167, at p. 180; Free Zones of Upper Savoy and the District of Gex Case, PCIJ, Series A/B, No. 46 (1932) at pp. 166–167; Legal Status of → Eastern Greenland Case, PCIJ, Series A/B, No. 53 (1933), at p. 48; → United States Nationals in Morocco Case, ICJ Reports 1952, p. 176, at pp. 202–203; → Guardianship of Infants Convention Case, ICJ Reports 1958, p. 55, at p. 67 et seq.; Right of Passage over Indian Territory, Merits, ICJ Reports 1960, p. 6, at p. 45). It is perhaps at the regulatory level that practice is nowadays most tolerant towards concurrent acts of third States (see *infra*, the application by the local authorities, though always

under local law, of rules of private law endowed with extraterritorial effects, chiefly concerning the status of persons and property. Note, also, from another angle, the tolerance shown towards the exercise abroad by heads of State of certain State functions of an essentially regulatory character, e.g. the signature of a decree). It finally concerns certain prerogatives constituting an expression of the State's *dominium* – for example, its power to carry out works upon its territory (see Lac Lanoux Arbitration, RIAA, Vol. 12 (1963) p. 281, at p. 308). There is usually considered to exist, moreover, a general presumption of regularity in regard to any acts performed by a sovereign State within its territory. This logical hypothesis underlies the → act of State doctrine applied in certain countries.

However, as Huber remarked in the Palmas Island Arbitration, the generality and exclusivity which characterize territorial sovereignty have as counterpart a duty, namely: "The obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory" (RIAA, Vol. 2 (1949) p. 829, at p. 839). In the Corfu Channel Case (Merits) the → International Court of Justice (ICJ) considered that, even if "a State on whose territory . . . an act contrary to international law has occurred, may be called upon to give an explanation . . . it cannot be concluded from the mere fact of the control exercised . . . over its territory . . . that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein" (ICJ Reports 1949, p. 4, at p. 18); it also declared it the duty of each State "not to allow knowingly its territory to be used for acts contrary to the rights of other States" (at p. 22). In concrete terms, the territorial sovereign as such is nowadays deemed to be under not merely a general obligation of vigilance *vis-à-vis* acts committed on its territory which might imperil the safety of foreign States or their nationals (an obligation correlative to the enjoyment of *imperium*; → Due Diligence) but also a no less general duty to make only reasonable use of the territory itself (a duty correlative to the enjoyment of *dominium*). Yet these are not the sole limits to the absolute character of territorial sovereignty. To these, as it were, inherent, immediate or necessary limits of a general nature, others of a different kind and origin must be added: i.e. circumstantial restrictions placed for various reasons on the exclusivity or plenitude of territorial jurisdiction.

4. Restrictions on the Exercise of the Attributes of Territorial Sovereignty

These essentially concern *imperium* and, less often, certain aspects of *dominium*, with the exception, in principle, of the most important of them, entire disposal, for, with the exception of what is now the very rare situation of co-sovereignty (→ Condominium) and of any free undertaking on the part of a State not to dispose of its territory in a given manner, any fettering of the right of entire disposal will in ordinary cases place the very existence of territorial sovereignty in doubt. Thus the restrictions examined here correspond by and large to the accomplishment by third States or foreign persons of certain activities, authorized by international law or by frequently concluded international agreements, in the territorial State or having some effect thereon.

(a) The general régime of immunities

This régime is in varying degrees extended to foreign legal entities (→ State Immunity; → International Organizations, Privileges and Immunities) or organs (heads of State, diplomatic and consular agents (→ Diplomatic Agents and Missions, Privileges and Immunities), international officials).

(b) The grant of territorial rights

This is usually done by treaty, the practice being quite varied in this regard. Some of the régimes concerned imply a situation of "suspended" sovereignty (McNair); others have become obsolete. Examples are the systems of → protectorate, → mandate and trusteeship (→ United Nations Trusteeship System); temporary and limited "international administration" entrusted to an organization (*inter alia* → Free Cities); lease and transfer of administration (→ Territory, Lease); → concession, cession of bases, military occupation in peacetime (→ Military Bases on Foreign Territory); → pledge of State territory; → servitudes; the limited right of → overflight mutually conferred

on each other by the parties to certain multilateral conventions (→ Chicago Convention on International Civil Aviation, UNTS, Vol. 15, p. 295, Arts. 5 to 21; United Nations Convention on the Law of the Sea, December 10, 1982; UN Doc. A/CONF. 62/122 with Corr., Art. 38 (→ straits used for international navigation) and Art. 53 (→ Archipelagos)); freedom of → navigation as regulated by instruments concerning → international waterways; access to internal maritime waters within the limits laid down by the Geneva Convention of December 9, 1923 on the international régime of sea-ports (LNTS, Vol. 58, p. 285) and by Art. 5(2) of the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, UNTS, Vol. 516, p. 205 (1982 Law of the Sea Convention, Art. 8(2)); and, finally, the enshrinement in a treaty of a right of transit (see, for example, where access to the sea is concerned, Convention on the High Seas of April 29, 1958, UNTS, Vol. 450, p. 82, Art. 3, and 1982 Law of the Sea Convention, Arts. 124 to 132, and the New York Convention on Transit of Land-Locked States of July 8, 1965 (→ Land-Locked and Geographically Disadvantaged States; → Transit over Foreign Territory); see also Barcelona Convention on Freedom of Transit of April 20, 1921 (→ Barcelona Conference (1921)) and → General Agreement on Tariffs and Trade (1947), Art. V).

It is rarer for third States or foreign persons to enjoy under international law territorial rights in foreign territory otherwise than on a conventional or treaty basis. When that is the case, the legal basis is normally a customary international law rule generally answering to the needs of juridical intercourse. This concerns mainly the right of → innocent passage through the territorial sea (1958 Convention on the Territorial Sea, Arts. 14 to 23; 1982 Convention on the Law of the Sea, Arts. 17 to 32) and through straits used for international navigation (1958 Convention on the Territorial Sea, Art. 16(4), para. 4; 1982 Law of the Sea Convention, Arts. 37 to 44 and Art. 45). In the Right of Passage Case, the ICJ left open the question of the existence of any → customary international law right of access to enclaves.

There are also cases where the enjoyment of the territorial rights alleged corresponds to a situation unilaterally created through the → use of force – now largely prohibited – by the beneficiaries themselves (belligerent occupation; military occupation following → *debellatio* (→ Germany, Legal Status after World War II); non-conventional military occupation in peacetime). These cases require nowadays to be analyzed bearing in mind the evolution of international law in the fields concerned as well as of the intertemporal law factor which may be involved in each particular situation.

(c) Jurisdiction of State extended outside national territory based on other factors of appurtenance

The main such factor is → nationality, this being the basis of the personal competence certain of whose essential manifestations abroad are customarily accepted. Personal competence has often been analyzed as consisting in a territorial competence endowed with extra-territorial effects (Bourquin). There are indeed many rules (of a political or private nature) which, though primarily meant to apply in the territory where they are issued, follow the nationals abroad. But personal competence can also be seen genuinely as extraterritorial, as when a normative act is directly addressed to persons located or situations developing outside the territory (see, for example, the principle of active personality and that – more controversial – of passive personality); or as in the case of certain acts performed by consular officials; or the jurisdiction exercised by the flag State over vessels in the territorial sea of another State and also, by extension, over the persons on board.

In any case, the jurisdiction of the territorial State is reasserted whenever the exercise of personal competence by a State involves any kind of "operational" measures in the territory of the former State (Combacau). Thus the foreign law, unless otherwise agreed, is applied only autonomously and in conformity with local conflict rules, at least if it belongs to the domain of private law (→ Private International Law). As for the consular functions, which nowadays are more modest in scope than in the age of capitulations (see → Vienna Convention on Consular Relations (1963), Art. 5), they can be exercised only when following the establishment of consular relations the States concerned agree on the establishment of

consular posts (Arts. 2 and 4). On the other hand, the limited scope of the "operational" powers enjoyed by the coastal State in its territorial sea over foreign merchant ships and government ships operated for commercial purposes (see 1958 Convention on the Territorial Sea, Arts. 19 to 21, and 1982 Law of the Sea Convention, Arts. 27 and 28) is explained by the necessity of observing the exigencies of navigation.

Another alleged subsidiary factor of appurtenance was discerned by Basdevant and has since been reaffirmed by many French writers on the subject: public services, whose organization, functioning and defence belong exclusively to the State they help constitute. Where they are concerned, the State extends occasionally its activities to foreign territory and foreign nationals, somewhat overriding in the process both territorial jurisdiction and personal competence. Such would be the case of such "organized wholes" as the following (Combacau): State ships and → State aircraft; diplomatic and consular services and cultural establishments (→ Diplomatic Agents and Missions); and armies stationed abroad in peacetime (→ Casablanca Arbitration; → Military Forces Abroad). Some of these situations can, however, be explained by reference to the régime of immunities or to the grant of territorial rights mentioned above. For example, the status of military forces abroad is by and large regulated by *ad hoc* agreements concluded between the sending and the receiving States.

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TERRITORY, ABANDONMENT

1. Notion

Dereliction or "deliberate" abandonment of territory is a mode of losing title to → territorial sovereignty, as occupation and → prescription are modes of acquiring it (→ Territory, Acquisition). When a State-owner permanently abandons uninhabited territory, it thereby loses → sovereignty over it and the territory becomes *terra nullius* until another State effectively occupies it (→ Effectiveness); in the case of inhabited territory, issues involving → self-determination and → decolonization may arise.

Mere withdrawal from territory, however, does not entail dereliction, unless the State has the intention (*animus derelinquendi*) to leave forever; a temporary withdrawal or a weakening of the exercise of authority over territory does not entail loss of sovereignty as long as there is a presumption that the State-owner has the will and ability to reoccupy it.

As a → unilateral act in international law, abandonment is distinguishable from cession of territory. Moreover, abandonment does not extinguish → servitudes of third parties, so that whichever State gains sovereignty over the abandoned territory does not take it free of encumbrances.

2. Historical Evolution of Legal Rules

Historically there have been very few examples of dereliction, which has occurred primarily with respect to discoveries of *terra nullius*

(→ Territory, Discovery) where the discovering State has failed to perfect its inchoate title by effective occupation and where the *animus derelinquendi* has been inferred from the State's failure to display its authority over the territory over a long period of time.

In 1639 the island of Santa Lucia in the Antilles was occupied by English settlers, who were shortly thereafter killed by the natives, no attempt being made by England to retake the island. Ten years later, French settlers arrived, considering the island *terra nullius*. In 1664 an English force attacked the French and drove them into the mountains, but in 1667 the English withdrew and the French returned. The question of dereliction by England remained open until she resigned her claims in the Peace Treaty of Paris in 1763.

The southern part of Delagoa Bay, Mozambique, which was under Portuguese territorial sovereignty, was occupied in 1823 by the British. It was not until 1875, in the → Delagoa Bay Arbitration, that the issue of abandonment was settled: The arbitrator found that, in view of Portugal's discovery and occupation through centuries, the temporary cessation of authority did not constitute dereliction.

On the other hand, in the → Palmas Island Arbitration (1928) it was inferred that although Spanish explorers had discovered the Island of Palmas or Miangas in the 16th century, Spain's failure to effectively occupy it over a period of centuries amounted to abandonment, and her failure to → protest against Dutch "continuous and peaceful display of State authority" since 1677 constituted → acquiescence.

In the → Eastern Greenland Case (1933) one of the decisive factors against the Norwegian claim was a → declaration made by the Norwegian Minister of Foreign Affairs, Ihlen, on July 22, 1919, to the effect that his government would not oppose Danish claims to sovereignty over → Greenland during the forthcoming peace conference (→ Estoppel), thus abandoning Norway's own territorial claims.

3. *Current Developments*

Recent examples of abandonment may be found in political declarations of heads of State in which a State's claim to territorial sovereignty over a certain disputed area has been abandoned, usually *vis-à-vis* → neighbour States with respect to a → boundary region. The motive is frequently one of political *rapprochement* through liquidation of old sources of friction in → international relations.

Thus, at the opening session of the 1977 ASEAN Summit at Kuala Lumpur (→ Association of South-East Asian Nations), Philippine President Marcos announced "that the Government of the Republic of the Philippines is . . . taking definite steps to eliminate one of the burdens of ASEAN, the claim of the Philippine Republic on Sabah". Sabah, formerly known as Northern Borneo, is now part of the Republic of Malaysia.

Peace treaties sometimes contain clauses by which a party abandons certain territorial claims, for instance the → Peace Treaty with Japan (1951) which provided in Art. 2 (b) for the abandonment of Japan's claim over Formosa (→ Taiwan). But such abandonment, also found in the → Peace Treaties after World War I (→ Versailles Peace Treaty (1919); → Saint-Germain Peace Treaty (1919)), is hardly voluntary and rather in the nature of cession of territory (→ Peace Treaties).

The Warsaw Treaty of December 7, 1970, between the Federal Republic of Germany and Poland provides in Art. 1 that the → Oder-Neisse Line "constitute(s) the western State frontier" of Poland (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)). Such → recognition has been interpreted by some publicists as an abandonment of Germany's claim over the pre-war German provinces east of the Oder and Neisse Rivers, which had been placed under Polish administration pursuant to Art. IX (b) of the → Potsdam Agreements on Germany (1945). Although the Federal Republic is certainly precluded from reasserting her former territorial claims, a reunited German State with a different legal personality from that of the Federal Republic (→ State Succession) could theoretically revive the claim, particularly in view of the Federal Republic's → notes to the three Western Powers regarding the rights of the Four Powers and the explicit limitation of any binding effect on the Federal Republic (→ Debellatio; → Germany, Legal Status after World War II).

Related to the issue of dereliction is that of the abandonment of a → mandate. A recent example that has given rise to various interpretations was Great Britain's abandonment of her mandate over → Palestine in 1948 without waiting for a clear transfer of sovereignty (→ Israel: Status, Territory and Occupied Territories).

The process of decolonization also provides some related examples, as in 1975 when the Portuguese authorities in → East Timor (→ Colonies and Colonial Régime; → Decolonization: Portuguese Territories), in view of a → civil war situation, declared themselves unable to rule the territory and withdrew. Notwithstanding the right of the Timorean people to self-determination, the neighbouring State of Indonesia invaded and annexed (→ Annexation) the territory, basing its action on the apparent abandonment by Portugal. The concept of decolonization, however, is distinguishable from abandonment in that a new State emerges, rather than *terra nullius*, upon the withdrawal of the colonial power (→ New States and International Law).

R.Y. JENNINGS, The Acquisition of Territory in International Law (1963).

J. FLORES, C. REYES and R. SABIO, The Legal Implications of the Unilateral Dropping of the Sabah Claim, Philippine Law Journal, Vol. 57 (1982) 78–103.

See also bibliography under → Territory, Acquisition and → Territory, Discovery.

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TERRITORY, ACQUISITION

A. Terminological Questions: Acquisition of Title to Territorial Sovereignty. – B. Acquisition *ab origine* or by Gains. – C. Modes of Acquisition of Title: 1. The Principal Modes. 2. Elusiveness of a Touchstone. – D. Common Rules: 1. Substantive Rules: (a) Principle of effectiveness. (b) Fundamental principles. 2. Procedural Rules: (a) Intertemporal law. (b) Determination of the critical date. (c) Other procedural rules. – E. Validity and Scope of Certain Modes of Acquisition: 1. Occupation. 2. Accretion. 3. Contiguity. 4. Conquest. 5. Cession. 6. Acquisitive Prescription. 7. Adjudication.

A. Terminological Questions: Acquisition of Title to Territorial Sovereignty

The expression "acquisition of territory" is commonly used by legal writers, yet its punctuality is questionable, given the true nature of a State's territory. One cannot of course deny the physical or natural dimension of territory, but there is more to the concept than that. Rooted in Roman patrimonial law and the mediaeval theory of eminent domain, the expression overemphasizes the idea of property, whereas the concept of the territory of the State in international law goes far beyond any private law notion of property in land or things.

The territory of a State is primarily the physical underlay of → territorial sovereignty; the area or space where the State exercises both its dominium or authority over the territory itself, and its imperium or authority over persons on that territory and the situations arising therein. In searching for alternative terms more akin to the international law concept of a State's territory, the expression "acquisition of territorial sovereignty" comes first to mind. However, the expression "acquisition of title to territorial sovereignty" would be more accurate. If "title" is understood in general as both the cause and the foundation of any personal right, one may ask what there is to distinguish it, in the present context, from the mode of acquisition. But if, for present purposes, one adopts a conceptual approach which differentiates between the actual process whereby territorial sovereignty is attained and the legal status thereby acquired, the distinction between "mode" and "title" is seen as logical, even if over-elliptical terminology and the manner in which territorial claims are normally advanced have tended to mask it. According to this approach, each "mode" affords a material description of a factual or juridical process which international law, as an objective system of reference, acknowledges to be capable of creating a "title" to – or basis of – territorial sovereignty. It is in this sense that it appears possible and correct to speak of "modes of acquisition of title to territorial sovereignty".

B. Acquisition *ab origine* or by Gains

By definition, the acquisition under discussion assumes the existence of an entity capable of acquiring. There is no such thing as a → State without territory. It follows that the question of State's → sovereignty over its original territory is basically different from that of a subsequent increase in that territory. There is thus a distinc-

tion to be made between the acquisition of title to territorial sovereignty by an existing State and the birth of a new State, independent of the circumstances leading to the creation of the latter (union, → dismemberment, → secession, → decolonization, etc.) and of the position adopted with respect to the declaratory or constitutive effect of its → recognition by other States. The rules relating to modes of acquiring title to territorial sovereignty considered here are, therefore, limited to gains or increases in territory by existing States. It should also be noted that, while normally opposable to third persons, title to territorial gains may in certain circumstances, particularly at its inception, be merely relative.

The capacity of a people to acquire territory, which during the last few decades has attracted increasing attention, particularly with regard to situations of colonial domination (→ Colonies and Colonial Régime) or foreign occupation (→ Occupation, Belligerent), has to be seen in the context of certain principles of international law embodied in the → United Nations Charter. Of particular relevance are the principle that States shall refrain in their international relations from the threat or → use of force against the → territorial integrity and political independence of any State and the principle of the equal rights and → self-determination of peoples.

C. Modes of Acquisition of Title

1. The Principal Modes

Theoreticians usually distinguish five main modes of acquiring title to territorial sovereignty: occupation, accretion, → conquest, cession, and → prescription, while some add adjudication, i.e. the acquisition of title through judicial award. This ostensibly very simple differentiation, which seems to correspond to certain traditional distinctions in private law, offers some didactic advantages. However, a closer look reveals weaknesses, and these have not escaped publicists. It is clear, for example, that any difficulty in establishing the *res nullius* character of an area will hamper the legal categorization of the acts of possession of which it may be the object. There are likewise circumstances in which the acquisition of territorial title through imposition of a → peace treaty may be hard to distinguish from mere conquest or → annexation. Attention has also been drawn by writers to the similarity between cession, on the one hand, and → acquiescence as a condition for prescription, on the other. Finally, having regard to the role played by the principle of → effectiveness some writers have even suggested that all the above modes of acquisition of title be reduced to just one: effective occupation (Reuter).

On the whole, international judicial decisions exhibit an even greater lack of precise systematization than doctrinal writings, though occupation seems to have been the object of more thorough examination (see, for example, → Palmas Island Arbitration (1928); → Clipperton Island Arbitration (1931); → Western Sahara (Advisory Opinion). On accretion, see the Chamizal Arbitration (1911; RIAA, Vol. 11, p. 309; → American-Mexican Boundary Disputes and Cooperation)).

2. Elusiveness of a Touchstone

Different schemes have been proposed for classifying modes of acquisition of title to territorial sovereignty. The most traditional one distinguishes between "original modes", relating in principle to areas not subject to the sovereignty of any State (i.e. occupation, certain cases of accretion), and "derivative modes", involving a transfer of sovereignty (i.e. cession, conquest or annexation, prescription, certain cases of adjudication). Some writers, however, look for a criterion in the nature of the process of acquisition itself. Reuter, for instance, distinguishes between modes that are derived from a concrete situation (occupation, contiguity, → *debellatio*) and modes which are based upon a legal title (international agreements, judicial awards, decisions of international organizations), and R.-J. Dupuy between acquisitions *de facto* (occupation, contiguity, conquest) and acquisitions by virtue of title (treaties, arbitral awards, decisions taken by coalitions of principal powers). An elaboration of this trend may be found in C. Rousseau, who adopts the following threefold division: juridical modes (occupation, cession, prescription, adjudication), historico-political modes (*debellatio*) and geographical modes (contiguity). Certain writers introduce a further element which has some bearing on the classification, namely the distinction between title and contents of title. Brownlie, for example,

enumerates the following as roots or content of title: a treaty of cession; other dispositions by treaty; consent in other forms; → *uti possidetis* doctrine; disposition by joint decision of the principal powers; renunciation or relinquishment; adjudication; agreements concluded with local rulers.

No doctrinal classification, no matter how helpful, should be looked upon as a conclusive presentation of the modes of acquiring title to territorial sovereignty. The division of modes of acquisition into original and derivative varieties stems from private law and is less cut and dried than appears at first. For example, in the cases of prescription and conquest, the territory in question will previously have been subject to a given territorial sovereignty, but it is also possible to look at the process of acquisition as involving two separate logical stages: first, the destruction of the original title and, secondly, the creation of a new title (Greig, Sereni). Following a similar line of reasoning, certain authors (e.g. Guggenheim) even cast doubt on whether cession is a derivative mode at all. Others such as Miele have pointed out that judicial award is an original mode, in that the decision in question constitutes the direct source of the title and excludes any transfer of sovereignty between the parties, which are presumed to have previously relinquished their respective claims. On the other hand, it has also been claimed that accretions of territory due to natural phenomena such as avulsion or the shifting of a river cannot really be classified as original in so far as such increases are at the expense of another State which has exercised sovereignty over the areas in question. Similarly, it appears difficult in contemporary law to describe as either original or derivative the acquisition of title over a non-State area which is occupied by a "socially and politically organized" people and is thus considered (*in casu*) not to constitute a *terra nullius* (Western Sahara (Advisory Opinion), ICJ Reports 1975, p. 12, at p. 39, and pp. 38–40). Other classifications also attract criticism. Hence the exact significance of such expressions as "modes based upon a legal title" or "acquisitions by virtue of title" remains elusive: is it not precisely the title which is the subject of acquisition through the operation of a mode? The confusion seems to stem from largely identifying title with its subsidiary meaning of document of title, or with possession of evidence of title.

The elaboration of a generally accepted system of classification of modes of acquisition is further hampered by the complexity of the factual situations and its corollary – lack of precision in the description and definition of each mode of acquisition.

D. Common Rules

To appreciate correctly the modes of acquisition referred to above, the interaction of a series of general principles and rules with the several elements of each of those processes is extremely important for a determination of whether title to territory has actually been acquired, particularly in a case involving competing claims. As these principles and rules are not confined to any given mode, or even to acquisition of title (they are also relevant in connection with maintenance, extent, consolidation, novation and loss of title), they will be called here, for convenience, common rules.

1. Substantive Rules

(a) Principle of effectiveness

International judges and arbitrators have very often invoked the principle of effectiveness in connection with the settlement of territorial disputes, either with respect to a given mode of acquisition, such as discovery and occupation, or in an overall manner, as in the following passages:

> "Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity . . . . If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things . . . . International law, the structure of which is not based on any super-State organisation,

cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations" (Palmas Island Arbitration, RIAA, Vol. 2 (1949) p. 829, at p. 839).

Moreover, "practice, as well as doctrine, recognizes ... that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title" (ibid., p. 839 and see ibid. pp. 850–852, 855 et seq.; see also → Grisbadarna Case; → Eastern Greenland Case; → Minquiers and Ecrehos Case; → Right of Passage over Indian Territory Case). As to the acts of sovereignty required to be effectively performed, the geographical circumstances of the area in dispute can be relevant, for it would not be logical to require the same intensity of exercise of sovereignty as elsewhere when an area is uninhabited, inhospitable and/or of difficult access (see → Clipperton Island Arbitration of 1931, RIAA, Vol. 2 (1949) p. 1104, at p. 1110; → Eastern Greenland Case, PCIJ, Series A/B, No. 53 (1933) p. 22, at p. 46). Consequently, effectiveness is not impaired by an accidental weakening of government activities which might be attributed to the special physical characteristics of the area of their exercise (see → Delagoa Bay Arbitration; Palmas Island Arbitration, op. cit., p. 840; Eastern Greenland Case, op. cit., p. 47).

However, when the territorial disputes in question specifically concern delimitation of a boundary, acts by local authorities cannot prevail over a treaty title, particularly when those acts are not in conformity with the unequivocal attitude of the central authorities (see → Sovereignty over Certain Frontier Land Case (Belgium/Netherlands); → Temple of Preah Vihear Case). When such elements as these are absent, the exercise of → acts of State within the area at issue is once more of fullest importance (see → Rann of Kutch Arbitration (Indo-Pakistan Western Boundary)).

Mere sporadic → protest does not establish an effectiveness which can be opposed to that resulting from actual exercise of acts of sovereignty in a given territory (Eastern Greenland Case, op. cit., p. 62; Minquiers and Ecrehos Case, ICJ Reports 1953, p. 47, at pp. 66–67). Where territorial pretentions are manifested in regard to a *res communis*, "general toleration" is regarded as indispensable to their "historical consolidation" and the birth of title (see → Fisheries Jurisdiction Cases (U.K. v. Iceland; Federal Republic of Germany v. Iceland)). In principle, once acquired, a territorial title is, under general international law, opposable *erga omnes*; recognition, for the most part tacit, can nevertheless be useful in the consolidation of the title either when it is disputed whether the conditions imposed by the rules concerned are actually met, or in the rarer circumstances of doubt as to the very existence of the rules invoked.

(b) Fundamental principles

There are also certain fundamental principles which have been the subject of frequent proclamations over the past few decades in major international instruments and the highest fora: they include the prohibition of resort to force; the → peaceful settlement of disputes and the right of self-determination of peoples. Like the principle of effectiveness endorsed by case-law, these principles, while historically addressed above all to certain modes of acquiring territorial title, are today suitable as general touchstones of the validity and/or effects of any mode when considered in a concrete situation.

2. Procedural Rules

(a) Intertemporal law

For historic titles (→ Historic Rights), case-law emphasizes the need to take due account of the intertemporal law principle, according to which the evaluation of the title concerned should be made on the basis of the international law in force at the time of its alleged inception (see, for example, the Grisbadarna Case, the Clipperton Island Arbitration, and the Western Sahara (Advisory Opinion); → International Law, Intertemporal Problems). But this principle of non-retroactivity was qualified by Max Huber, in his arbitral award concerning the Island of Palmas as follows:

"The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law" (Palmas Island Arbitration, op. cit., p. 845).

(b) Determination of the critical date

Judicial decisions have also underlined the importance of the exact moment of crystallization of a territorial dispute for the determination of the respective rights of the parties: the critical date on which the sovereignty must be considered established and after which the behaviour of the parties can no longer be taken into account (Bastid). (See, for example, the Palmas Island Arbitration, op. cit., p. 845; the Eastern Greenland Case; the Minquiers and Ecrehos Case and the Rann of Kutch Arbitration.) On the relative character of the "critical date", see the → Argentina-Chile Frontier Case.

(c) Other procedural rules

In addition to the principle of intertemporal law and the rules relating to determination of the critical date, there are some mainly procedural or evidentiary rules which play a considerable role in ascertaining whether title to territory has actually been acquired: e.g. → acquiescence, → estoppel, the non-presumption of abandonment (→ Territory, Abandonment).

E. Validity and Scope of Certain Modes of Acquisition

1. Occupation

It is widely accepted that occupation as a mode of acquisition can only be effected in respect of a *terra nullius*; yet this rule is not wholly unambiguous. While the concept of *terra nullius* excludes *a priori* from its field of application both territories subject to State sovereignty and areas constituting *res communis* or the → common heritage of mankind, it would seem no longer possible to treat it as always identical with the concept of "non-State areas". Many contemporary authors consider that in the future occupation should, in the light of such principles as self-determination, be confined to *terrae nullius stricto sensu*. Furthermore, the concept of *terra nullius* covers, in addition to areas which have never been the object of any appropriation, those which have been successively appropriated and abandoned and it is often extremely difficult in practice to establish actual abandonment.

Another element of prime importance here is effective possession, treated in some judicial decisions as a general condition for the acquisition of any territorial title (see *supra*). Since Grotius, the majority of writers have defined effective possession by reference to the combination of two criteria borrowed from Roman law: the material apprehension of a *corpus* and the manifestation of an *animus possidendi*. The appropriateness of such a transposition, however, is somewhat problematic, given that, on the one hand, it is difficult to evaluate objectively several competing *animi possidendi* and that, on the other, the boundary supposedly separating the material and psychological elements of possession is somewhat impalpable in relation to effectively performed acts.

Yet against this it seems certain that physical possession must be accompanied by its juridical extension, that is, the peaceful and continuous performance of acts of sovereignty, whose required intensity will vary according to the conditions in each case. Thus discovery and fictive occupation, which since the Reformation have historically superseded the granting of title by the Pope (see, for example, the celebrated Bull *Inter caetera* of 1493; → History of the Law of Nations), are today no more than inchoate titles which must be perfected within a reasonable period of time if they are not to become devoid of any effect in law (see Palmas Island Arbitration, op. cit., p. 846; → Territory, Discovery).

Furthermore, possession is not effective unless it has two further characteristics. First, for reasons of legal stability, but also so as to allow third States to advance any rights they may have, it must be public. The requirement of notoriety is however not backed by a general obligation to notify (→ Notification). Even the General Act of the → Berlin West Africa Conference of 1884/1885, while in force, remained limited in scope *ratione personae* (signatories), *ratione loci* (the African coasts) and *ratione temporis* (future occupations). However, notification continues to enjoy the support of writers who postulate, for example, that it is in itself a useful element of proof (Brownlie) or argue that it constitutes a valued gesture of courtesy (Verhoeven). Secondly, possession must be exercised by a State or, exceptionally, by an entity specially mandated by a State for this purpose (see the Guiana Boundary arbitration of 1904, RIAA, Vol. 11 (1961) p. 21; → Guyana-Venezuela Boundary Dispute).

It must also be considered that there is practically no further room for the discovery of new lands on the earth, and that most of the land areas of the globe are at present placed under the territorial sovereignty of an existing State, as metropolitan territory, or as a territory entitled to exercise the right of self-determination, or subject by treaty to a special international régime (e.g. → Antarctica). Thus the precondition of *terra nullius* for acquisition of title by occupation has lost the significance it had in the past. Certainly, mankind has developed means of space exploration, but the relevant international instruments adopted by States provide expressly that outer space, including the moon and other → celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means (→ Outer Space Treaty). In contrast, territorial sovereignty or exclusive national jurisdiction in maritime areas or airspace has for centuries been linked to territorial sovereignty exercised over land areas (→ Air, Sovereignty over the; → Maritime Jurisdiction). The 1958 and 1982 conventions relating to the → law of the sea have preserved the *res communis* status of the → high seas and the → sea-bed and subsoil, notwithstanding generally accepted extensions of territorial sovereignty or exclusive national jurisdiction to certain maritime and submarine areas formerly considered as *res communis* (→ Exclusive Economic Zone). Occupation retains its significance, however, in regard to the maintenance or loss of title.

2. *Accretion*

Accretion, which concerns territorial changes resulting from natural causes, is often presented by legal writers as an autonomous mode of acquisition of territorial title. Publicists are virtually unanimous in recognizing that as such it demands no act of consolidation on the part of the beneficiary nor any form of acquiescence from any third party (particularly in the case of an accumulation of alluvial deposits; → River Deltas). The basis of this appears to be a presumption of effective occupation. It sometimes happens, however, that such a presumption is disproved, and that ground displaced as a result of a violent natural process (avulsion and sudden change in alignment of the bed of a frontier river) remains subject to the sovereignty of its original possessor (as in the Chamizal Arbitration, op. cit.). Accretion may also appear to be involved when a State extends its territory by carrying out operations thereon which modify its physical nature (artificial accretion) at the expense either of the international community (e.g. enlargement of territorial sea consequent on dyke construction), or of a → neighbour State (e.g. artificial deflection of the course of a frontier river; → Boundary Waters). However, to the extent that natural phenomena are not the prime cause, it would seem logical in such cases to require some kind of recognition or acquiescence to consolidate acquisition of title.

3. *Contiguity*

With regard to contiguity (continuity, proximity), a number of theories which amount to special applications have in the past been misused to circumvent the general requirements for effectiveness (theories of "hinterland", "catchment areas", "natural limits", etc.). It was to resist such abuses as these that Arts. 34 and 35 of the General Act of the Berlin West Africa Conference were adopted. Moreover, Max Huber, in the Palmas Island Arbitration, rejected contiguity as an autonomous mode of unilateral and *ipso jure* acquisition of territorial sovereignty, deeming it imprecise. The majority of legal writers today take the same approach; some have considered reference to contiguity as amounting to little more than a "technique" for applying the principle of effective occupation (Brownlie). Yet the principle of effectiveness has to be interpreted in a reasonable manner: Might not contiguity in itself therefore constitute title to particularly inhospitable *terrae nullius* in the absence of any competing act of State?

That, in any case, is what has been claimed by certain States in respect of the polar areas, for example, by the sectors theory propounded by Canada in 1907 and the Soviet Union in 1926, holding that any State with a coastal front on the → Arctic Ocean be granted rights over the territories and islands lying within a geodesic triangle having for its base the coast in question and the North Pole for its apex. This theory has been rejected by the majority of States, even those whom it would benefit, and appears now to have been largely abandoned. It has also been criticized

in view of the monopoly régime to which it leads (Smedal) and because of the contradiction between its maximalist approach, which includes parts of the "frozen sea" in the sectors referred to, and the principle of freedom of the seas. Application of the sectors theory to Antarctica is more difficult to conceive, because this area is too far from the territory of the States that could otherwise have attempted to make use of it. In reality, the claims made in this region, contested by other States, are primarily founded on occupation or on discovery and occupation, although continuity or contiguity (Argentina, Chile) and historic rights (Chile) are also advanced by those States. These claims have of course been "frozen" until 1989 by the Antarctic Treaty.

As a presumption of effective occupation of an area which is uninhabited and/or barren and has not been subject to any conflicting exercise of sovereignty, contiguity will generally carry more weight when the area in question constitutes an "organic" or "individualized" whole (see the Guyana Boundary Case, op. cit., pp. 21–22). One must, further, emphasize the importance of contiguity in the extension of territorial sovereignty and/or exclusive national jurisdiction to maritime areas (→ territorial sea, → contiguous zones, → fishery zones and limits, economic zones) and the subsoil thereof, such as on the → continental shelf – as reflected in the 1958 Geneva Conventions and the 1982 Convention on the Law of the Sea.

4. *Conquest*

Conquest, as a mode of acquisition, is proscribed by contemporary international law as in general being incompatible with the principle of the prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The territory of a State cannot at present be the object of acquisition by another State resulting from an illegal threat or use of force, and no territorial conquest resulting from such threat or use of force can be recognized as legal (see → Friendly Relations Resolution). Non-recognition of open annexation is viewed as a guarantee that the State victim of another's recourse to illegal use of force conserves all its rights (Verhoeven). Furthermore it should not be forgotten that the principle under discussion here is referred to as a prime example of → *jus cogens*. In the presence of such a rule, recognition, acquiescence and estoppel cannot be said to generate the effects normally attached to them.

5. *Cession*

Cession of title normally takes place by means of a treaty, agreement or understanding. This mode was formerly quite common and was reminiscent of certain modes of transfer of ownership in private law. Thus a distinction was drawn between cessions carried out "for value" (e.g. France's cession of Louisiana to the United States for 60 million francs in 1803) or by an "exchange" (e.g. Great Britain's cession of the island of → Heligoland to Germany, in exchange for Zanzibar, in 1890) and "gratuitous" cessions (e.g. France's cession of Lombardy to Italy in 1859). Leaving aside cessions resulting from the conclusion of peace treaties, territorial changes through cession are nowadays rare. Those that do occur concern, in any case, marginal areas (e.g. the cession by the United States of the Swan Islands to Honduras in 1971) or are the result of agreed boundary rectifications. Cession nonetheless continues to give rise to a certain number of interesting legal problems. Thus, legal opinion is divided over the precise moment at which transfer of title occurs: on the exchange of instruments of ratification or when effective possession is taken. Moreover, while it is generally agreed that the effects of a cession are opposable *erga omnes*, a parallel process of recognition by third States might be advantageous, inasmuch as a cession might conceivably have been effected in violation of treaty commitments, or have as object an imperfect title, or be perceived as detrimental to a third State's rights.

Furthermore, the principle of equal rights and self-determination of peoples raises a series of major issues concerning the operation of cession as a mode of acquisition. First, there is the question of the consultation (holding of → plebiscites) and right of → option of nationality of the population concerned in relation to the contemplated territorial change. Secondly, this principle nowadays plays an extremely important role in decolonization matters and certainly consti-

tutes, in that context, a limitation on the free disposal of territory by the administering State. The principle of self-determination, which recognizes the "separate and distinct status" of the territory of a colony or other → non-self-governing territory, has consequences for processes concerning territorial gains. In implementing the principle of self-determination, States have a duty not to authorize or encourage any action which would " . . . dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States . . . " and must refrain from any action aimed at " . . . the partial or total disruption of the national unity and territorial integrity of any other State or country" (Friendly Relations Resolution).

6. *Acquisitive Prescription*

This institution, which from its origin in Roman law (*usucapio*) spread into many systems of private law, is surrounded by controversy regarding its admission into the international legal order. Its advocates emphasize its character as a general principle of law and its "pacifying" properties, regarding it as an essential factor of legal stability (application of *quieta non movere*). As such, it calls for the effective, public, peaceful and continuous exercise over a certain period of State authority *animo possidendi* and as a sovereign *in territorio alii* (→ Prescription).

Its detractors point to certain elements of uncertainty. For example, there appears to be no rule of international law which provides a criterion for measuring an essential consolidating factor of the prescriptive process, the passage of time. Admittedly, prescriptive title may exist independently of any statute of limitations and the period deemed sufficient must be fixed judicially in the light of the circumstances. Nevertheless this lacuna, however understandable, is a source of insecurity and as such difficult to reconcile with the primordial function assigned to prescription by its advocates. Moreover, there is a division of opinion as to the intensity which must characterize any counteraction if it is to constitute an interruption of the process. Thus, while some consider that diplomatic protests suffice, others believe in the necessity of recourse to the machinery for the peaceful settlement of disputes. Some doubt has thus been cast on the real utility of an independent doctrine of prescription in international law, which in any event ascribes certain effects to consent or to acquiescence. In the final analysis, prescription may be merely one facet of the broader, synthetic principle of effectiveness so often reaffirmed in international case-law.

7. *Adjudication*

This procedure refers primarily to the settlement of territorial disputes by judicial decision or → arbitration, i.e. by a "third party" deciding in conformity with international law. It follows that these decisions are in the majority of cases declaratory rather than constitutive. Generally, therefore, a judgment or arbitral award is not the foundation of the title to the territory but rather a confirmation of the existence of the title. In a wider sense, adjudication may also refer to territorial settlements made by a political organ of an international organization or by a group of principal powers at the end of generalized hostilities (cf. → Conferences of Ambassadors). In the case of international organizations, the organ concerned is normally empowered to act in pursuance of provisions contained in a peace treaty which may form the basis of title. As for assignments by a group of principal powers (→ Great Powers), they may take place either in conformity with a peace treaty or settlement or prior to its conclusion. In the first case, the situation is similar to the case of international organizations. In the second, it is difficult to see how such assignment could in itself effect a transfer of title to territory. This is, of course, independent of the fact that the decisions taken may in certain circumstances, for example *vis-à-vis* an aggressor State, be justified on other grounds (→ Aggression). Mere political assignments may, however, serve to consolidate title or to facilitate acquisition of title through one of the modes admitted in international law.

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TERRITORY, DISCOVERY

1. Notion

Simple or "physical" discovery merely entails the sighting or "finding" of hitherto unknown or uncharted territory; it is frequently accompanied by a landing and the symbolic taking of possession. In principle, only a *res nullius* or *terra nullius* can be discovered, although in the classical era of discovery (1450–1600) continents and → islands inhabited by aboriginal populations were "discovered" and subjected to → annexation and colonization (→ History of the Law of Nations; → Colonies and Colonial Régime). The concept of discovery does not include an element of intention, as a discovery may be the result of a chance sighting or of an exploratory expedition; nor is the person of the discoverer of relevance, since he may be a private individual or an authorized State envoy or representative.

From the standpoint of international law, discovery becomes legally relevant when a State affirms that the discovery was made on its behalf and proceeds to claim → territorial sovereignty. Although a → declaration of occupation or other official → notification to other States is useful evidence of *animus occupandi*, it is not a necessary condition for the validity of a State's claim.

Although there is still some difference of opinion on the matter, it is safe to say that international law grants an inchoate title to the discovering State in order to give it the possibility of enjoying the benefits of its discovery. Following symbolic annexation by the erecting of landmarks and the hoisting of flags on a few points of the discovered territory, the State must within a reasonable period of time display such activity on the discovered territory as will qualify as effective occupation (→ Effectiveness), for example by establishing a military garrison or civilian settlement, or by performing other acts of → sovereignty. Thus, the inchoate title renders

the discovered region *terra prohibita* and acts as a temporary bar to occupation by another State. This inchoate title, however, lapses if it is not perfected within a reasonable time. In this sense, discovery perfected by effective occupation may be counted with accretion, cession, → conquest and → prescription as one of the classical modes of acquiring title to territory (→ Territory, Acquisition).

2. *Historical Evolution of Legal Rules*

During the classical era of discovery, the diplomatic correspondence of Spain, Portugal, England, France and the Netherlands contained evidence that the foreign offices of these nations considered discovery with symbolic taking of possession an adequate basis for title to *terra nullius* in North America. But England, France and the Netherlands were not prepared to accept the sweeping claims of Spain and Portugal, even if fortified by Papal Bulls, to the newly discovered continents (→ Recognition). Thus Queen Elizabeth in 1580 informed the Spanish Ambassador to England that she could not persuade herself that Spain had any just title to all of North and South America just because Spaniards "had touched here and there upon the coasts, built cottages, and given names to a river or a cape". She considered herself entitled to establish colonies in those parts which the Spaniards did not inhabit. One century later, in the dispute with England over New Netherlands (New York and adjacent territory) the Dutch rested their claim not on discovery itself but on priority of occupation as the only criterion to determine legal title to *terra nullius*.

In the 19th century sovereignty over the American Northwest was disputed between England, Russia and the United States. Lord Stowell summarized the British view in maintaining that:

> "Possession does not appear in the opinion and practice of States to be founded exactly upon the same principles in the cases of islands and continents. In that of islands, discovery alone has usually been held sufficient to constitute a title. Not so in the case of continents . . . .[I]t has not been generally held, and cannot be maintained that the mere discovery of a coast gives a right to the exclusive possession of a whole extensive continent to which it belongs . . . . An undisputed exercise of sovereignty over a large tract of such a continent and for a long tract of time would be requisite for such purposes" (cited in Alaskan Boundary Tribunal Case, January 24, 1903).

In the age of imperialism, occupation rather than discovery became the test of legal title to African territories, as reflected in Arts. 34 and 35 of the convention adopted at the → Berlin West Africa Conference (1884/1885).

3. *Judicial Decisions and Arbitral Awards*

The legal implications of discovery have been best explained in a number of decisions of the → Permanent Court of International Justice (PCIJ), the → International Court of Justice (ICJ), and in certain awards following international → arbitration.

In the → Delagoa Bay Arbitration (1875) the French President, acting as arbitrator between Portugal and Great Britain, noted that Delagoa Bay (Mozambique) was discovered by Portuguese explorers in 1506, that in 1544 a military fort and settlements were established and that henceforth territorial sovereignty was claimed by Portugal on the grounds of continuous occupation. While the British did not dispute Portuguese sovereignty over the northern part of the bay, they contended that the Portuguese had failed to exercise effective authority over the southern area of the bay (→ Territory, Abandonment). The arbitrator held that although Portuguese authority over the southern part had weakened, a temporary cessation of authority did not suffice to end a title based on discovery and occupation through centuries (Martens NRG2, Vol. 3, p. 517).

In the Caroline Islands dispute (1885) Pope Leo XIII, acting as mediator between Spain and Germany (→ Conciliation and Mediation), found that although Spain had discovered the islands in the 16th century and sent missionaries there to "Christianize the natives", she had failed to effectively occupy the territory. On the other hand, since Germany had only recently claimed the islands as belonging to its → sphere of influence, the Pope proposed that Germany recognize Spain's formal sovereignty over the islands and that Spain in turn grant special commercial rights to Germany. The dispute was thus settled on the basis of a Spanish-German Protocol of De-

cember 1885 (Martens NRG2, Vol. 12, p. 292).

In the → Palmas Island Arbitration (1928) the → Permanent Court of Arbitration under Max Huber examined the United States' claim to sovereignty, as successor of Spain, which had discovered the Island of Palmas (or Miangas) in the early 16th century. The Netherlands' claim was based on prescription by continuous and peaceful display of State authority since 1700.

In awarding the island to the Netherlands, Justice Huber formulated the modern view with respect to discovery:

> "The title of discovery . . . would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty" (RIAA, Vol. 2 (1949) p. 829, at p. 869).

In the → Clipperton Island Arbitration (1931) King Victor Emmanuel III of Italy was appointed as sôle arbitrator between Mexico and France. The Mexican claim was based on → State succession, asserting that Spain had gained title by discovery of what Spanish called Passion Island; but Mexico could not establish any manifestations of Spanish sovereignty over the island, which was rediscovered by the Englishman Clipperton in 1705 and subsequently by French seafarers. It was not until 1858 that the French Government claimed sovereignty and granted a → concession for the exploitation of guano. The arbitral tribunal found that the French title based on effective occupation represented the stronger claim (RIAA, Vol. 2 (1949) p. 1105).

In the → Eastern Greenland Case (1933) the Permanent Court of International Justice held that Denmark had sovereignty over all of → Greenland and rejected the Norwegian claim that a certain area known as Eirik Raudes Land was *terra nullius* when Norway issued a declaration of occupation in 1931. Interestingly enough the PCIJ seems to have reduced the requirements of effectiveness of occupation in view of the inaccessibility of the territory (Legal Status of Eastern Greenland, Judgment, PCIJ, Series A/B, No. 53 (1933) p. 22).

Since World War II and the recognition of the principle of → self-determination, in particular as it relates to the process of → decolonization, the concept of *terra nullius* has come under sharp criticism. This development is reflected in the → Western Sahara Advisory Opinion, particularly in the comments of the Court (ICJ Reports 1975, p. 12, at p. 39) and in the separate opinion of Judge Ammoun (ibid. at p. 86; cf. also → Indigenous Populations, Protection; → Indigenous Populations, Treaties with).

4. Current Legal Situation

Today the concept of discovery is primarily of historical interest. With modern technology including satellites (→ Spacecraft and Satellites) there are hardly any undiscovered territories left on the globe. Historic titles and the legal consequences of discovery are, however, still occasionally referred to by States in claiming title to territory, for example the → Falkland Islands (Malvinas) and certain islands in the Antarctic (→ Antarctica Cases (U.K. v. Argentina; U.K. v. Chile); → Historic Rights). On the other hand, it should be pointed out that in the light of the → United Nations Charter and prevailing standards, the concept of discovery, effective occupation and historic titles have been rendered obsolete with respect to territories inhabited at the time of discovery and colonization.

Yet discovery can still take place, as in the case of new volcanic islands. If they emerge within the → territorial sea of a State, that State has immediate sovereignty over them. If, however, a new volcanic island arises in the → high seas, which is a *res communis*, it may be discovered by any State. Of course, since volcanic islands usually develop over a period of weeks or months, several States could conceivably claim the discovery and their attempt to effect symbolic annexation or to establish effective occupation could well lead to → armed conflict.

Moreover, there may still exist undiscovered rocks or banks in the open sea, but these are not subject to appropriation. Finally, although the 1982 United Nations Convention on the Law of the Sea (UN Doc. A/CONF. 62/122 with Corr.) is silent on the issue of discovery, the new principle of the → common heritage of mankind is emerging, at least with respect to → marine resources in areas beyond the territorial sea, the → exclusive

economic zone and the → continental shelf (1982 Convention, Art. 136).

The international consensus with respect to discoveries in outer space is unequivocal. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, commonly referred to as the → Outer Space Treaty (UNTS, Vol. 610, p. 206, in force October 10, 1967), provides in Art. 2: "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation or by any other means" (→ Space Law; → Celestial Bodies). Similarly, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, which entered into force on July 11, 1984, provides in Art. 11: "1. The moon and its natural resources are the common heritage of mankind . . . 2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means" (ILM, Vol. 18 (1979) p. 1434; UN GA Res. 34/68 of December 5, 1979, Annex).

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TERRITORY, LEASE

1. Definition

A lease is a contract by which an owner of land or a building (the lessor) agrees to the use of such property by another (the lessee) for a certain time for a fixed payment (the rent), usually in money. This definition, deriving from private law, is with some small modifications also valid in international law. A lease of territory is an agreement by which a → subject of international law – as a rule a sovereign State – agrees to allow another subject of international law to have the use of a part of the lessor's territory through the exercise of some or all sovereign rights, including the lessee's own administration, and the usufruct of the territory for a certain time for a certain payment.

2. General Principles

The lease of territory, even as an agreement between States, may be subject to the private law rules of the lessor State, but this kind of lease is not the subject of the considerations that follow.

Some legal scholars deliberately avoid the term lease when discussing specific types of agreements in international law. This fact, however, cannot veil the similarities to the private law lease which constitute good reasons for other authors to make use of that notion. On the other hand, it is quite clear that the lease of territory nowadays is of decreasing importance.

In general, it cannot be denied that the lease of territory may imply some rules comparable to those of other institutions of international law, such as cession, → mandate, → protectorate or peaceful or belligerent occupation (→ Occupation, Belligerent; → Occupation, Pacific). In principle, however, they should not be confused.

In traditional practice an agreement for the lease of territory is concluded between at least two subjects of international law, usually between two States. In this agreement the lessor resigns fully or partly the use of his sovereign rights to the benefit of the lessee, who is allowed to install his own régime on the leased territory. Such a régime includes, at the least, governmental administration in order to bring the right of usufruct into effect, and at the most total administration and jurisdiction, i.e. the exercise of all sovereign rights. In the

latter case the sovereignty of the lessor State is reduced to a *nudum jus* without any trace of effective application. One of the main characteristics of the lease is that the *nudum jus* of sovereignty of the lessor is to be given content in the future: The lessor has a claim to full possession of the territory at the end of the time stipulated in the agreement. If there is no certain time stipulated, three possibilities are to be considered according to the circumstances of the agreement: firstly, the lessor may have a claim to the return of full possession at any time; secondly, the lessor may have a claim to negotiations on that subject; or thirdly, the lessor may have a claim to the return of full possession when the purpose of the contract is fulfilled. The latter two points may apply, for instance, in the case of a perpetual lease. Finally, the lessee has to pay a rent which generally, but not necessarily, is paid in a single fixed amount or as recurring fee, for example payable annually.

No right arising from the contract may be transferred by a party to the agreement to a third party without the consent of the other party.

3. *Specific Issues*

(a) Citizenship and nationality

The inhabitants of the leased territory do not lose their original → nationality or citizenship. Even if the lessee accords them civil rights and other rights which used to be privileges of nationals or citizens of the lessee, they theoretically remain totally under the sovereignty of the lessor, including their property rights, etc. Thus inhabitants of the leased territory remain under the → diplomatic protection of the lessor. This does not exclude the possibility of a sort of concurring diplomatic protection by the lessee, provided that his jurisdiction over the lessor's nationals or citizens in the leased territory goes as far as his jurisdiction over his own nationals or citizens, and that the lessor consents.

(b) Lease and democratic system

The relationship between sovereignty and the individual is the source of another problem which has played a part in the decline of the importance of leases of territory in international relations today: The lease of inhabited territory poses some difficult political and legal problems for States with a democratic constitutional system. In such States the lessor would have to obtain the consent of the population involved which is going to be at least partly governed by the administration of the lessee. Such consent would also have to cover the question to what extent this population would resign its democratic rights in respect to the lessor. The lessee, on the other hand, would have to consider the political participation of the citizens of the lessor in its own government, at least as far as the leased territory is concerned.

(c) Treaty-making power

If the agreement between the lessor and the lessee does not contain rules concerning the power to conclude treaties with third parties on issues relating to the leased territory or its inhabitants, the circumstances (e.g. tacit will, implied powers, etc.) will decide which of the parties to the lease is competent to conclude international treaties. The result will depend on the extent of the sovereign rights the party concerned is allowed to exercise according to the lease agreement.

(d) Responsibility

The problem of "concurring" sovereignties might also create difficulties relating to the responsibility for actions which are wrongful according to international law and take place on or derive from the leased territory. If the lease agreement does not stipulate otherwise, the lessee is responsible for all actions of its own organs on the leased territory. A participation in that responsibility to the debit of the lessor might be considered if the organs of the lessee act in the name of the lessor or if the lessor does not make use of any legal or factual possibility to intervene. If the action is taken by an organ of the lessor on the leased territory, the lessor is itself responsible so far as the treaty does not impose liability on the lessee. Such responsibility depends ultimately on the general rules of attribution and on the answer to the question on behalf of whom the organ concerned has taken illicit action.

4. *Practice*

The history of the last hundred and fifty years contains quite a few examples of leases of territory. They were most widespread at the height of

the colonial period, as the following instances demonstrate. History also reveals that the main purposes of leases of territory were the grant of trade facilities and the opening of trade routes, and the gaining control of certain strategic points of the world for military purposes in order to play a more effective role in global → power politics.

Leases of the "African type" (Verzijl) were concluded between colonial powers for the purpose of territorial adjustments or delimitations of spheres of political or military influence, the construction of trade posts and the opening of access to ports and trade routes on water and on land (for examples see Verzijl, p. 399 et seq.; → Spheres of Influence).

Leases of the "Chinese type" were established between China and European great powers at the end of the last century, for example between China and Germany, Great Britain, France and Russia. The purpose was the colonization of certain Chinese territories in order to gain strategic points for international sea trade and for the military control of the eastern seas. Some leases served the purpose of executing sovereign rights within the communities of certain Chinese cities in order to retain protection and jurisdiction of the respective State over its nationals (for examples see Verzijl, p. 400 et seq.). Most of the territories were returned to China in 1922 without regard to stipulated duration of the lease (Washington Treaty of 6 February 1922; see also the article on → Hong Kong, which can only partly be considered a case of a lease of territory).

A third type of lease, without a colonial background, has served and still serves to provide enclaved States with access to ports and other points of importance for purposes of trade (for examples see Verzijl, p. 405 et seq.; → Enclaves).

A fourth type of lease which is still of considerable importance is that designed to secure military, naval or air bases (e.g. British air bases on → Cyprus; for more examples see Verzijl, p. 406 et seq.; → Military Bases on Foreign Territory).

Finally, a form of lease, occasionally subject to private law, may be used to secure a piece of land in order to construct roads, railways, canals, etc. One of the best known examples is that of the → Panama Canal. Even though some authors do not admit the Treaty of 1903 between Panama and the United States as being a lease, the preconditions given above for a lease of territory appear to be satisfied upon consideration of the circumstances of the case and the language used in the agreement: "grant in perpetuity of the use, occupation and control".

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TRANSIT OF GOODS OVER FOREIGN TERRITORY

Problems relating to transit of goods over foreign territory arise in many respects. They are of vital importance in the case of land-locked countries, but they also occur frequently in regions having an intricate borderline pattern due to geographical or historical factors, as is the case mainly in Western Europe and in some parts of Asia and Africa. Similar problems have to be coped with even inside customs or economic unions (see → Customs Union; → Traffic and Transport, International Regulation).

Traditionally, freedom of transit was considered as being part of freedom of commerce, as provided for in → commercial treaties. Explicit provisions on transit appeared for the first time in the context of the establishment of free zones in → ports (→ Free Ports), which entailed the creation of corresponding transit régimes. An early arrangement of this kind is to be found in Arts. X and XI of the Santiago Treaty of October 20, 1904 between Bolivia and Chile (CTS, Vol. 196, p. 403); later on, the same device was resorted to in several of the post-World-War-I peace treaties (→ Peace Treaties after World War I).

The matter was regulated for the first time on a multilateral basis in the Barcelona Convention and Statute on Freedom of Transit of April 20, 1921 (LNTS, Vol. 7, p. 13), negotiated under the aegis of the → League of Nations. This Convention has

provided the model for all subsequent provisions in this field. Recalling Art. 23(e) of the Covenant, under which members of the League had committed themselves to take measures with a view to ensuring "freedom of communications and of transit", the Preamble of the Barcelona Convention states as follows:

"Desirous of making provision to secure and maintain freedom of communications and of transit, . . .

Recognising that it is well to proclaim the right of free transit and to make regulations thereon as being one of the best means of developing co-operation between States without prejudice to their rights of sovereignty or authority over routes available for transit . . . ."

In Art. 2 of the Statute on Freedom of Transit, which constitutes the body of the Convention, the contracting States commit themselves to facilitate free transit on routes in use convenient for such purpose without any distinction as to the → nationality of persons, the → flag of vessels or the place of origin or destination of goods. Under Art. 3, "traffic in transit shall not be subject to any special dues in respect of transit" and there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit, it being understood that "[t]he rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover". According to Art. 5 the freedom of transit does not prevent the contracting States from applying restrictive measures relating to the control of traffic in dangerous drugs and arms, as well as products bearing false marks of origin or infringing on commercial property rights, or aiming at the prevention of unfair competition.

The substance of the Barcelona Convention was embodied in Art. 33 of the → Havana Charter under the heading "Freedom of Transit". This provision was taken over, in turn, into the → General Agreement on Tariffs and Trade (GATT) under Art. V. It is to be noted that the GATT provision was extrapolated at a time when the negotiations on the Havana Charter were not yet terminated, which explains why there are some drafting discrepancies between both texts. These divergencies do not, however, affect the principles of both provisions.

Art. V of GATT, after having defined the notion of "traffic in transit" in para. 1, provides as follows:

"2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. . . . such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered."

Para. 4 adds that charges and regulations imposed on traffic in transit must be "reasonable", whereas para. 5 provides that traffic facilities must be granted on a → most-favoured-nation basis. There is no doubt that the general exceptions of Art. XX, relating *inter alia* to health protection, as well as the security exceptions of Art. XXI of GATT, also apply to goods in transit.

Art. V of GATT is not applicable to the operation of → aircraft in transit, but does apply to air transit of goods, including baggage (see para. 7). It may be recalled in this respect that the → Chicago Convention on International Civil Aviation of December 7, 1944 (UNTS, Vol. 15, p. 296) had already granted customs facilities for aircraft in transit (Art. 24) and customs exemption for baggage of passengers in transit (Annex 9, Chap. V). The latter provisions have given rise to litigation in two cases in France. The first is that of Kamolpraimpna (Cour d'appel de Paris, February 21, 1972, Gazette du Palais (1971) p. 793, and Cour de cassation, June 29, 1972, Revue française de droit aérien (1972) p. 433), relating to a passenger conveying gold in transit. In this case, the French Cour de cassation quashed the appeal decision, which was favourable to the application of the Chicago Convention, for want of an official interpretation of the French ministry for Foreign Affairs. The second case is that of Males (Cour

d'appel de Paris, June 27, 1973, Revue française de droit aérien (1974) p. 44), relating to a passenger carrying drugs and arms in transit. It appears from the latter decision that in the meantime the Ministry had ruled that the relevant provisions of the Chicago Convention lacked direct effect in France.

The New York Convention on Transit Trade of Land-Locked States of July 8, 1965 (UNTS, Vol. 597, p. 3) is entirely based on the preceding Conventions (→ Land-Locked and Geographically Disadvantaged States). Principle IV of the preamble speaks of "free and unrestricted transit", whereas Art. 3 exempts traffic in transit from any "customs duties or taxes chargeable by reason of importation or exportation", as well as from "any special dues in respect of transit", except those which are intended to defray expenses entailed by transit operations. This provision thus clearly distinguishes the status of goods in transit from goods imported into or exported from the State of transit. Art. 4 of the same Convention makes clear that traffic in transit is subject, on a "reasonable" basis, to tariffs and charges inherent in the use of transport facilities such as means of transport, port installations and routes.

Problems in relation to transit are bound to arise also in a customs union as a consequence of the transfer of customs clearance of goods from the point of entry into the customs territory, be it through ports or land frontiers, to the point of destination of the goods. The goods in question may then, according to circumstances, travel in transit over the territory of one or more member States of the union. Thus the → European Economic Community (EEC) has established an elaborate régime on Community transit (Regulation 222/77 of December 13, 1976, Official Journal of the European Communities, Vol. 19 (1976) L38/1, as amended). Numerous agreements have been concluded on the same subject by the EEC with Austria and Switzerland.

The → Court of Justice of the European Communities for its part had to cope with problems relating to transit in the SIOT case, upon a request for a preliminary ruling by the Italian Corte Suprema di Cassazione, relating to the compatibility with both EEC law and GATT of a disembarcation tax levied by Italy on crude oil channelled from the port of Trieste through the transalpine pipeline to Germany (a member State of the EEC) and Austria (a non-member State). In its judgment of March 16, 1983 (ECR 1983, p. 731) the Court recognized (a) that the principle of free transit, as far as intra-Community trade is concerned, is inherent in the customs union which, according to Art. 9 of the EEC Treaty is at the basis of the Community; and (b) that, as far as a third State is concerned, the Community must make sure that Art. V of the GATT is respected by its member States, adding, however, that this provision has no direct effect in the Community and can, therefore, not be relied upon in a national Court.

Considering the evolution outlined above, we find an impressive coherence on all essential points from the Barcelona Convention, through the Havana Charter and GATT to the New York Convention on Transit Trade of Land-Locked States. Of them all, the latter Convention provides the clearest and best adapted provisions and it may, therefore, serve in clarifying the present state of international law in the matter.

In view of the foregoing, the following principles may be considered to govern this area.

(a) Traffic in transit is free and States are obliged to allow such traffic to take place on the most convenient routes over their territory, including waterways and sea-routes under their jurisdiction. This freedom is, however, limited by the traditional reservations relating to public security and health.

(b) Traffic in transit is immune from the levy of any customs duties and any other taxes relating to import or export of goods. Likewise any special taxes on transit are prohibited, except in so far as they reflect the cost of transportation and the use of related facilities, it being understood that such dues must be applied on a non-discriminatory basis as compared to the dues imposed on national operators.

GATT, Analytical Index (1986) (ad Article V).
B. NOLDE, Droit et technique des traités de commerce, RdC, Vol. 3 (1924 II) 295–461 (Chaps. IV and VI).
J.H. JACKSON, World Trade and the Law of GATT (1969) Sec. 19.3.

PIERRE PESCATORE

TRANSIT OF PERSONS OVER FOREIGN TERRITORY *see* Enclaves; Land-Locked

and Geographically Disadvantaged States; Neighbour States; Traffic and Transport, International Regulation

TRENDTEX TRADING CORPORATION v. CENTRAL BANK OF NIGERIA

1. Background

In 1975 the Federal Government of Nigeria ordered a considerable quantity of cement from overseas suppliers. Payment was to be made through letters of credit established by the Central Bank of Nigeria against presentation of shipping documents to the Bank's correspondents in various countries. The letters of credit were not confirmed by the correspondent banks. When it became clear that the volume of cement arriving in Nigeria was too great for the country to handle, the Nigerian Government ordered the Central Bank not to pay against further presentations of documents until certain new procedures had been put into force. Trendtex, a Swiss company, was the beneficiary of a letter of credit for an instalment contract to ship cement. Some of the instalments had already been shipped but on presenting the documents for the latest shipments Trendtex was told by the correspondent bank in London that the Central Bank had countermanded its instructions to pay.

2. The Litigation

Trendtex, together with beneficiaries of other letters of credit repudiated in similar circumstances, sued the Central Bank in the High Court in England. Actions were also brought against the Central Bank in the courts of the Federal Republic of Germany and the United States by other beneficiaries. In its action Trendtex claimed the price of the shipments made, damages for non-acceptance of the balance to be shipped and, in addition, sought an injunction – the English equivalent of *saisie conservatoire* – to require the Central Bank to retain within the jurisdiction of the English court sufficient funds to meet the claim. In the High Court at first instance Mr. Justice Donaldson held that the Central Bank, though constituted in Nigerian law as an entity separate from the Government, was for the purposes of → international law to be regarded as part of the State of Nigeria ((1976) 1 W.L.R. 868). As such it was absolutely immune, since English law drew no distinction between acts *jure imperii* and acts *jure gestionis* (→ State Immunity).

In 1977 Trendtex successfully appealed to the English Court of Appeal. Lord Denning, the presiding judge, considered that the rules of → customary international law, as they exist from time to time, form part of the common law of England ((1977) 1 Q.B. 529). Consequently a change in international law produces a corresponding change in English law notwithstanding earlier English judicial decisions to the contrary normally binding on courts in later cases. On the evidence produced on the present state of international law the judge was satisfied that the *jus imperii/jus gestionis* distinction was now part of customary international law, and thus part of English law, even if the cement had been required for State purposes such as the construction of army barracks. Thus even if the Central Bank were an organ of the Nigerian Government, which he doubted, it was not entitled to immunity in this case. Lord Justice Shaw held that the Central Bank was not part of the Nigerian Government and agreed with Lord Denning that, even if it were, the restrictive doctrine of State immunity represented the international law rule and was thus part of the English law notwithstanding earlier English judicial decisions applying the absolute doctrine. The third judge, Lord Justice Stevenson, held that the Central Bank was not part of the Nigerian Government and was thus not entitled to immunity; he did not agree with his colleagues, however, that the English doctrine of judicial precedent could be avoided in the way they proposed.

The Central Bank appealed to the House of Lords as the ultimate judicial tribunal in the United Kingdom, but the case was settled between the parties before the appeal could be heard.

3. The Significance of the Case

The case is significant in the United Kingdom both in the law relating to State immunity and in the relationship between → international law and municipal law. The Court of Appeal upheld the restrictive doctrine of State immunity notwithstanding earlier judicial decisions supporting the

absolute doctrine and the fact that the United Kingdom was not at the time a party to the → European Convention on State Immunity of 1972. The importance of the case in this respect became a matter of history the following year when the United Kingdom legislature, partly as a result of the uncertainty produced by the litigation, enacted the State Immunity Act 1978. This Act, which now provides the basis for granting immunity to foreign States in United Kingdom courts, recognizes in broad terms the *jus imperii/ jus gestionis* distinction. Its enactment allowed the United Kingdom to ratify in 1979 the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, April 10, 1926, together with its 1934 Protocol, as well as the European Convention on State Immunity, May 16, 1972.

In applying the doctrine of restrictive immunity, Lord Denning and Lord Justice Shaw drew no distinction between immunity from suit and immunity from enforcement, notwithstanding evidence that the Central Bank funds sought to be retained by injunction were part of the overseas currency reserves of Nigeria. The State Immunity Act 1978, however, provides in general that a foreign State shall be immune from enforcement measures, including injunctions, except in respect of property for the time being in use or intended for use for commercial purposes. But a specific amendment was introduced during the legislation's passage through Parliament to provide that the property of a State's central bank shall not be regarded as used for commercial purposes whether the bank is an entity distinct from the State or not. Thus if the facts of Trendtex were to arise again in an English court, the Central Bank of Nigeria would not be subject to the injunction although it would be subject to the suit.

The wider significance of Trendtex lies in the holding by two of the judges that rules of customary international law, once proved, are part of the common law of England without a specific act of adoption or transformation on the part of the legislature or executive. Although statements to this effect have been made in English courts for over two centuries – particularly in cases concerning foreign envoys – the matter has been controversial at least since the well-known Franconia Case in 1876 (The Queen v. Keyn (1876) 2 Ex.D. 76). Apart from the accepted qualification that such incorporation cannot prevail over a conflicting United Kingdom statute, the Trendtex principle may still be too widely stated. It is not clear, for example, that the United Kingdom could acquire territory, or rights in territory, simply by the development of a rule of customary international law. Until the House of Lords is called upon to make a full examination of the direct incorporation principle, its scope, and to some extent its status, remains uncertain.

Trendtex Trading Corporation v. Central Bank of Nigeria, (1967) 1 W.L.R. 868 (High Court); (1977) 1 Q.B. 529 (Court of Appeal).

International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, April 10, 1926, and 1934 Protocol, LNTS, Vol. 176 (1937) 199–219.

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UNIFICATION AND HARMONIZATION OF LAWS

1. Notion

The need to unify or harmonize laws presupposes diversity of laws. Diversity of laws may exist within a State, in which case, attempts to unify the law of that State might be described as aiming at "internal" unification of law. Historical examples are the unification of French law after the French Revolution and the unification of German law after the foundation of the German Reich in 1871. Present examples are the attempts to unify some branches of the law of the several states of the United States, of the states of Australia and of the provinces of Canada. In general, however, the term "unification or harmonization of laws" is most frequently used in an international context, referring to the process of unifying or harmonizing the laws of independent States. The method used in the past and still largely practised today is to draw up a uniform law and to incorporate it in one form or another in a bilateral or multilateral treaty which imposes on

the signatory States, after ratification or accession, a duty arising under international law to adopt and apply the uniform law as their municipal law (→ International Law and Municipal Law).

2. *Development*

Since unification of laws presupposes diversity of laws, the movement for the international unification of law did not develop before the second half of the 19th century, when the law had come to be considered as essentially national in character and bound up with the idea of the nation State. The early enthusiasts of international unification believed that it would be possible to unify the law of the whole world, and that unification would be brought about solely by way of legislation emanating from the States, from regional groups of States, or even from a world political organization. Experience has demonstrated, however, that the obstacles to unification are considerable and can be surmounted only where there is a clear and present advantage to be gained from it. On the other hand, while unification of the law can be achieved through legislative fiat, the same results can be reached in practice in those fields where freedom of contract reigns and the parties to an international transaction can therefore agree on terms, clauses, and conditions uniformly applied in international trade relations. The → International Chamber of Commerce, the United Nations Economic Commission for Europe, and various associations of traders in certain commodities have been highly successful in working out standard clauses and standard form contracts widely used in international trade.

One of the chief advantages of unified law is that it makes international legal business easier. In the area covered, unified law avoids the hazards of applying → private international law as well as foreign substantive law and thus reduces the risks of international transactions by giving relief both to the person who plans the venture and to the judge who has to resolve the dispute to which it gives rise. Accordingly, unification of law has first been successful in limited areas of commercial law where the practical advantages to be gained are strongest. Thus, international unification of law has met with considerable success in the field of the laws relating to negotiable instruments (→ Bills of Exchange and Cheques, Uniform Laws), the protection of intellectual property (→ World Intellectual Property Organization), the transportation of persons and goods by ships, railways, and → aircraft (→ Air Law; → Civil Aviation, Unlawful Interference with; → Railway Transport, International Regulation; → Traffic and Transport, International Regulation), and the law of sales (→ Sale of Goods, Uniform Laws).

There exists today a multiplicity of institutions, organizations and associations – national and international, governmental and private – whose business it is, on a world or regional scale, to promote the adoption of uniform laws and model laws by drawing up drafts, convening colloquia, organizing the meeting of diplomatic conferences, and disseminating relevant information. Of special importance are the Rome Institute for the Unification of Private Law (UNIDROIT), created in 1926 and placed under the aegis of the → League of Nations (LoN, Official Journal, Vol. 7 (1926), 38th and 39th sessions of the Council, p. 577); the → United Nations Commission on International Trade Law; and a number of other institutions operating in more limited fields of commercial law, such as the → International Civil Aviation Organization, the → International Maritime Organization, and the Central Office for International Railway Transport.

Outside the various branches of commercial law, efforts towards unification have been successful mainly in the fields of private international law (→ Hague Conventions on Private International Law), of civil procedure, in particular with respect to → arbitration and the → recognition and execution of foreign judgments and arbitral awards (→ Hague Conventions on Civil Procedure), and of labour law (→ International Labour Organisation). Unification and harmonization of laws have spread to other areas of law where they have been undertaken within the institutional framework of groups of more or less closely associated or neighbouring States, such as the → European Communities, the → Council of Europe, the Nordic countries (→ Nordic Cooperation), the Benelux countries (→ Benelux Economic Union), the socialist countries (→ Council for Mutual Economic Assistance), and the Latin American countries (→ Latin American Economic Cooperation).

3. *Methods and Techniques*

(a) Unification by supranational organizations

Where States have transferred limited legislative powers to a → supranational organization, the unification of the law of the member States may be achieved in various ways. If one takes the example of the European Communities, unification of the law will result from the fact that the Treaty of Rome itself confers to some extent identical rights and duties on individuals directly enforceable in the courts of the member States (UNTS, Vol. 298, p. 11). Secondly, under Art. 189 of that Treaty, any "regulation" made by the Council is "binding in its entirety and directly applicable in all Member States", and any "directive" made by the Council binds the member States to give effect, in their own way, to the result to be achieved. Under these powers, and also by way of international treaties entered into by the member States of the European Communities, unification or harmonization of the law has been achieved over a broad range of issues where this has been found necessary for the proper functioning of the Common Market. These are the fields of competition law; industrial property; company law; employment law, including related questions of social security law; agriculture; transport law; the rights of individuals, firms and companies to establish themselves in other member States; and the rules governing the jurisdiction of the courts of member States in civil and commercial matters and in the enforcement of foreign judgments.

(b) Unification by treaty

The generally available method of unification is the ratification of, or accession to, international treaties in which the contracting States have reached agreement on the text of rules of law to be applied uniformly throughout their territories. These treaties can be of a very different character as to both form and substance. They can be bilateral or multilateral, regional or universal, and can be open for ratification or accession to all States, a limited group of States, or only to those States which took part in the elaboration of the treaty. The uniform rules of law may be contained in the text of the treaty itself, or may be set out in a document, known as uniform law (*loi uniforme*), annexed to the treaty. The uniform rules may be very detailed and specific, as in the Geneva Convention on Bills of Exchange, Promissory Notes, and Cheques (LNTS, Vol. 143, p. 257, at p. 355). Alternatively, the contracting States may limit themselves to laying down broad principles indicating the particular results to be achieved, but leaving to each State the choice of the means of obtaining the result (see e.g. Art. 20 of the → European Social Charter).

(c) Unification by model laws

If a treaty has become binding, the contracting States are obliged, as a matter of international law, to give effect, without modifications and amendments, to the uniform rules contained in the treaty, as part of their municipal law. No such obligations exist where the technique of the model law (*loi modèle*) has been used. In this case, the text of the rules of law to be applied uniformly may have been drafted by a diplomatic conference composed of duly authorized representatives of States, by international organizations, by → non-governmental organizations, or by some other body or group of lawyers. This text will then be recommended to States for adoption. The advantage of this method is that it may be easier to reach agreement on the substance of the model law and that its adoption, because of the States' power to modify the text at any time, may appear more attractive to them. On the other hand, the purpose of achieving a unification of the law may not be reached through a model law because the States are entirely free to disregard it and may, even if they adopt it, make modifications, either at the time of adoption or later, as they see fit. Nevertheless, this technique has been used with considerable success both in the field of "internal" unification of law (in particular within the United States) and in international unification (e.g. by the Nordic countries).

In many cases, however, the attempt has been made to use the technique of unification by international treaty to provide an incentive for ratification or accession by inserting into the treaty one or more reservation clauses (*clauses facultatives*) under which States are entitled to declare that the uniform rules shall apply only in part or only under certain conditions (→ Treaties, Reservations). An example is Art. 5 of the Hague

Convention relating to the Uniform Law on the International Sale of Goods of 1964, under which a contracting State may declare that it will apply the Uniform Law only to contracts in which the parties thereto have chosen that law as the law of the contract (UNTS, Vol. 834, p. 107). Another possibility is to leave the States free, after ratification or accession, to modify the uniform laws in the future if they see fit. When a clause of this type was inserted in the Geneva Conventions on Bills of Exchange, Promissory Notes, and Cheques it was anticipated that the States would not avail themselves of the right of modification, and experience has justified this expectation.

(d) Unification of the law relating to international matters

It is rare that unified laws are applicable both to international and domestic affairs. An example is the Geneva Conventions on Bills of Exchange, Promissory Notes, and Cheques, which apply to negotiable instruments regardless of the → nationality, domicile or residence of the parties to the instrument and irrespective of the national or international character of the underlying transaction. In most cases, however, unified laws have the more modest objective to unify the law only to the extent to which it is applicable to "international" transactions, affairs, or relationships. In this case, since "international" and "domestic" cases will be governed by different sets of legal rules, much depends on how the uniform law defines its scope of application. An example is the Warsaw Convention on International Carriage by Air whose uniform rules are applicable only to cases involving an "international" carriage as defined in Art. 1, para. 2 (LNTS, Vol. 137, p. 11). Numerous other examples from conventions unifying the law of international transport might be given. Similarly, the United Nations Convention on Contracts for the International Sale of Goods (ILM, Vol. 19 (1980) p. 671) applies to "contracts of sale of goods between parties whose places of business are in different States (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State" (Art. 1, para. 1). Experience shows, however, that States have frequently decided to extend the uniform law to "domestic" cases as well or at least to modify the law relating to "domestic" cases on the lines of the uniform law. They have done so not only in order to reduce the complexity following from the different legal treatment of "international" and "domestic" cases within one jurisdiction, but also because the uniform law which is often the fruit of careful comparative research appears to be more suitable and better adapted to modern needs.

(e) Unification of private international law

In many fields of law where substantive unification or harmonization is impossible or undesirable, it has been found useful to establish, through international conventions, uniform rules of private international law. Where this has been achieved the courts and the parties are still faced with the often difficult problem of ascertaining the substantive contents of the applicable national law. But they are at least guided by uniform rules in determining which national law is to be applied. As a result, a given case will be governed by the same national law regardless of the site of the court adjudicating the case. Thus the strategy of "forum shopping", i.e. of selecting a forum on the ground of the party's preference for the national law which, under the forum's private international law, will be applied, is discouraged. In addition, the danger that an "international" contract or an "international" marriage will be recognized as valid in one jurisdiction and as invalid in another is avoided. In the past this approach has been used mainly in the field of family law. While the unification of the substantive rules of this branch of the law is difficult and perhaps not even desirable there is a strong need, given the increased mobility of people in modern times, to unify the pertinent choice of law rules. Many of the Hague Conventions on Private International Law have dealt specifically with the unification of the rules governing the choice of family law, and the international competence of courts in this matter. Outside the area of family law unification of choice of law rules has been achieved through a number of Hague Conventions in limited fields such as sales, traffic accidents and products liability. A major step forward in this area will be the entry into force of the Rome Convention on the Law Applicable to Contractual Obligations, which has been worked out by the member States of the European Communities (Official Journal of

the European Communities, October 19, 1980, L 266/1–19).

4. Drafting and Interpretation

Drafting a uniform law is one of the most difficult tasks, presupposing as it does the collaboration of lawyers of different nationalities, brought up and trained in different legal traditions and attitudes, and using different languages. If the unification of the law in a particular area is to be achieved, it is indispensable to start out with a careful comparative inventory and critical evaluation of the functionally equivalent rules currently applied in the States whose law is to be unified. Other problems may result from the diversity of legislative style in different countries, the varying connotations of technical terms used in different languages and legal systems, the attachment of lawyers to the traditional categories used in their national laws, and the influences brought to bear on the drafting process by pressure groups operating in different countries.

If uniform rules of law have entered into force, there is a serious risk that because of divergent methods of interpretation the same rules will be given a different meaning in the countries concerned. There are numerous examples that demonstrate the danger of what may be called "judicial nationalization of uniform law". Where the same uniform rule has been interpreted in different countries to mean different things, it is indeed a controversial question whether the courts, in choosing the interpretation to be applied to the case at hand, are allowed to resort to their private international law – i.e. that branch of the law which should have fallen into disuse by the unification process in the first place.

Various remedies have been proposed to reduce the risk of divergencies in interpretation. Time and again scholars have reminded the courts that the interpretation of uniform law differs from that of national law. To some extent help may be derived from the rules and canons used in the → interpretation of international law. It has been suggested, for example, that the principles laid down in Arts. 31 to 33 of the → Vienna Convention on the Law of Treaties may be useful as guidelines for the interpretation of uniform law as well. There is also general agreement that the courts, in interpreting uniform law, should seek to ensure its basic policy of unification, by aiming at the meaning which is most likely to be accepted by other jurisdictions, or is in conformity with the interpretation that has already been reached in those jurisdictions. Sometimes this idea is laid down explicitly in the text of the uniform law itself. Thus, the United Nations Convention on Contracts for the International Sale of Goods provides in Art. 7 that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . . ." Therefore, what is desirable, and indeed necessary, is the use of comparative law as a method of interpreting uniform law (→ Comparative Law and International Law). This is a most ambitious objective, however, given the scarcity of judicial resources, the dearth of comparative legal training among lawyers, and, in some cases, the lack of easily accessible information on the interpretative case law of other jurisdictions.

Arguably, the best means to solve the problem is to confer on an international or supranational court the competence to solve problems of interpreting uniform law. It is not sufficient, however, if standing to institute litigation of this type is granted only to States, as has been done in the past on a number of occasions. For example, under Art. 173 of the European Patent Convention of 1973 (ILM, Vol. 13 (1973) p. 270), "[a]ny dispute between Contracting States concerning the interpretation or application of the present Convention" may under certain circumstances be submitted by any of the States concerned to the → International Court of Justice for a binding decision. However, States have hardly ever made use of this possibility, and provisions of this kind have remained a dead letter. It would be more promising to confer on an international or supranational court a power to hear appeals by individuals, firms or companies against decisions of national courts involving problems of interpretation and application of uniform law, or to empower or even oblige national courts to submit problems of this type to the international or supranational court for decision. The latter procedure is applicable within the framework of the European Communities (Art. 177 of the Treaty of Rome) and the member States of the European Communities have seen fit voluntarily to extend this

procedural device to other fields (e.g. in the Protocol of June 3, 1971 concerning the Interpretation by the European Court of Justice of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, Official Journal of the European Communities 1978, L 304/97).

5. Future Prospects

While the movement for the unification of law by way of uniform legislation has been successful in the limited areas described, there is no doubt that this process is rather slow, does not always lead to the desired results because of the danger of divergencies in interpretation, and may produce technical complexities following from the limited scope of application of each uniform law. There is general agreement today, therefore, that this process is to be supplemented by the gradual development of what is sometimes called an international *lex mercatoria*, i.e. a body of standard form contracts, general conditions, and standardized clauses uniformly applied and interpreted, in particular by arbitration tribunals, in international trade (→ Commercial Arbitration). It has been argued also that the legislative unification of the law in special fields ought to be accompanied by an attempt to identify uniform rules and principles of general contract law whose persuasive power in guiding courts and arbitration tribunals in the determination of international cases would result *non ratione imperii, sed imperio rationis*.

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HEIN KÖTZ

UNIONS OF STATES *see* Confederations and Other Unions of States

UTI POSSIDETIS DOCTRINE

1. Notion

The expression *uti possidetis* derives from Roman law, where it formed one of the Praetorial possessory interdicts. This interdict was essentially a prohibition by the Praetor against interference with the possession of immovable property, and its purpose was to decide which of the claimants should be put in possession, and thus enjoy the favourable position of defendant in the *vindicatio*, or action for ownership. Thus, in Roman law, *uti possidetis* consisted of the award of interim possession, as a preliminary to the determination of ownership.

The notion *uti possidetis* was first used by international lawyers to describe a method of determining what territorial changes had occurred as the result of a → war. The international law of war gave the name *uti possidetis* to the system of consolidating the *de facto* situation resulting from hostilities and their aftermath. It used to apply in so far as the combatant States made no stipulation to the contrary; such States would continue in possession of what they already possessed. This principle is no longer operative; Art. 2(4) of the → United Nations Charter and the principle of → self-determination have had an important impact in the present area. The modern view is adopted in para. 10 of the → Friendly Relations Resolution of the → United Nations General Assembly. The occupation and acquisition of territory by States in contravention of the principles of the Charter is unlawful (→ Territory, Acquisition). The existing norms of international law thus favour return to the → *status quo ante*.

The principle of *uti possidetis* came to have a different meaning in Spanish America. It consisted of a practice embodied in a number of bilateral treaties and constitutions of Spanish American countries, which stated the intention of those countries that wherever possible, their international → boundaries should follow the former colonial boundaries. A different principle applied to the settlement of boundaries between Brazil and her neighbours (→ Boundaries in Latin America: uti possidetis Doctrine).

More recently, the doctrine of *uti possidetis* in the context of African boundaries was discussed by the → International Court of Justice (ICJ) in the → Frontier Dispute Case (Burkina Faso/Mali).

2. Application

The *uti possidetis* principle was treated as a → general principle of law by two Latin American Judges, Armand-Ugon and Moreno Quintana in the case concerning → Sovereignty Over Certain Frontier Land Case (Belgium/Netherlands) (ICJ Reports 1959, p. 209, at pp. 240 and 255).

The *uti possidetis* principle was said by the Chamber of the International Court of Justice in the Frontier Dispute Case (Burkina Faso/Mali) (ICJ Reports 1986, p. 554) to be a general principle which was logically connected with the phenomenon of obtaining independence, wherever it occurred. Its obvious purpose was said to be to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. The Chamber adopted the somewhat controversial approach that the fact that the new African States have respected the administrative boundaries established by the colonial powers must not be seen as a mere practice contributing to the emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to South America, but as the application to Africa of a rule of general scope. The approach taken by the Chamber seems to have been influenced by the fact that Burkina Faso and Mali achieved independence in 1960, before the adoption of the Charter of the → Organization of African Unity (OAU) in 1963 and of the Cairo resolution in 1966. It is not thought that the Chamber meant that the *uti possidetis* principle was binding on those African States which dissented from it.

The principle of *uti possidetis* appears in no sense mandatory, and Latin American as well as other States have frequently agreed to modify it, or to adopt different principles for the purpose of arriving at a settlement. Nevertheless, there are clearly sound policy reasons in favour of the

general principle that boundaries established by law before independence remain in existence. This principle has been accepted by tribunals concerned with boundaries in Asia (→ Temple of Preah Vihear Case; → Rann of Kutch Arbitration (Indo-Pakistan Western Boundary); → Boundary Disputes in the Indian Subcontinent). It also has been clearly articulated in the Resolution on Boundary Disputes passed in Cairo on July 21, 1964 by the OAU (→ Boundary Disputes in Africa; Frontier Dispute Case (Burkina Faso/Mali)).

The 1964 OAU resolution which gives effect to certain principles stated in Art. 3(3) of the OAU Charter solemnly declares that all member States pledge themselves to respect the borders existing upon their achievement of national independence. The enactment of this resolution may be regarded as a consequence of the general acceptance that, although the political union of the independent African States was desirable, such union was not a realistic objective to pursue in the immediate future. Although the principle of respect for pre-independence boundaries contained in the OAU resolution is sometimes equated with that of *uti possidetis* (as in the Frontier Dispute Case (Burkina Faso/Mali), ICJ Reports 1986, at pp. 565–567), there are certain historical and technical distinctions between these principles. Thus it soon became clear that a territorial claim in Africa could not be upheld except in the presence of effective occupation. On the other hand, the Spanish American claim of *uti possidetis* was, to a considerable extent, an attempt to establish constructive → sovereignty over unoccupied territory. However, both methods of approach are functionally similar, because they constitute attempts to provide for the peaceful solution of inherited border problems (F.C. McEwen, pp. 25–31). In the case of Africa, it might be very difficult to arrive at satisfactory alternative solutions.

It has been argued (Brownlie, p. 12) that, although the OAU resolution may have no binding effect in international law, the resolution, together with State practice based upon it, provides the basis for a rule of → customary international law binding those States which unilaterally declared their acceptance of the principle of the *status quo* at the time of independence. As already pointed out above, the Chamber of the International Court of Justice has adopted the alternative view that the OAU resolution has a declaratory effect only, and recognizes and confirms an existing principle of law (Frontier Dispute Case (Burkina Faso/Mali), ICJ Reports 1986, at p. 565). Morocco and Somalia did not accept the Cairo resolution. Morocco's occupation of part of the Western → Sahara, which that country has attempted to legitimize on the basis of the restoration of its territorial integrity, violates the principle of respect for pre-independence boundaries contained in this resolution. Somalia's opposition to the resolution is founded on its claim to parts of Kenya and Ethiopia, which is based upon the principle it espouses of the union and self-determination of the Somali peoples. Somalia thus envisages that the principle of self-determination can be invoked between independent African States. There is some doubt whether if, in accordance with the view taken by Brownlie, the Cairo resolution has had a constitutive effect in the sense that it has contributed to the formation of a principle of regional customary law, such a principle can prevail over that of self-determination, which is now generally regarded as a legal principle derived from the principles contained in the UN Charter (→ Western Sahara (Advisory Opinion); → Regional International Law). As already pointed out, the Chamber of the ICJ treated the *uti possidetis* principle as one of general scope, but contented itself with a mere reference to the fact that it might conflict with that of self-determination, without attempting to state the outcome of such a conflict (Frontier Dispute Case (Burkina Faso/Mali), ICJ Reports 1986, at p. 567; see also the Separate Opinion of Judge Luchaire at pp. 652–653).

Although only a minority of African boundary disputes are ethnically based, it may be the case that the status of the Cairo resolution will be undermined in the future by the different practice of certain African States, or by objections of principle (Brownlie, p. 12). The OAU's unwillingness to depart from the resolution in the conflict in the Horn of Africa between Ethiopia and Eritrea has, for example, given rise to controversy.

The *uti possidetis* principle is also of some importance in considering claims to → Antarctica. Chile and Argentina claim certain rights in Antarctica, relying partly on the prop-

inquity of Antarctica to Latin America, partly on the *uti possidetis* principle, and partly on actual occupation. These claims compete to some extent with each other, and with that of other States such as the United Kingdom. If the rule of *uti possidetis* is one of international law, then the Latin American sector was not *res nullius* at the time when the United Kingdom's acts of sovereignty were carried out. The United Kingdom would argue that a rule of regional custom is subordinate to general international law, and is not opposable as to third parties (→ Clipperton Island Arbitration (1932)). It would also contend that *uti possidetis* is only applicable to territory over which Spain had title in 1810, and that even if Spain had inchoate title which she relinquished to Argentina and Chile in that year, there is no evidence that these countries perfected and maintained such title during the years immediately following independence. However, despite the difficulty in applying the *uti possidetis* principle in concrete cases, and the doubts as to whether it can be extended to the Antarctic, it has been argued that it is no more dubious than the sector principle, which it resembles in a number of ways (F.M. Auburn, Antarctic Law and Politics (1982) 49–51).

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VATICAN *see* Holy See; Concordats; Lateran Treaty (1929)

VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS

1. Historical Background

In 1962, at the high tide of modern → decolonization the → International Law Commission (ILC) took up the topic Succession of States and Governments on the recommendation of the → United Nations General Assembly. After preliminary studies, the entire question was divided, because of its wide scope, into three parts. For the part Succession in respect of Rights and Duties resulting from Sources other than Treaties the ILC appointed M. Bedjaoui as Special Rapporteur in 1967. On the basis of his 13 reports, the ILC finalized a draft convention in 1981 (for details see YILC (1981 II, Part 2) p. 9 et seq.).

Pursuant to Resolution 37/111 of the General Assembly, a UN Conference was held in Vienna from March 1 to April 8, 1983, which adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts by a vote of 54 in favour, 11 against and 11 abstentions. The ILC draft underwent only a few, albeit important changes. The Convention is deposited with the → United Nations and will enter into force upon deposit of the fifteenth instrument of ratification or accession (→ Depositary). As of December 31, 1985, it had been signed by 6 States (→ Treaties, Conclusion and Entry into Force).

2. Major Provisions

The Convention applies only to the effects of a → State succession in respect of State property, archives and debts (Art. 1). As in its forerunner, the → Vienna Convention on Succession of States in Respect of Treaties, succession is defined as the replacement of one State by another in the responsibility for the → international relations of territory (Art. 2; → Territorial Sovereignty). The Convention applies only to succession of States occurring in conformity with → international law (Art. 3). It provides for a certain degree of retroactive application if States agree (Art. 4). Part II on State property, Part III on State archives and Part IV on → State debts are structured in strict parallelism. After an introductory section with general provisions, each part distinguishes five specific categories of succession of States: transfer of part of the territory of a State, emergence of a newly independent State, uniting of States, separation of part or parts of the territory of a State and dissolution of a State (→ Secession; → Dismemberment; → States, Extinction; → New States and International Law).

In the case of transfer of territory, in the absence of an agreement, immovable State property situated in the territory to which the succession of States relates passes to the successor State; movable State property passes only if it is "connected with the activity of the predecessor State in respect of the territory" (Art. 14). In the case of separation, other movable State property also passes in an equitable proportion (Art. 17; → Equity in International Law). In the case of a newly independent State, immovable State property passes to the successor State (even though situated outside the territory from which the newly independent State is formed), if it had formerly "belonged to the territory" and had become State property of the predecessor State during the period of dependence (→ Colonies and Colonial Régime). If the dependent territory had "contributed" to its "creation", it passes in proportion to this contribution. Similar rules in favour of formerly dependent territories are envisaged for movable property (Art. 15).

State archives (Art. 19 et seq.) are not considered part of movable State property and are treated as a separate category. The Convention tries to take into account the character of archives as part of the cultural heritage of a territory (→ Cultural Property). In the absence of an agreement, State archives which for "normal administration of the territory" should be at the disposal of the successor State pass as a rule to that State. Furthermore, State archives pass if they "relate" to the territory that passes. The rules concerning the closeness of this relationship vary according to the different categories of succession. Newly independent States may also claim archives "which belonged to the territory" and became property of the predecessor State during the period of dependence (Art. 28). The provisions are supplemented by rules concerning the duty to furnish reproductions or to provide other evidence from State archives.

State debts, in the absence of an agreement, pass to the successor State in an "equitable proportion" in the cases of transfer and of separation of part or parts of the territory of a State (Arts. 37 and 40). The amount of State property passing can be taken into account when determining the equitability. In the case of newly independent States, no State debts of the predecessor State pass unless an agreement between the newly independent State and the predecessor State provides otherwise (Art. 38).

For the settlement of disputes a compulsory → conciliation procedure is provided for, similar to that in the Convention on Succession in Respect of Treaties.

3. Special Legal Problems

The Convention defines State debt as any financial obligation of a predecessor State towards another State, an international organization or any other → subject of international law (Art. 33). Financial obligations towards private individuals fall outside the scope of the Convention. This was criticized in the ILC and at the Conference as a lack of balance in the Convention since rights against private individuals form part of the definition of State property. It was also said that at least in Western countries, a large proportion of State debts are owed to private persons and that the Convention was therefore incomplete.

A State succession does not as such affect property, rights and interests of a third State situated in the territory of the predecessor State (Art. 12; see also → Treaties, Effect on Third States). Nor does it affect the rights and obligations of creditors (Art. 36). Exceptions to this rule in the ILC Draft were eliminated by the Conference.

A special safeguards clause in favour of natural or juridical persons provides that nothing in the Convention should be considered as prejudging in any respect any question relating to their rights and obligations (Art. 6). The rights of natural and juridical persons remain protected within the framework of general international law (→ National Legal Persons in International Law).

The validity of devolution agreements between the predecessor State and the new State depends upon respect for certain general principles, such as the principle of the permanent sovereignty of every people over its wealth and natural resources (Art. 15; → Natural Resources, Sovereignty over), as well as the right of the peoples of those States to development, to information about their history and to their cultural heritage (Art. 28). Validity also depends upon the principle that implementation of the devolution agreement must not endanger the fundamental economic equilib-

rium of the newly independent State (Art. 38). Similar clauses are also contained in Arts. 30 and 31. The advisability, legal scope and legal consequences of these clauses were the subject of controversy at the Conference and led *inter alia* to the rejection of the Convention as a whole by a number of States.

4. *Evaluation*

The Convention is not likely to gain universal acceptance. Even though limited in its scope of application, it still contains a number of rather controversial provisions. From the viewpoint of general international law, certain basic features of the Convention which were generally not disputed at the Conference should be underlined: the primary role of agreement between the parties, the central role of equity in the allocation of property and debts, the special role of archives, the principle that debts pass to the successor State, the principle that rights of third States remain unaffected by a succession of States and the principle that newly independent States should to a certain extent enjoy preferential treatment.

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VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES

1. *History*

The Vienna Convention on Succession of States in Respect of Treaties (UN Doc. A/CONF.80/31), adopted on August 22, 1978, has not yet entered into force. Its adoption by an impressive majority at the plenipotentiary Conference at Vienna constituted another step in the codification of treaty law within the framework of the → United Nations, the first fruit of which was the 1969 → Vienna Convention on the Law of Treaties (→ Codification of International Law).

The → International Law Commission (ILC) had in 1949 already considered the general topic of → State succession as a prospective subject of codification. The work begun in 1967 concerning the succession of States in respect of treaties led in 1974 to the adoption of a draft treaty (UN Doc. ST/LEG/12). The ILC relied primarily upon recent cases of State succession and on the procedure adopted by → depositaries of multilateral conventions (→ Treaties, Multilateral). To a lesser extent, doctrine, jurisprudence and preliminary work done by other bodies were taken into consideration.

The final text of the Convention was adopted by a United Nations conference that met in Vienna from April 4 to May 6, 1977, and in second session from July 31 to August 23, 1978. After only negligible alterations and the addition of only one supplementary article (Art. 13), the ILC draft was adopted, with few abstentions, in the final vote on August 22, 1978. As of December 31, 1985, 20 States have signed the Convention and 6 have ratified or acceded to it.

2. *General Principles*

The Convention on State Succession reflects the provisions of the Convention on the Law of Treaties: Both deal only with written treaties between States. The former defines the basic concept of State succession as the replacement of one State by another in the responsibility for the → international relations of a given territory (Art. 2(1)(b)) and not just a change of → government. This neutral definition is intended to avoid difficulties that might result from referring to the change of → territorial sovereignty or to the treaty-making power. Since it covers all aspects regarding the legal affiliation of territories with respect to treaties, this definition may well prove to suffice for practical application.

Art. 7 of the Convention embodies the principle that treaties cannot be applied retroactively (cf. Convention on the Law of Treaties, Arts. 4 and 28). However, in order to avoid making the

Convention inapplicable to future cases of succession which might occur before its entry into force, provision is made for optional – limited – retroactive application: Under certain conditions a successor State and a State party to the treaty may agree to apply the codification rules retroactively to the time at which succession took place.

According to Art. 6, the Convention applies only to the effects of a succession of States occurring in conformity with international law, and, in particular, the principles of international law embodied in the → United Nations Charter. Art. 8 states that special devolution agreements may be concluded *ad hoc* between predecessor States and successor States to regulate the transition of treaty rights and obligations without affecting third States parties to the treaty.

By virtue of Art. 13 the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources (→ Natural Resources, Sovereignty over) remain unaffected by the provisions of the Convention. Art. 14 indicates that questions relating to the validity of a treaty shall be determined according to the rules of the general international law of treaties.

3. *State Succession in Respect of Parts of States*

As regards the transfer of parts of territory, treaties of the predecessor State in principle lapse in order to make room for the treaties of the successor State (Art. 15), in accordance with the principle of "moving treaty boundaries". (The matter is discussed in depth in → Treaties, Effect of Territorial Changes and → Treaties, Territorial Application.)

4. *Free Choice for Newly Independent States*

In determining State succession, the Convention distinguishes between "newly independent" States (Part III, for definition see Art. 2(1)(f); → New States and International Law) and other States (Part IV). New States formed as a result of → decolonization are given preferential treatment in the exercise of the right to → self-determination. Such a State is, in principle, free to establish itself as a party to multilateral treaties which at the date of the succession of States were in force in respect of its territory (right of option, Art. 17(1)) or it may choose not to be committed by those treaties (the so-called *tabula rasa* (clean slate) doctrine). The parties to a convention that is to continue in force must accept the unilateral declaration of the newly independent State (→ Unilateral Acts in International Law) unless they have recourse to the escape clauses included in this provision by asserting that the continuation of the treaty would be incompatible with its object and purpose or would radically change the conditions for its operation (Art. 17(2); see also Art. 14).

Bilateral treaties may be abrogated by newly independent States as well, but to remain in force they require the agreement of the other State party to the treaty (principle of → consensus, Art. 24).

Newly independent States formed from two or more hitherto dependent territories are treated in the same way as States formed as a result of decolonization (Art. 30).

5. *Continuity: Other Cases*

As regards the emergence of new States as a result of separation, dissolution or merger of existing States, the Convention provides for the automatic continuation of all treaties – including bilateral ones (principle of → continuity) – unless the new State or a State party to the treaty successfully invokes the escape clauses (incompatibility with the object and purpose of the treaty, radical change in the condition for its operation).

The merger of States is dealt with as a matter which calls for strict continuity (Art. 31). When States unite, bilateral treaties as well as multilateral conventions are, as a rule, to be continued. The new State may not unilaterally expand the treaty's geographical application. Such equal treatment of bilateral and multilateral treaties, in contrast to the consensus principle (Art. 24) applied to newly independent States resulting from decolonization, does not take into account the fact that the content and form of bilateral treaties are in general more closely connected with the specific individuality of a State. The bilateral partner, according to Art. 30, has the right to a voice in the continuation of treaties with a newly independent State formed from two or more territories, while according to Art. 31 it is required to continue bilateral treaties with new States

arising from a fusion of independent States. The escape clauses (test of compatibility, changed circumstances) hardly offer a suitable substitute for the right to object.

The principle of continuity also applies to → dismemberment of States and to → secession (Arts. 34 and 35) except in cases of separation of parts of a territory in the process of decolonization.

6. *Boundary Treaties; Territorial Régime*

Regardless of a change in the status of a particular territory, Arts. 11 and 12 of the Convention provide without exception for the continuity of "radicated" treaties clearly related to a specific territory. Such treaties which "run with the land" continue to be valid despite any change in the affiliation of the area with a particular State. This holds true for treaties establishing → boundaries (Art. 11) as well as for other territorial régimes in which the local relation to the treaty is so relevant that it continues to be valid even after the occurrence of international changes bringing about the State succession (Art. 12).

7. *Settlement of Disputes*

On the pattern of the Convention on the Law of Treaties, this Convention, in Arts. 41 to 45 and in the Annex, contains provisions for the settlement of disputes regarding its application and interpretation (→ Interpretation in International Law). If → consultations and → negotiations (Art. 41) between the parties concerned do not lead to a solution, an obligatory conciliation procedure may be invoked by either party to bring about a settlement of the dispute (Art. 42; → Conciliation and Mediation). A five member conciliation commission is to study the matter and subsequently submit its recommendations – admittedly not binding – to the parties to the dispute. In addition, the dispute may be submitted to the → International Court of Justice or to a court of → arbitration upon the basis of a prior general or *ad hoc* acceptance of the jurisdiction of the court (Art. 43).

8. *Assessment*

Whether the Convention will prove to be a universally acceptable codification cannot yet be assessed, since as of December 31, 1985 only six States have ratified or acceded to it in seven years. Large parts of the Convention constitute progressive development of international law. New law has been created in fields where there is a lack of consistent international practice and general legal consensus. Only a few principles, such as that of moving treaty borders (Art. 15) or the continuity of territory-related treaties (Arts. 11 and 12), are already recognized as → customary international law.

Moreover, it is open to doubt whether the subject-matter was ripe for codification. It is difficult to grasp and define, in both concrete and legal terms, the disintegration of States and the formation of new States. These atypical political events defy the drawing of abstract guidelines absolutely valid in all individual cases.

The consensus of the régime of the Convention returns to a consistent distinction. Part III, dealing with the treaty situation of newly independent States, is governed by the principle of free choice/*tabula rasa* with the added faculty of continuing treaties without the consent of the partners concerned. The other provisions ("normal cases"), relating to existing States, are based upon the principle of continuity. Even taking into consideration the special situation in which States formed as a result of decolonization find themselves, this dichotomy does not appear to be quite well-balanced. Admittedly, the difference of treatment is tempered by the escape clauses. It remains to be seen, however, whether these clauses, with their relatively indefinite content, will make it possible to reach objectively satisfactory settlements of differences of opinion as to what circumstances are to be regarded as exceptional; no clear conclusions can yet be drawn from utilization of the equivalent clauses in the Convention on the Law of Treaties (→ Clausula rebus sic stantibus).

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VITAL INTERESTS

1. Concept

This formula was introduced into legal language at a time when the concept of → sovereignty of States was recognized in an absolute form. It was used to preserve the dominant interests of States to act freely and without being bound by international obligation in relations with other States. As far as their freedom of action is limited by legal norms, the recourse to "vital interests" is used in order to regain freedom of action.

Several institutions of international law are based on or at least influenced by this idea of vital interests in the existence, sovereignty and independence of States (→ States, Fundamental Rights and Duties). Examples are the rights based on the idea of → self-preservation, including → self-defence and → reprisals, the rules for the termination or suspension of treaties (→ Treaties, Termination) mainly in the case of fundamental changes of circumstances (→ Clausula rebus sic stantibus), and also the right to declare reservations to conventions or treaties (→ Treaties, Reservations).

A recourse to vital interests can be justified by the structural weaknesses of the international legal order, *inter alia* the limited capacity of international law to take account of factual changes and to enforce legal obligations. To the extent that the international legal order progresses, the need to recognize a recourse to vital interests diminishes.

Publicists have attempted to define "vital interests" as, for example: "Des questions qui tendent à l'existence même de l'Etat et aux racines de son organisation" (Nyholm). A clear and objective definition meets with similar difficulties as in the attempt to define the concept of "political questions" (→ Judicial Settlement of International Disputes). C. Rousseau even speaks of "éléments psychologiques singulièrement fluctuants et variables sans valeur technique et d'une élasticité dangereuse". As a matter of fact each State may have different opinions on what it regards as being of vital importance for it. Great powers may be inclined to include elements of → power politics and to regard more matters as vital than smaller States with a stronger legal consciousness. Thus, for instance, the United States for some time included in arbitration treaties the respect for the "maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe doctrine" (Arbitration Treaty between Germany and the United States of America of May 5, 1928, LNTS, Vol. 90, p. 177, at p. 180; → Monroe Doctrine). It is well understandable that this ambiguous concept met with a certain displeasure.

2. The Vital Interests Clause

The best illustration of this discomfort is the history of the role of a formalized clause in the field of → arbitration and other forms of settlement of international disputes (→ Arbitration and Conciliation Treaties; → Arbitration Clause in Treaties; → Compromis). The vital interests clause was introduced by the Russian Government in its invitation to the First Hague Peace Conference of 1899 (→ Hague Peace Conferences of 1899 and 1907). Until then, a reservation for

"sovereignty" had been usual in arbitration treaties. A few years later the Arbitration Treaty between France and Great Britain of October 14, 1903 excepted all conflicts which concerned *inter alia* the vital interests of the State parties and authorized them to decide unilaterally which matters were covered by the clause. More than 100 arbitration treaties concluded up to 1914 followed this model.

Criticism was mainly directed against the competence of States parties to prevent any settlement by a unilateral declaration which had to be accepted without discussion and control. A basis for some improvements was introduced when a clear distinction was made between arbitration and conciliation (→ Bryan Treaties (1913/1914); → Conciliation and Mediation) and when the rule was introduced that the competent body itself decided whether it had jurisdiction (Hague Convention I, Art. 73; Statute of the → Permanent Court of International Justice (PCIJ), Art. 36; Statute of the → International Court of Justice (ICJ), Art. 36(6)). This rule did not, however, *ipso facto* make obsolete the claim of vital interests. As long as the opinion prevailed that this clause implicitly limited the competence of a court to decide a dispute, that court had to decide whether the alleged facts constituted vital interests. If, under present conditions, an express reservation of vital interests were to be made in a *compromis*, the deciding body would face the problem whether such reservation is valid. This could be questionable in view of the self-judging character of the clause or of its undefinable content (cf. also → Connally Reservation).

The efforts repeatedly undertaken to exclude certain reservations concerning the competence of international judicial organs have failed (see Maus, pp. 12–20 for elaboration of the Statutes of the PCIJ and ICJ). On the other hand an improvement was reached by the listing of matters for which the deciding body is competent (as in Art. 36(2) of the ICJ Statute) instead of defining them in an abstract manner (as "legal matter" in contrast to "political questions", or "conflicts of interest underneath the threshold of vital interests of States") (Schindler, p. 62 et seq.; Neuhold, p. 385 et seq.).

State practice in the field of arbitration between the two World Wars concentrated on efforts to eliminate the self-judging character of the vital interests claim. The idea that the tribunal should be competent to decide when such a claim is made appears already in the counterproposals for the Covenant of the → League of Nations of May 5, 1919 presented by the German Government to the Allied powers (Text in H. Wehberg, Die Pariser Völkerbundakte (1919) p. 92). It was subsequently taken over into the Arbitration Treaty of December 3, 1921 between Germany and Switzerland (Gaus/Huber Agreement; LNTS, Vol. 12, p. 271) as well as into a number of other arbitration treaties (Schindler, p. 88). These treaties have frequently been called the turning point in the modern development of arbitration. Also in other treaties of this time the term "vital interests" disappears and is replaced by the reservation for matter essentially or "solely within the domestic jurisdiction of States". The → General Act for the Pacific Settlement of International Disputes (1928 and 1949) confirmed this development (Art. 39 paras. 1 and 2). The character of these matters has to be determined "by international law". All other reservations of a similar kind are implicitly excluded. Only reservations "exhaustively enumerated" in para. 2 are admitted. This high standard would even exclude express reservations for disputes concerning "vital interests". Unfortunately the binding force of this Act is an open question.

3. Revival of the Idea

The use of self-judging reservations has been revived by certain States when they accepted the jurisdiction of the International Court of Justice. Not only the United States but also some other States have made reservations of a self-judging character: Their governments decide what "matters within their domestic jurisdiction" are. No doubt, there is a difference between domestic affairs and vital interests. "Domestic affairs" can be defined objectively and a State would make a bad impression if it used its competence to define the concept in order to include matters which do not belong to this category. Nevertheless the way is paved for escaping any judicial control. The objections against this "obnoxious and crippling" self-judging reservation (P. Jessup) are well known.

During recent decades the term vital interests has even reappeared in legal discussions.

The first case occurred when the Canadian Prime Minister Trudeau in the House of Commons defended the new reservation concerning the compulsory jurisdiction of the ICJ in matters of the → law of the sea (April 1970). He pointed out that Canada was not prepared to engage in litigation with other States concerning vital issues where the law was either inadequate or non-existent.

The second case concerns Iceland, whose Minister of Foreign Affairs on May 29, 1972 informed the ICJ that his Government was not willing to confer jurisdiction on the Court "considering that the vital interests of the people of Iceland are involved" (→ Fisheries Jurisdiction Cases (U.K. v. Iceland; Federal Republic of Germany v. Iceland), ICJ Reports 1973, p. 3, at p. 7). The Court answered with one sentence: Iceland had made no express reservation in this respect (ibid., p. 19). It would be going too far to conclude from this answer that an express reservation of this kind would be regarded as legitimate by the Court.

The third case is not only the most recent one but also the most problematic. The question of military and paramilitary activities in and against Nicaragua was brought before the ICJ by Nicaragua. The defendant did not invoke the domestic jurisdiction clause, but emphasized that she abstained from doing so "without prejudice to the rights of the United States under that proviso" (US Counter Memorial, p. 9 quoted in Dissenting Opinion of Judge Schwebel, ILM, Vol. 24 (1985) p. 164). In its statement on the withdrawal from the proceedings of January 18, 1985 the State Department explained: "we have acted in the exercise of the inherent right to collective self-defense . . . . We have done so in defense of the vital national security interests of the United States." Does this constitute a disguised reference to the vital interests clause, identified here with the Connally Reservation?

Apparently "vital interests" are not yet a dead letter.

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KARL JOSEF PARTSCH

ZEISS CASES

1. Introduction

"Zeiss Cases" have been brought before the courts of a great number of States all over the world since the end of World War II and up to the present date. They relate in substance to the rights to use the name "Carl-Zeiss-Stiftung", "Carl Zeiss" or "Zeiss" as a trademark for optical and glass instruments. The "Carl-Zeiss-Stiftung" may be the widest known, but is by no means the only example of the situation of a number of enterprises which had their seat in the eastern part of Germany and, after the end of World War II and Soviet occupation there, were re-established on the territory of what is today the Federal Republic of Germany, while the remaining organization, after having been transferred to nationalized institutions (→ Expropriation and Nationalization), continued business in the Soviet zone of occupation, now the German Democratic Republic (GDR).

The issue which was before the courts in England was the validity of the authorization of

Zeiss-East's solicitors to bring action on behalf of the "Carl-Zeiss-Stiftung" against Zeiss-West. The crucial point was whether English courts could take judicial notice of the laws of a State and acts of its government which were not recognized (→ Recognition) by the British Government, or whether such laws and acts had to be regarded as a nullity (→ Acts of State).

2. *Historical Background*

The "Carl-Zeiss-Stiftung", a charitable foundation, was incorporated in 1896 under articles of constitution promulgated with State approval at Jena, then in the Grand Duchy of Saxe-Weimar. The foundation owned an optical works and a glass works run each by a separate board of management, but having no legal entity separate from the foundation. The function of the foundation was to receive the net profits and to use them for charitable purposes connected with, *inter alia*, the University of Jena. The foundation was administered by a "special board" acting through a deputy.

Under Rule 5 of the articles of constitution, the rights and duties of the special board were to be vested in that department of the government of the Grand Duchy under which the affairs of the University of Jena were placed. Rule 113 provided that in case of political changes those rights and duties were to be made over to that department of the State then responsible for the University of Jena, provided it had its seat in Thuringia, otherwise to the highest administrative authorities in Thuringia. In 1918, under the Weimar Republic, the Grand Duchy of Saxe-Weimar was abolished and a new State of Thuringia was set up under which the Ministry of Education became the special board, which was later on taken over by a *Reichsstatthalter* during the National Socialist régime. When the area was occupied in 1945 by American forces, a new provisional government of Thuringia was set up and its Ministry of Education became the special board. In July 1945, by agreement between the Allied Powers, Thuringia was taken over by the Russians. Together with the American forces, the management and a great number of Carl Zeiss' skilled workers left Thuringia and re-established the enterprise in Heidenheim (West-Germany). By decrees of the Russian authorities, who had previously confiscated most of their assets, the two firms in Jena became nationalized industries in 1948. The foundation itself remained unaffected. In 1949 the Soviet Union set up the GDR to govern that part of Germany occupied by Soviet forces and purported to make it an independent sovereign State. The provisional Minister of Education of Thuringia continued to act as the special board of the foundation. In 1952 the GDR abolished the State of Thuringia and divided its territory into districts. Jena was in the district of Gera and from then on the Council of Gera assumed the rights and duties of the special board of the "Carl-Zeiss-Stiftung".

3. *The Carl-Zeiss-Stiftung before English Courts*

In 1955 the Carl-Zeiss-Stiftung (East) under the authority of the Council of Gera initiated proceedings in order to restrain two English retailers and the Carl-Zeiss-Stiftung (West) from selling optical or glass instruments under the name of "Zeiss". The defendants, in turn, applied for an order that all further proceedings in the action should be stayed and the action should be dismissed on the ground that it was begun and was being maintained without proper authority; this motion led to separate proceedings which remained the only ones to be decided upon by English courts, since the parties later on settled their litigation in the main action out of court.

Since both sides accepted in the first instance that East German laws were valid either as those of the GDR or of the Soviet Government, the defendant's summons was dismissed and the action allowed to go forward (Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. (1965) R.P.C. 299 (C.D.)).

Upon appeal by the defendants the Court of Appeal unanimously set aside this decision (Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. and others (No. 2) (1965) 1 All E.R. 300). During the proceedings the Foreign Office certified in reply to the court's question as follows: "Her Majesty's Government have not granted any recognition de jure or de facto to (a) the German Democratic Republic or (b) its Government" (certificate dated September 16, 1964, cited at (1966) 2 All E.R. 544–545). In reply to a subsequent question the Foreign Office certified that:

"(a) From the zone allocated to the Union of Soviet Socialist Republics Allied forces, under

the Supreme Allied Commander, General Eisenhower, withdrew at or about the end of June, 1945. Since that time and up to the present date Her Majesty's Government have recognised the state and government of the Union of Soviet Socialist Republics as de jure entitled to exercise governing authority in respect of that zone. In matters affecting Germany as a whole the States and governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the United States of America and the Union of Soviet Socialist Republics were jointly entitled to exercise governing authority. In the period from Aug. 30, 1945 to Mar. 20, 1948, they did exercise such authority through the Control Council for Germany. Apart from the states, governments and control council aforementioned, Her Majesty's government [has] not recognised either de jure or de facto any other authority purporting to exercise governing authority in or in respect of the zone. Her Majesty's government, however, regards the aforementioned governments as retaining rights and responsibilities in respect of Germany as a whole" (certificate dated November 6, 1964, cited ibid., p. 545).

The Court of Appeal, abiding by a firmly established principle of English law, considered itself to be bound by these certificates and concluded that the "German Democratic Republic" and its laws as well as the Council of Gera, created under these laws, must be ignored in English courts, and that, consequently, there were no "highest administrative authorities in Thuringia" in the sense of Rule 113 of the articles of constitution of the Carl-Zeiss-Stiftung entitled to perform acts of government and to authorize actions in English Courts.

The Court of Appeal also rejected the contention that acts of the "German Democratic Republic" and the Council of Gera must be presumed by an English court to have been made in fact by the government of the Soviet Union, because the creation of the German Democratic Republic affected Germany as a whole and the Foreign Office Certificate had made it clear that the British Government did not recognize the authority of the Government of the Soviet Union to do that.

The House of Lords reversed the Court of Appeal and restored the previous judgment on the ground that the act of the Government of the GDR should be recognized as the act of the Russian Government operating through its subordinate body in East Germany (Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. and Others (No. 2) (1966) 2 All E.R. 536). The court was unanimous in holding that the matter before it did not affect Germany as a whole but only the Russian zone of occupation where the GDR was set up by and had derived its authority and status from the Government of the Soviet Union. Since the court was bound under the certificate of the Foreign Office to hold that the GDR was not in fact set up as a sovereign independent State, the only other possibility was that it was set up as a dependent subordinate organization through which the Soviet Union was entitled to exercise indirect rule.

The holdings of the Chancery Division and of the House of Lords regarding the identity of the foundation were severely restricted by a later ruling in the Chancery Division to the specific question of the authorization of Zeiss-East's solicitors to bring suit on behalf of the foundation (Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. and Others (No. 3), (1969) 3 All E.R. 897). Thus the merits were still to be decided, but the parties settled their litigation out of court without disclosing the terms of the settlement.

4. Evaluation

Two general principles of English law were clearly established at the time of the Carl Zeiss litigation and remain valid up to the present date: An unrecognized State cannot sue or be sued in an English court, and the governmental acts of an unrecognized State cannot be recognized by an English court.

A rigid adherence to these principles may, no doubt, have far-reaching and inconvenient consequences in case of governmental acts of unrecognized States which directly affect family or property rights of individuals, not to mention the consequence that English courts might have to close their eyes to political realities including those as firmly established as was the GDR in the mid 1960s. While other legal systems, for example the United States legal system after the Russian Revolution, has taken judicial cognizance of the

laws and governmental acts of unrecognized, but established → *de facto* régimes unless this would contradict public policy, there is so far no binding English authority supporting such a qualification of the above-stated principles, although Lord Wilberforce in the House of Lords judgment regarded this as a possible future development.

The Carl Zeiss litigation did not in itself involve rights of individuals, but a probable consequence of the judgment of the Court of Appeal, if upheld, would have been that marriages, the transfer of property or the purchase of goods performed under the laws of the GDR would also have had to be treated as of no effect by English courts. The House of Lords clearly wanted to avoid this consequence. Finding itself barred by the certificates of the Foreign Office from regarding the GDR as a sovereign State, the House of Lords might have found it inevitable to follow the trends shown in other legal systems and to apply some qualification to the general principle, had it not seen the possibility to interpret the said certificates. The result of this interpretation, i.e. the qualification of the GDR as an organization subordinate to the Soviet Union, whose acts of government could be recognized as those of the Soviet Union, might appear as unrealistic as the Court of Appeal's finding, but it avoided the inconveniences indicated which would have followed from a rigid adherence to the general principle of → non-recognition of the laws and acts of non-recognized States.

Recently the Court of Appeal demonstrated the undiminished validity of the "Carl Zeiss exception" (which is rather the rule applied to unusual circumstances) by applying it to a case involving the "Republic of Ciskei", a former "homeland" and part of the territory of the Republic of South Africa, declared by the latter in 1981 to constitute a sovereign and independent State, but not recognized as such by the British government. The Court nevertheless granted *locus standi* to the "Republic of Ciskei" as being a subordinate body set up by the Republic of South Africa to act on its behalf (Gur Corp. v. Trust Bank of Africa Ltd., (1986) 3 W.L.R. 583).

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TORSTEN STEIN

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